
Vol. 13 No. 2

SEPTEMBER 2022

ISSN: 0976-3570

INDIAN JOURNAL OF LAW AND JUSTICE



g' rZr0 Yl .gł {V.g' rZr

DEPARTMENT OF LAW

University of North Bengal
Darjeeling, West Bengal, India

Vol. 13 No. 2

September 2022

ISSN: 0976-3570

EDITORIAL BOARD

Chief Editor

Prof. (Dr.) Rathin Bandyopadhyay

Editors

Dr. Sujit Kumar Biswas

Associate Editors

Ms. Prema Lepcha

Ms. Neelam Lama

Assistant Editors

Dr. Sangeeta Mandal Dr. Sanyukta Moitra Dr. Soma Dey Sarkar Dr. Chandrani Chatterjee

Dr. Dipankar Debnath Subhajit Bhattacharjee Supama Bandyopadhyay Sagnika Das

Ashima Rai Shubhajeet Shome

Editorial Assistants

Sourav Kundu, Farheen Rais, Rima Kumari Ram, Nafisha Afroz, Deepsgar Dutraj, Priska Rai, Mrinmayee Das, Jena Chowdhury, Hiqa Naz Pradhan, Debasmita Sarkar, Keya Dutta, Ujjwal khatiwara, Habiba Naz Pradhan, Shalini Saha, Monika Goyal, Dikila Sherpa, Poulomi Bhowmik, Taniya Tuli, Debabrata Pyne

International Advisory Board

Prof. (Dr.) T.K. Saha, Dean, School of Law, Mount Kenya University, Nairobi, Kenya

Prof. Mark Perry, Professor, School of Law, University of New England, Australia

Prof. (Dr.) Guy Osborn, Professor, School of Law, Westminster University, U.K.

Prof.(Dr.) Anat Peleg, Director, Center for Media, Bar-Ilan University, Tel Aviv, Israel

Dr. Samuel Awala, Assistant Professor, Albany State University, Albany, New York, U.S.A.

Dr. Jesse J. Norris, Assistant Professor of Criminal Justice, Department of Socio-cultural and Justice Science, State University of New York, Fredonia, New York, U.S.A.

Dr. Ana Penteadó, Adj. Associate Professor, The University of Notre Dame, Sydney, Australia

National Advisory Board

Prof. Dilip Ukey, Professor & Vice Chancellor, Maharashtra National Law University, Mumbai, Maharashtra

Prof. S.K. Bhatnagar, Professor & Vice Chancellor, Dr. R. M. Lohia National Law University, Lucknow U.P.

Prof. Balaraj Chauthan, Professor & Vice Chancellor, Dharmashastra National Law University, M.P.

Prof. N.K. Chakraborty, Professor & Vice Chancellor, W. B. National University of Juridical Sciences W. B.

Prof. B.P. Panda, Professor & Former Vice Chancellor, M.N.L.U., Mumbai, Maharashtra

Prof. V. Sudesh, Head & Dean, Faculty of Law, Bangalore University, Karnataka

Prof. N.S. Gopalkrishnan, Professor and Head, Department of Law, C. U. S. T., Cochin, Kerala

Prof. Ali Mehdi, Professor, School of Law, Benaras Hindu University, U.P.

Prof. B.B. Pandey, Former Professor, Department of Law, Delhi University, New Delhi

Prof. Ved Kumari, Professor & Dean, Department of Law, Delhi University, New Delhi

Prof. Bhagirathi Panigrahi, Head & Dean, Department of Law, Berhampur University, Ganjam, Orissa

Prof. Meenu Paul, Professor & Head, Department of Law, Punjab University, Chandigarh, Punjab

Prof. A.K. Pandey, Professor, School of Law, Benaras Hindu University, U.P.

Prof. Subhram Rajkhowa, Professor & Head, Department of Law, Gauhati University, Assam

Prof. (Dr.) Indrajit Dube, Professor, Rajiv Gandhi School of Intellectual Property Law, IIT, Kharagpur, W. B.

Prof. Jyoti J. Mozika, Professor & Head, Department of Law, NEHU, Shillong, Meghalaya

Prof. Jayanta K. Saha, Professor & Former Head, Department of Law, Bankura University, W. B.

Prof. (Dr.) Dipa Dube, Professor, Rajiv Gandhi School of Intellectual Property Law, IIT, Kharagpur, W. B.

Prof. (Dr.) Manik Chakraborty, Director, Amity Law School, Amity University, Kolkata, W. B.

Prof. (Dr.) Sarit Sadhu, Former Professor, Department of Law, University of Burdwan, W. B.

Prof. (Dr.) Shaichi Chakraborty, Professor & Former Head, Dept. of Law, University of Calcutta, W. B.

Prof. (Dr.) Sanjeev Kumar Tiwari, Professor & Head, Department of Law, University of Burdwan, W. B.

Vol. 13 No. 02

September 2022

ISSN-0976:3570

INDIAN JOURNAL OF LAW AND JUSTICE



গ' নীৰ্ঘা য় .গ' নীৰ্ঘা

DEPARTMENT OF LAW
UNIVERSITY OF NORTH BENGAL
DARJEELING, WEST BENGAL, INDIA

INDIAN JOURNAL OF LAW AND JUSTICE

Cite This Volume as IJJ (2022)

Printed at North Bengal University Press, Raja Rammohunpur, P.O-North Bengal University, District: Darjeeling, Pin – 734013, West Bengal, INDIA for the Department of Law, University of North Bengal.

The Indian Journal of Law and Justice is a biennial publication. Contributions to the Journal are invited in the form of articles, notes and case comments. Contribution should be typed in double space on one side of A-4 size paper and sent in CD or as an attachment with e-mail at: ijlnbu@gmail.com

The Department of Law shall be the sole copyright owner of all the published materials. Apart from fair dealing for the purposes of research, private study or criticism, no part of this Journal may be copied, adapted, abridged, translated, stored in any retrieval system, computer system, photographic or other system or reproduced in any form by any means whether electronic, mechanical, digital, optical, photographic, or otherwise without prior written permissions from the publisher.

The editors, publishers, and printers do not own any responsibility for the views expressed by the contributors and for the errors, if any, in the information contained in the Journal.

Editorial Note

Season's Greetings!

I am glad to announce the publication of the Vol. 13 No. 02 issue of the Indian Journal of Law and Justice. The Indian Journal of Law and Justice has come a long way in the last one decade from being a national law journal to being an internationally acclaimed journal and from being a mere print version to having a website of its own, namely ijlj.nbu.ac.in. I also announce the indexing of the journal with SCOPUS along with the HeinOnline. Innumerable scholars, academicians and professionals from the field of law as well as other social sciences sector have been relying on this journal for their scholarly publications and have played a pivotal role in their early career success. I along with my highly efficient editorial team pledge to building on the legacy of this journal. With the dawn of the New Year, a few changes in the submission process are expected. We are making an endeavour for online submissions of articles and research papers to improve and expedite peer review. We, as a team, shall continue to remain committed to making it a forum that welcomes scholarship from a diverse and global group of authors, whose ideas are at the cutting edge of law and policy research.

The current issue opens with the issue of judicial oversight on administrative contracts in Jordan authored by Dr. Tareq al Billeh, which highlights the need for the administrative judiciary in Jordan to retreat from its jurisprudence, which states that the jurisdiction of the administrative judiciary has been mentioned exclusively, as these jurisdictions do not include disputes related to contracts of all kinds, including administrative contracts.

The conflict between hate speech and free speech has been taking the centre stage and the issue of cyber hate by drawing a comparison between Malaysia and India has been eruditely presented by Nadia Nabila Mohd Saufi, Saslina Kamaruddin and Niteesh Kumar Upadhyay. On a similar note, S.M. Amir Ali has examined the enabling role played by the judiciary in enriching and deepening the free speech jurisprudence when faced with cases of sedition. The author attempts to trace the genealogy of the sedition law, along with shedding light on the background in which it was enacted in colonial India.

Manual Scavenging remains to date the social evil that has been an obstacle in the road of “India Shining”. Dr. Namita Singh Malik and Dr. Smita Gupta paper on manual scavenging delves into legal institutional mechanisms available in South Asian countries to address the problem of manual scavengers. It also proposes workable solutions to put an end to this obnoxious prevalent practise. Vatsala Mishra and Mayank Singh’s note on Municipal Solid Waste Management traces lacunae of Solid Waste Management Rules, 2016 and questions the insufficiency and the incompetency.

Dr. Sanjay Prakash Srivastav’s “Functioning of Indian Courts and Litigants’ Right to Justice” attempts to unearth what forces are obstructing, or working as a barrier in achieving the goal set by preamble of the Indian Constitution and preventing implementation of statutory obligations relating to speedy justice.

Protection of traditional knowledge with respect to Geographic Indications and The Protection of Traditional Knowledge Bill, 2022 by Dr. Shambhu Prasad Chakrabarty Abhisekh Rodricks and Legal Regimes of Changing Space Security by Jinia Kundu and Dr. Bhavani Prasad Panda delve into unique areas of legal regime in India and abroad.

Special mention of papers on Recognising the Social and Cultural Rights of the Climate Refugees in Sundarban Delta by Mrinalini Banerjee and Dr. S. Shanthakumar and Damming the Rivers Of North Bengal by Soumya Pratik Dutta and Madhumita Dhar Sarkar are due here as they raise the climate change and legal issues with reference to climate refugees and river biodiversity. Also, Siddharth Singh’s paper on “Common but Differentiated Responsibilities” principle of climate change regime highlights the needs for appropriate application of the principle of CBDR to address the concerns of vulnerable countries that are regularly struggling with the threats of climate emergency.

Gyandeep Chaudhury’s research paper on Artificial Intelligence and Copyright/Authorship dilemma raises concerns over inclusion and amendment of Copyright laws to include AI. Akshay Baburao Yadav and Shivanjali Mane’s paper deals with the constitutional right of online streaming of court proceedings and the issues thereto. The paper on cyberspace based cross-border terrorism by Veerendra Mohan, examined efficacy of extant laws to deal with this contemporary form of terror.

Amrita Singh and Dr. Ravi Kant Verma's commentary on the Triple Talaq verdict of the Supreme Court of India in Shayara Bano case traces the jurisprudence evolved by Indian courts vis-à-vis personal laws and therefore the right to spiritual freedom.

This issue contains two book reviews handled deftly and concisely by two young reviewers.

I thank all contributors for their submissions to this edition and their cooperation with the editorial team during the production phase. I express my gratitude again to the entire Editorial Team whose commitment and perseverance made this publication possible.

Suggestions and opinions for the improvement of the journal is solicited.

With Best Wishes

Prof. (Dr.) Rathin Bandhopadhyay
Chief Editor

Artificial Intelligence: Copyright and Authorship/Ownership Dilemma?	
<i>Gyandeep Chaudhary...</i>	...189
Damming the Rivers Of North Bengal: A Socio-Legal Approach towards Sustainable Use of the River Biodiversity	
<i>Soumya Pratik Dutta and Madhumita Dhar Sarkar...</i>	...217
Tracing the “Common but Differentiated Responsibilities” (CBDR) Principle under Climate Change Regime	
<i>Siddharth Singh...</i>	...229
Cyberspace Based Cross-Border Terrorism: An Overview of Global and Indian Legal Regime	
<i>Veerendra Mohan...</i>	...252

NOTES AND COMMENTS

Pros & Cons of Triple Talaq: Post Shayara Bano Judgment	
<i>Amrita Singh and Ravi Kant Verma...</i>	...273
Municipal Solid Waste Management: An Analysis of Current State of Affairs in India	
<i>Vatsala Mishra and Mayank Singh...</i>	...281

BOOK REVIEW

OUR CONSTITUTION DEFACED AND DEFILED (1974) by N.A. Palkhivala, Macmillan Company of India, Limited, Delhi, pp. 175.	
<i>Rebant Juyal...</i>	...295
Environmental Law in India (2nd ed.2005) by P Leelakrishnan, LexisNexis Butterworths Pvt.Ltd, Viaya Building, 17 Barakhama Road, New Delhi-110001, Pg 340, Price-295	
<i>Ashima Rai...</i>	...301

**The Judicial Oversight on the Administrative Contracts in
the Jordanian Legislation and the Comparison:
The Modern Qualitative Jurisdiction of the
Administrative Judiciary**

Dr. Tareq AL-Billeh¹

Abstract

The research addresses with the issue of the judicial oversight on the administrative contracts, where the research highlighted the fact that the ordinary judiciary in Jordan is the competent to deal with disputes related to administrative contracts, this was confirmed by the Jordanian Administrative Judiciary Law, and the jurisprudence of the Administrative Judiciary in many of its provisions, in which the ordinary courts, are the competent courts with the general jurisdiction to look after all judicial disputes related to administrative contracts, so that the research dilemma lies in that administrative contract disputes must be within the specific jurisdictions of the administrative judiciary, as is the case in some comparative legislative and judicial systems in (Egypt, France and Morocco), where the administrative judiciary is competent to consider disputes related to administrative contracts, while the research concluded a number of findings and recommendations, the most important of which is the need to amend Article (5) of the Jordanian Administrative Judiciary Law No. (27) for the year (2014), by including administrative contract disputes within the scope of jurisdiction of the administrative judiciary, and amending the aforementioned law by adding articles dealing with all types of administrative contracts, and the need for the administrative judiciary in Jordan to retreat from its jurisprudence, which states that the jurisdiction of the administrative judiciary has been mentioned exclusively, as these jurisdictions do not include disputes related to contracts of all kinds, including administrative contracts.

Keywords: *The Judicial Oversight, The Administrative Contracts, The Administrative Judiciary, The Ordinary Judiciary, The Jurisdiction, Qualitative Jurisdiction*

¹ Assistant Professor, Faculty of Law, Applied Science Private University, Al Arab St 21, Amman, Jordan, and the author is a practicing lawyer in Jordan.

I. INTRODUCTION

The administrative contracts are an important field of the practical reality, as these contracts link the administrative activity with its contractors, where it aims to achieve the interests and needs of citizens, as the contract is associated to business, supplies, services or other matters, and although this contractual relationship is regulated, there are many disputes, issues and controversies that may arise², therefore, there is a need for judicial oversight by courts with qualitative competence to consider administrative contract disputes so that to be immediately ready to resolve the disputes that may arise or that may arise between the contracting parties, the development of these contracts, whether economically or socially, led to the necessity for judicial oversight³.

What is meant by the administrative contract: "A contract concluded by a public legal individual with the intent to operate or organize a public utility, in which the administration intends to adopt the methods and provisions of administrative law, where the contract includes exceptional terms uncommon in private law."⁴, While what is meant by the general administration: "Any governmental administrative entity that represents the government, whether it is a public institution, a ministry or a municipality, and it is a party to the administrative contract."⁵

The issue of judicial oversight on administrative contracts is a fundamental issue that has a significant impact on practical reality, the research will address this matter extensively and in-depth, and it will look at all aspects of the topic, whether theoretical or practical, where the importance of the study lies in

² SULEIMAN AL-TAMAWI, *THE GENERAL FOUNDATIONS OF ADMINISTRATIVE CONTRACTS* 59-60 (5th ed. Dar Al-Fikr Al-Arabi, Egypt 1999).

³ HAMDY OKASHA, *ENCYCLOPEDIA OF ADMINISTRATIVE AND INTERNATIONAL CONTRACTS*, Administrative Contracts In Practical Application General Principles And Foundations 4-5 (Monsha'at Al Ma'aref 1998). NAWAF KANAAN, *THE ADMINISTRATIVE LAW AND ITS APPLICATIONS IN THE UNITED ARAB EMIRATES A COMPARATIVE STUDY* 115-116 (Ithraa for Publishing and Distribution 2004).

⁴ Tariq Al Busaidi, *The Legal Nature of the Concession Contracts and Investment Contracts Concluded by the State* According to the B.O.T System, 36 UAEU. 21, 27-28 (2008). https://scholarworks.uaeu.ac.ae/sharia_and_law/vol2008/iss36/1

⁵ SAHEM NAWAFILAH, *THE EFFECTIVENESS OF IMPLEMENTING THE ADMINISTRATIVE CONTRACT AND CONTRACTOR SELECTION PROCEDURES IN THE JORDANIAN PUBLIC ADMINISTRATION* A case study in the Jordanian Ministry of Public Works and Housing 8-9 (Master Thesis, Al Al-Bayt University 2004).

addressing the oversight of administrative courts on administrative contracts, in addition to the increasing role of administrative contracts in the establishment and management of public utilities, and the need to implement contractual obligations on the specified dates without delay, and that the failure to address these issues leads to ambiguity and weakness in the application of the provisions of the articles of the Administrative Judiciary Law.⁶

The research seeks to address the shortcomings in the texts of the Jordanian Administrative Judiciary Law by referring to comparative administrative laws and regulations (Egyptian, French, and Moroccan), the judgments of the French Council of State, the judgments of the Egyptian Supreme Administrative Court, the Court of Cassation in Egypt, the judgments of the Administrative Court in Morocco, the judgments of the Moroccan Court of Cassation (The Administrative Chamber), and to clarify the viewpoint of jurisprudence in these countries, where the researcher looks forward that this research will constitute an effort to address the deficiency, ambiguity, and weakness in legal texts and jurisprudence, to add scientific legal knowledge to these texts, jurisprudence, and its practical applications.⁷

This research aims to highlight that the ordinary judiciary in Jordan is the competent authority to consider disputes related to administrative contracts, this was confirmed by the Administrative Judiciary Law and the jurisprudence of the administrative courts in many of its rulings, so that the ordinary courts are the competent courts with the general jurisdiction to look after all judicial disputes related to administrative contracts, except for those excluded by a special provision, contrary to what is followed in the judicial system in (Egypt, France, and Morocco), where the administrative judiciary is competent to deal with disputes related to administrative contracts.

The research will attempt to answer the questions listed below that represent the research dilemma: What are the practical difficulties that arise from the nature of the jurisdiction to resolve disputes arising from administrative contracts? What is the role of the judiciary in monitoring the breach of contractual

⁶ BASHAR ABDUL HADI, THE ADMINISTRATIVE CONTRACT THE LEGAL, ADMINISTRATIVE AND LITERARY ASPECTS ANALYTICAL STUDY AND SUGGESTED SOLUTIONS 28-30 (House of Culture for Publishing and Distribution 2015).

⁷ Administrative Judiciary Law Act, 2014, No. 27, Acts of Parliament, 2014 (Jordan).

obligations, whether the breach is by the administration or by the contractor? Are the decisions made about the administrative contract separate from or linked to the contract? What are the consequences of canceling the administrative decision in relation to the contract if this decision is canceled due to its illegality?

The descriptive-comparative approach will be adopted in this research due to the diversity of legislations that differed in addressing the sub-sections and sub-topics of the main topic of the study, clarifying the differences between these legislations, knowledge the strengths and weaknesses of these different legislations, and the extent of which they are considered, the research also followed the analytical approach to analyze all the provisions of legislation related to the subject of this study to determine its contents, implications, and objectives, then criticizing and commenting on it, and highlighting the critical aspect of the researcher, the research also followed the critical approach, to highlight the viewpoints and trends of jurisprudence in the topics that were addressed, where the critical aspect of the researcher is highlighted in every aspect that he dealt with in the jurisprudential trend, where this research necessitated the use of several research methods due to the nature of its complexity among the texts of the law, the viewpoints, the jurisprudential trends, and the judicial rulings.⁸

II. THE PRACTICAL PROBLEMS THAT ARISE FROM THE NATURE OF THE JURISDICTION OF THE ADMINISTRATIVE CONTRACTS

It should be noted that the Administrative Judiciary Law in Jordan has limited its jurisdiction, as these jurisdictions do not include disputes related to contracts of all kinds, including administrative contracts.⁹

⁸ BASHAR MALKAWI, (2008), (The Scientific Fundamentals of Writing Legal Research) "Ph.D. and Master's Theses", Bar Association Research Judicial Institute Research and Student Research Conferences and Seminars 13-14 (Dar Wael for Publishing and Distribution 2008).

⁹ Administrative Judiciary Law Act, 2014, § 5 (a), No. 27, Acts of Parliament, 2014 (Jordan) states the following: "The Administrative Court has exclusive jurisdiction to deal with all appeals related to final administrative decisions, including: 1. Appeals

In a ruling of the Jordanian Supreme Administrative Court, it was stated that: "Since the dispute, the subject of the present lawsuit, is related to the termination of a contract, whereas, administrative contracts and its rescission are not subject to an appeal on the grounds of cancellation, as the jurisdiction of the administrative judiciary is determined by Article(5) of the Administrative Judiciary Law, in addition, Article (17) of the contract denoted by the term (Disputes) stipulates that: (The Amman Court of First Instance / Palace of Justice is the competent authority to consider any disagreement or dispute that may arise between the two parties in connection with or because of this contract),therefore, the subject of consideration of the current lawsuit is not within the jurisdiction of the administrative judiciary and belongs to the ordinary courts, and since the Administrative Court has reached this conclusion in its contested judgment, it's judgment is in accordance with the law".¹⁰

about the results of the elections of councils of chambers of industry and commerce, trade unions, associations and clubs registered in the Kingdom, and electoral appeals that are conducted in accordance with the active laws and regulations, unless another law stipulates giving this jurisdiction to another court, .2. The Appeals submitted by those concerned in the final administrative decisions related to appointment to public positions, promotion, transfer, delegation, Secondment, delegation, service proof, or classification,3. Formal employees appeals related to the cancellation of the final administrative decisions related to the termination of their services or their suspension from duty, 4. Formal employees appeals related to the cancellation of the final decisions issued against them by the disciplinary authorities, 5. Appeals related to salaries, bonuses, bonuses, annual increases, and pension rights due to public employees, their retirees, or their heirs in accordance with the active legislation. 6. The appeals submitted by any aggrieved person to request the cancellation of any system, instructions or decision, which are based on the violation of the system by the law issued pursuant to it, the violation of the instructions to the law or the system issued pursuant to it, or the decision's violation of the law, the system or the instructions issued based on it., 7. Appeals submitted by any aggrieved party related to the cancellation of the final administrative decisions, even if the decisions were protected by the law issued pursuant to It., 8. Appeals against any final decisions issued by administrative entities with judicial jurisdiction, with the exception of decisions issued by conciliation and arbitration boards in labor disputes. 9. Appeals that are within the jurisdiction of the Administrative Court under any other law".

¹⁰ Jordan Investment and Multiple Transport Company v. Land Transport Regulatory Authority, Supreme Administrative admin 15 July 2020, D 2020, 172 (The Jordanian Supreme Administrative Court Decision). Where it was stated in regard of a ruling of the Jordanian Supreme Court of Justice (formerly) that: "... Since Article (9) of the Law of the Supreme Court of Justice No. (12) of (1992) and its amendments enumerate the

While in other countries such as (France and Egypt), this requires them to conclude several types of contracts that differ in the degree of their involvement in them, but this requires defining the types and sorts of these contracts, and whether these contracts are ordinary contracts so that to be submitted to the ordinary judiciary, or it have the terms and specifications of administrative contracts in order to be subject to the supervision of the administrative judiciary.¹¹

Also, in order to prepare and implement the administrative contract, the administration may decide on a set of administrative decisions, and these decisions may raise several problems and disputes, which may be referred to the judiciary to determine decisions types, whether they are administrative decisions separated from the administrative contract, so that its legality will be studied through the annulment lawsuit, or they are decisions related to the contract, so the administrative court decides on them.¹²

A. The Judicial Competence Related to the Type of the Administrative Contract

Before addressing the details of the nature of the judicial competence related to the type of administrative contract, it should be noted that the judicial system globally is moving towards adopting two systems: The First System: Is the unified judicial system, an example of which is the Anglo-Saxon system, so that, there are no dilemmas in the distribution of judicial competence in that system, where both individuals and administrations are subject to the same law and procedure, and the system does not distinguish between administrative disputes and other disputes. The Second System: Is a dual judicial system, as

jurisdictions of this court exclusively, which does not include appealing the administrative contracts and objecting it, therefore, handling this lawsuit is outside the jurisdiction of the High Court of justice.” Maher v. Zarqa Municipality, Supreme Justice admin 19 May 2011, D 2011, 33 (Jordanian Supreme Court of Justice Decision).

¹¹ Iman Al Abdouli and Aaad Al-Qaisi, *The judge in charge of judicial oversight of the unilateral termination of the administrative contract for reasons of public interest*, 17 JOURNAL SLS, 137, 137-164 (2020). <https://spsu.sharjah.ac.ae/index.php/JLS/article/view/2328>.

¹² Taif Youssef, *The role of the judiciary in resolving the administrative contract disputes*, Ministry of Justice and Freedoms, Rabat, Morocco, Directorate of Studies, Cooperation and Challenge, http://adala.justice.gov.ma/AR/Etudes_Ouvrages/Etudes_administrati on.aspx.

several countries have adopted this system, including (France, Egypt, and Jordan), where there is an administrative judiciary besides the ordinary judiciary that specializes in looking into administrative disputes that fall within its jurisdiction, this system takes into account two methods to determine the jurisdiction between the ordinary judiciary and the administrative judiciary: First Method: Is that the law specifies exclusively the judicial disputes within the jurisdiction of each party, or the law defines the competence of at least one of these two authorities, this method was adopted in the Jordanian law to determine the jurisdiction of the administrative court exclusively under Article (5) of the Administrative Judiciary Law No. (27) Of (2014) and was preceded by Article (9) of the repealed Supreme Court Law No. (12) Of (1992)¹³.

Second Method: It is that the legislator sets general principles according to which the types of judicial disputes that each judicial entity is competent to look after, for example, the legislator states that the administrative judiciary is competent to handle the administrative disputes, and keeps a margin for the judiciary to deal with judicial disputes of an administrative nature and disputes of a civil nature.¹⁴

In general, the judicial Jurisprudence has settled on dividing administrative contracts into two categories: First Category: The administrative contracts by their nature, that is, there is no specific legal text indicating that they are administrative contracts, which prompted the judiciary to set certain criteria that distinguish it from other contracts. Second Category: The administrative contracts stipulated in the law, which jurisprudence names administrative contracts, such as concession contracts, supply contracts, public works, public deals, transportation services, and rent, because such functions relate to a public utility, and the law determines its administrative nature, and the concept of the administrative contract in light of the government's interference by its various

¹³ SAMI JAMAL AL-DIN, THE OVERSIGHT OF ADMINISTRATION ACTIVITIES 278-279 (Mansha'at Al-Maaref 1982).

¹⁴ ALI SHATNAWI, JORDANIAN ADMINISTRATIVE JUDICIARY 271-272 (1th ed. 1995).

departments and institutions and the multiplicity of its activities is represented by several concepts that are difficult to enumerate.¹⁵

In a ruling of the Jordanian High Court of Justice (Formerly), it was stated that: “Granting and rejecting the license is considered an administrative decision as a legal procedure issued by the administration in the course of carrying out its activity, and it is included in the definition of the administrative decision, as settled by jurisprudence and the administrative judiciary, and appeals to consider disputes arising from administrative contracts are not part of these. Three conditions of the administrative contract are required: One of the Contracting Parties must be a public legal person. The contract relates to the administration or management of a public utility. The contract includes exceptional terms that are uncommon in private law contracts.”¹⁶

The French Council of State defined administrative contracts as, those contracts entered into by a public legal person with the intent of managing a public facility and in which it appears that his intends to comply with the provisions of public law, this is illustrated by the inclusion in these contracts’ uncommon terms in the private contracts.¹⁷

The Egyptian Supreme Administrative Court was considered that the administrative contract is derived from an agreement in which one of its parties is a public legal person with the intent to establish or manage a public facility and in which the intent appears to adopt the general law methods by imposing exceptional terms uncommon in the transactions of individuals, whether the administration has privileges and authorities that individuals do not have, or by

¹⁵ BASHAR ABDUL HADI, THE ADMINISTRATIVE CONTRACT THE LEGAL, ADMINISTRATIVE AND LITERARY ASPECTS ANALYTICAL STUDY AND SUGGESTED SOLUTIONS 28-30 (House of Culture for Publishing and Distribution 2015).

¹⁶ Jordan Telecom Public Shareholding Company v. Telecommunications Regulatory Authority, Supreme Justice admin 5 July 2010, D 2009, 539. (Jordanian Supreme Court of Justice Decision).

¹⁷HAMDI OKASHA, ENCYCLOPEDIA OF ADMINISTRATIVE AND INTERNATIONAL CONTRACTS, Administrative Contracts In Practical Application General Principles And Foundations 4-5 (Monsha'at Al Ma'aref 1998).

granting the contractor with the administration exceptional authorities against others that he does not enjoy when contracting with individuals.¹⁸

In a ruling issued by the Egyptian Court of Cassation (Criminal), it was stated that: "for a contract to be considered administrative, the administration, as a public authority, must be a party to it, and the contract must be related to the activity of a public utility with the intent of managing or regulating it, or characterized by adopting the method of public law, with exceptional terms uncommon in private law texts".¹⁹

B. The Judicial Competence Related to the Type of the Administrative Decision

The appeal against the decisions issued by the administration in the event of exceeding its authorities , as in the event of concluding or executing the administrative contract, those disputes that arise between the contracting parties are represented either in the procedures and events that occur during the convening stage or when implementing the contract, thus, disagreements and disputes may arise from these issues, so that the judiciary intervenes to control these differences and disagreements, decide on them and resolve them in one of two methods: First Method: Presenting the disputes related to the contract in terms of implementation the conditions, annulment, cancellation and compensation for damages caused to it to the comprehensive judiciary. Second Method: Referring disputes related to decisions separate from the contract to the court for invalidation, whether those disputes are related to the formation, implementation or termination of the contract, and what is meant by decisions are those issued by the administration regardless of the terms and conditions of the contract.²⁰

¹⁸ ABDEL AZIZ KHALIFA, Execution of the administrative contract and settling its disputes by jurisprudence and arbitration Exceptional administration authorities in the implementation of its administrative contract Contractual obligations of the administration and its contractor Settlement of administrative contract disputes 11-12 (Monsha'at Al Ma'aref 2009).

¹⁹ Cass crime 28 May 1992, D 1958, 1459 (Decision of the Egyptian Court of Cassation).

²⁰ ABDEL AZIZ KHALIFA, THE ADMINISTRATIVE LIABILITY IN THE CONTRACTS FIELD AND THE ADMINISTRATIVE DECISIONS According to the Law of Tenders and Auctions and its Executive Regulations 21-22 (Dar al-Kutub Al-Masryah, 2007).

The administration may issue a set of decisions that precede the formation of the administrative contract, such as the decisions to grant concession licenses, decisions regarding auctions or exclusions from competition, decisions regarding approval of the contract or those relating to physical separation from the contract if it has already been signed, also, the decisions related to refusing to sign or ratify the contract, while all of these decisions are subject to appeal for cancellation if they arise from a violation of the general rules regulated by the laws, whereas these decisions that issued by the administration contribute to the formation of the contract, moreover, these administrative decisions are considered administrative decisions separate from the contract and their cancellation can be appealed.²¹

The Jordanian Supreme Administrative Court ruled that: "It is observed that the decisions complained of have been issued by the challenged based on the provisions of the agreement concluded between the Ministry of Health and appellant against the decision, as the fact of the dispute revolves around the implementation of the agreement, and that this requires researching the agreement, its terms and conditions, and the extent of any party's commitment to it, and such research is out of the jurisdiction of the administrative judiciary, where the cancellation lawsuit must be against the administrative decision and not on the administrative contracts, and whereas the decisions issued by the party being challenged are issued based on the administrative contract concluded between the Ministry of Health and the appellant, and because the administrative judiciary is not competent to consider this lawsuit, the lawsuit must be dismissed for lack of jurisdiction."^{22,}

The administration may issue a set of decisions in order to implement the contract, as it is the entity responsible for managing the public facility, where these decisions clearly affect the status of the contracting party and the implementation of the contract, and regarding the decisions issued for the cancellation of administrative contracts, the administration, as it is responsible

²¹ HAMDI OKASHA, *Ibid* 49-51.

²² The dominant care company for expense management and medical insurance services v. Central Bidding Committee, Supreme Administrative admin 19 March 2019, D 2019, 84(Jordanian Supreme Administrative Court Decision).

for managing the public facility, may issue a decision to terminate the contract without relying on the regulating clauses of the administrative contract.²³

The question that arises here is: "Are those decisions issued regarding the administrative contract separate from or related to the contract?"

In order to answer this question, must refer to what has been settled by jurisprudence and the judicial diligence, where it is noted that a rule has been established, so that a distinction is made between the decisions issued by the administration as a general authority and which are based on the provisions of the law, where the decision in this case is considered an administrative decision separate from the contract and can be appealed for cancellation, and between the procedures issued by the contracting administration to implement the terms of the contract as a result of the contractor's breach of his contractual obligations contained in the contract, as these decisions are related to the contract and are subject to appeal by the ordinary judiciary, on the basis that the ordinary judiciary is a comprehensive judiciary for those decisions.²⁴

As the French Council of State ruled:" The decision of the Minister of Interior to expel expatriate employees, employed by the contractor to complete a deal for the state is not justified by law, because if the contract does not prevent the use of foreign labor, such use remains lawful in all cases through the implementation of the necessary measures required by public security, bearing in mind that this decision, even if it was related to the implementation of an administrative contract, it was a separate decision, and the means to appeal against the cancellation were the available mean to cancel it."²⁵

In another ruling of the French Council of State it was stated that: "Since the decision of the obligation-granting authority requires the termination of the obligation contract, it is not considered a decision separate from the contract for the obligating party, therefore, the obligor cannot file another lawsuit against this decision, other than the lawsuit he can file with the contract judge."²⁶

²³ ABDEL AZIZ KHALIFA, THE GENERAL FOUNDATIONS OF ADMINISTRATIVE CONTRACTS 341-342 (The House of Legal Books 2005).

²⁴ Abdul Aziz Khalifa, The Administrative Liability, *ibid* 28-29.

²⁵ Gilles et Bellet , 29 April 1898(Decision of the French Council).

²⁶ CEE, FEB, 1987, STE FRANCE 5, REC.28.

In order to accept the cancellation lawsuit for administrative decisions separate from the administrative contracting process, this decision must be tainted by one of the defects of legitimacy stipulated in Article (7/a) of the Jordanian Administrative Judiciary Law.²⁷

The question that arises in this section is: What are the consequences of rescinding the administrative decision in relation to the contract if this decision is rescinded due to its illegality?

To answer this question, it is worthy to mention that the annulment judge only monitors the legality of administrative decisions separate from the administrative contract, as the illegal administrative decision is canceled by him and he may not override that by ordering the administration to do something or refrain from doing something, in the framework of the theory of separation of authorities, where the administrative judge does not administer, but issues judicial rulings²⁸.

The jurisprudence has developed in France in relation to this principle, which states that judicial supervision of the annulment of the contract should not go beyond a separate decision, the French Council of State confirmed in a case in which it considered that the cancellation of the decision to approve the concession contract prevents the implementation of the conditions contained in this contract, and in another lawsuit, the French Council of State indicated that "When the group violated one of the basic procedures for concluding the deal after the publication of the requests for proposals, the separate decision was appealed, which was canceled and the consequent contract voided."²⁹

²⁷ Administrative Judiciary Law Act, 2014, § 7 (a), No. 27, Acts of Parliament, 2014 (Jordan) states the following: "The lawsuit shall be filed against the person who has the authority to issue the appeal decision or whoever issued it on his behalf, provided that the lawsuit is based on one or more of the following reasons:(1) Lack of competence.(2) Violation of the Constitution, Laws or Regulations, or error in its application or interpretation.(3) The inclusion of the decision or the procedures for its issuance is defective in form.(4) Abuse of authority.(5)Defective reason.

²⁸ Mahmoud Al-Sayed, *The Authority of Administration to End the Administrative Contract a Comparative Study* 549-553(Dar Al-Nahda Al-Arabiya 1993). Abdul Aziz Khalifa, *Administrative Liability*, Previous Reference, *Ibid* 30.

²⁹ MOHAMED ABDEL BASSET, *THE DUTIES OF THE ADMINISTRATIVE AUTHORITY* 402 (Alexandria University 1984).

Therefore, it becomes clear that the cancellation of a separate administrative decision related to an administrative contract may affect the concluded contract, either by compensating the appellant in the event that the contract continues to be implemented or by preventing the implementation of the terms of the contract and invalidating it, accordingly, it can be said that the criteria related to determining the nature of the dispute related to administrative contracts have developed significantly, as a result of the development of the state's activity through its intervention and management of the activity of its facilities, either directly or through the mixed economy, thus, this development created many dilemmas due to the diversity and development of these contracts by defining the authority with jurisdiction to consider disputes, whether it is the ordinary judiciary or the administrative judiciary, so that, it is believed that the solution to these dilemmas is to establish a set of criteria to determine the competent authority to consider these controversies, and to rely on several criteria and rules to distinguish between decisions taken by management which related or separated from the procedures for preparing, executing and rescinding these contracts, and whether those decisions taken in this framework are related to legal and regulatory texts that affect the legality of the administrative decision in order to be presented to the judiciary for cancellation, or are they decisions related to the implementation of the terms and conditions of the contract in order to be presented to the ordinary judiciary.³⁰

III. THE JUDICIAL OVERSIGHT ON THE LIABILITY OF THE ADMINISTRATION AND THE CONTRACTING PARTY

The administration, as a public authority, has several exceptional authorities to confront the contracting party during the implementation of its contractual obligations, even if there is no provision in the contract giving it that authority, which gives it the right to enjoy general privileges in order to ensure the regular and steady operation of public utilities, the authority of the administration goes beyond the powers granted to the contracting party, which he has no right to object to, given that the administration is the concessionaire, these authorities

³⁰ MAHER ALLAWI, ISSAM AL-BARZANJI & IBRAHIM AL-FAYYAD, THE COMPETENCIES BETWEEN THE ORDINARY JUDICIARY THE ADMINISTRATIVE JUDICIARY AND RESOLVING THE PROBLEMS OF CONFLICT BETWEEN THEM 220-224 (House of Wisdom Creative Design and Printing 1999).

are represented in oversight the implementation, amendment and termination of the contract with the imposition of the resulting penalties, as the administration performs its authority over this right according to the type of the administrative contract in terms of its connection with the public utility, in order to achieve the public interest, while these authorities granted to the administration do not affect the rights of the entity with which the administration contracts, whether to obtain financial return or collect some compensation in case the administration violates the terms of the contract, taking into account the principle of financial balance of the contract.³¹

The administration may commit several errors when executing the contract, and its error is either administrative, financial or technical, and the error results in harm to the contracting party, the management obligations are represented in two basic obligations, namely, the technical and legal obligations in the implementation of the administrative contract and the financial obligations in the implementation of the contract, and that any breach by the administration of these obligations results in a contractual error that entails its liability to compensate for the damages it causes to the contracting party, thus, the judiciary has a key role in monitoring the administration's violation of its obligations, deciding and settling it by extracting material evidence and applying the law in this regard by taking several measures.³²

A. The Judicial Oversight of the Administration's Breach of its Obligations Related to the Financial Return of the Administrative Contract

The administration's first obligations are to pay the financial return agreed upon in the contract to the contracting party immediately upon its implementation of the content of the contract, where the contracting party gets the financial return either in full after the implementation of the contract or in part as an advance payment and gets the rest through payments according to what is implemented from the contract, and the value of the financial return of the contracting party is determined in the value of the contract or the value agreed upon in the texts of the contract, in addition to the value of the additional activities that occurs

³¹ MAHMOUD AL-JUBOURI, *THE ADMINISTRATIVE CONTRACTS* 125 (House of Culture for Publishing and Distribution 2010).

³² HAMDY OKASHA, *ibid* 78-79.

during implementation, or the variation orders issued to the contractor in light of the price specified in the contract.³³

The question that arises here is: "What if emergency circumstances occurred during the implementation of the contract that led to an increase in the financial burden on the contractor and the complexity of his financial situation, which led to a breach of the principle of financial balance of the contract?"

To answer this question, it is necessary to refer to several theories established by jurisprudence and Judicial diligence, namely the (Al -emir) work theory and the theory of emergency circumstances , as for the (Al -emir) work theory, it is related to the legal administrative procedures issued by the contracting administration, which leads to harmful effects on the contracting party, which increases its burdens stipulated in the contract, such as amending the terms of the contract, or that the procedure is general and affects the obligations of the contracting party indirectly, such as amending laws related to financial matters.³⁴

A ruling issued by the Jordanian Court of Cassation stated that: "The (Al -emir) work theory means that the public authority as a preemptory authority, if it was previously contracted with an individual with an administrative contract for supply, public works, or otherwise, then the public authority issued a law that affects the elements of the contract that it is bound by and affects its economies, and the contracting party bears new burdens and costs that increase the burdens it committed in the beginning, the administration shall be liable for compensating the contractor for the damage he sustained as a result of the administration legitimate act, but however fair and flexible the (Al -emir) work theory was, it was not adopted by the Council and the Civil Law of (1977),also, the Court of Cassation did not find in the provisions what would allow it to be adopted, in addition, the judiciary in other Arab countries that have a civil law prior to the Jordanian civil law did not take it into account, however, jurisprudence and the judiciary have established that in order to apply the (Al -emir) work theory, the following is required: First Condition: The new

³³ *Ibid* 303-304.

³⁴ ALI ABDEL MAWLA, THE CIRCUMSTANCES THAT ARISE DURING THE IMPLEMENTATION OF THE ADMINISTRATIVE CONTRACT 14-15 (PhD diss, Ain Shams University, Egypt 1991).

legislation issued after the decade in which the government committed itself to the individual and which increased the financial burden was unexpected to be issued. Second Condition: The new legislation inflicted a specific harm to the contracting party with the government that would disrupt the financial status of the contract and affect a particular group or individuals, whereas if the legislation is general and comprehensive for the whole population or for an unlimited number of them, the above theory does not apply. There is also no basis for considering the (Al -emir) work theory as an application of the theory of emergency accidents stipulated in Article (205) of the Civil Law, this is because the theory of emergency accidents is an independent theory that does not fall under the concept of the (Al -emir) work theory, because there is a fundamental and essential difference between the two theories in terms of conditions and formation”.³⁵

As for the theory of emergency circumstances, it depends to procedures outside the control of the administration as well as the contracting party, where these circumstances are unpredictable, but sometimes the administration may abandon its financial obligations in case there are problems in the implementation of the administrative contract in a way that affects the terms and conditions of the contract by affecting the financial balance of the contract, or through delay and procrastination in performance.³⁶

In all these cases, the role of the judiciary is to intervene to resolve and judge these disputes. as the differences arising from these matters are represented in several issues:

First: That the contracting party with the administration resort to a claim for compensation due to a change in the terms of the contract, as the administration may amend the terms of the administrative contract based on the new circumstances, and this modification may go beyond the terms related to ensuring the regular and steady operation of the public utility, where these new conditions affect the advantages enjoyed by the contracting party with the

³⁵ Cass civ 10 April 1979, D 1979, 117 (Jordanian Court of Cassation Decision).

³⁶ OMAR HELMY, THE NATURE OF THE JURISDICTION OF THE ADMINISTRATIVE JUDICIARY IN ADMINISTRATIVE CONTRACT DISPUTES 132-136 (Dar Al-Nahda Al-Arabiya 1993). Ali Abdel Mawla, *Ibid* 14.

administration, so that, the contractor has the right to resort to the courts to claim compensation.³⁷

Therefore, it can be said that the contracting party has the right to demand compensation due to the administration changing the terms of the contract, and if the administration has the right to amend the terms of the administrative contract, then this right should not exceed the conditions related to ensuring the regular and steady functioning of the public utility.³⁸

Second: That the contracting party resort to a claim for compensation for procrastination or delay in the payment of financial consideration and legal benefits, this claim has two parts:

First Part: Demanding the party contracting with the administration to compensate for the procrastination, as the administration may delay in implementing its financial obligations towards the party contracting with it, whether intentionally or unintentionally, so it is necessary to prove the fact of procrastination.³⁹

Second Part: Claiming the party contracting with the administration for legal financial interest, as the administration may delay in implementing its obligations and this delay results in legal interests, these interests are legal compensation that each contracting party is obligated to pay as an effect of his delay in paying the due amounts resulting from his breach of his contractual obligation, and these legal interests constitute a percentage that is legally determined and calculated from the date of the judicial claim until the date of full payment as long as the due amount of the debt is known and payable, that is,

³⁷ BASHAR ABDUL HADI, *Ibid* 55-56.

³⁸ OMAR SALEH, THE JUDICIAL OVERSIGHT ON THE ADMINISTRATIVE CONTRACTS IN THE CONVENING AND IMPLEMENTATION STAGES A COMPARATIVE STUDY 103-117 (Master Thesis, Alexandria University 2021).

³⁹ Makhliid Khashman, Muhammad Al-Hussein, The Administrative Contracts and its Penalties in the Jurisprudence of the Jordanian Administrative Judiciary and the Comparative Judiciary, 43 *Dirasat: Shari'a and Law Sciences*, 1343, 1343-1349 (2016) file:///C:/Users/user/Downloads/10612-52371-1-PB%20(2).pdf.

these financial interests are based on firm foundations, and the judiciary has no discretionary power to estimate, since the amount awarded is known.⁴⁰

B. The Judicial Oversight Regarding the Administration's Refusal to Refund the Value of the Final Guarantee to the Contracting Party

The administration may refrain from refunding the value of the final guarantee to the party contracting with it, which is obligated to provide a guarantee before commencing with the implementation of its contractual obligations, this guarantee constitutes one of the conditions provided by law to secure the contractual obligation of the contractor until the final delivery of the work, and it is necessary to return the warranty and the rest of the guarantees that take its place, where the contracting administration may confiscate the value of the final guarantee of the contracting party only in the event that the contractor fails to fulfill his contractual obligations as compensation for the damage he sustained⁴¹, and if these damages exceed the value of the guarantee, the administration has the right to claim compensation for the damages incurred by it as a result of the breach of the contractual obligation, accordingly, and in return for confiscating the guarantee in case of default by the contracting party, the administration is obligated to return the final guarantee after the contracting party finishes completing the works and fulfilling its contractual obligations as stipulated in the contract and within the specified period.⁴²

In a ruling issued by the Moroccan Administrative Court (Casablanca), stated that: "That the guarantee or insurance is deposited by the contractor on which the deal contract is based, and that it represents the administration's right to ensure the contractor implementation of the obligations arising from the contract, and what is clear from the records is that the plaintiff delivered the contract vehicles to the defendant, which gives him the right to claim a refund of

⁴⁰ Mansour Al-Atoum, The Legal System for Delay Fines in Administrative Contracts A Comparative Analytical Study, 53 scholarworks.uaeu.ac.ae sharia and law, 343, 360-361, (2013). https://scholarworks.uaeu.ac.ae/sharia_and_law/vol2013/iss53/6

⁴¹ AISHA GHAYYUM, THE FULL JUDICIARY LAWSUIT IN ADMINISTRATIVE DISPUTES 60-66 (Master Thesis, Akli Mohand Olhaj University 2019).

⁴² JAMAL OTHMAN, The General Theory and Its Applications in the Field of Cancellation of Administrative Contracts in Jurisprudence and the Judiciary of the State Council 221-225 (Modern Arab Office, 2007). ABDEL MONEIM KHALIFA, The Administrative Liability in the Field of Contracts, *Ibid* 104-106.

the guarantee amount, accordingly, the request related to it is valid and justified and must be responded."⁴³

C. The Judicial Oversight of the Administration's Obligation to Compensate the Contractor for Unilateral Termination of the Administrative Contract

The termination by the singular will of the administration is one of the distinguishing features of an administrative contract from a civil contract, where the public administration, exclusively and without the need to resort to the judiciary, has the right to terminate the administrative contract in the event that the contractor seriously breaches his obligations imposed on him, the administration is also obligated to compensate the contracting party in the event of termination of the contract without there being any breach by the contracting party of its obligations⁴⁴, where the reason for this compensation is to deprive the contractor with the management of the financial benefits that the full implementation of the contract brings, which may harm his investments, therefore, the administration is obligated to compensate the contracting party for the termination of the contract in order to achieve the public interest, provided that there is no express provision in the contract whereby the contracting party waives its right to compensation in the event of unilateral termination of the contract.⁴⁵

The administration's commitment is rooted in a principle enshrined in the laws of all countries, it is the principle of executing the contract with its contents and in accordance with what is required by good faith, as Article (202) of the Jordanian Civil Law states the following: "The contract shall be executed in accordance with what it contains and, in a manner, consistent with the requirements of good faith. The contract is not limited to obligating the contracting party to what is stated in it, but also deals with what is required for

⁴³ Administrative 3 July 2006, D 2004T, 334 (The ruling of the Moroccan Administrative Court Casablanca in its judgment).

⁴⁴ Thamer Al-Mutairi, The administration's Abuse in the use of its authority to amend the administrative contract Comparative Study 88-97 (Master's Thesis, Middle East University 2011).

⁴⁵ HIND ABU MURAD, THE AUTHORITY OF THE ADMINISTRATION TO TERMINATE THE ADMINISTRATIVE CONTRACT A COMPARATIVE STUDY 39-41 (Master's thesis, University of Jordan 1999).

its implementation in accordance with the law, custom and the nature of the disposition⁴⁶.”

The Moroccan Administrative Court (Casablanca), in its judgment No. (243) dated (29/9/1996), stated the following: “Whereas, as the administrative jurisprudence and the judiciary reached the right of the administration to terminate its contracts, even if the contracting party did not commit any error, and that the administration always has the power to terminate the contract whenever it deems that it is required by the public interest, where the other party has the right to compensation if it has a right, and this is subject to the circumstances that require such termination, and the administration is directed to resort to it in order to achieve the intended public interest.⁴⁷”

D. The Judicial Oversight of the Administration’s Obligation to Compensate in the Event of Termination of the Administrative Contract

The administration may terminate the contract by canceling it as a result of a serious error by the contracting party if the administration finds that the rest of the contract does not serve the public interest, the judicial jurisprudence has identified a set of cases in which the administration can terminate the contract, and they are of two types:

First Type: The compulsory termination of the contract: this termination results in the case of the contracting party with the administration using fraud or manipulation methods, either directly or through others, but it is required that this fraud or manipulation affects the contract, and examples of this is the termination of the contract due to the bankruptcy or insolvency of the party contracting with the administration, which leads to the impossibility of carrying out the contract.⁴⁸

Second Type: The permissible termination of the contract: In this case, the administration has the discretion to inflict such termination penalty as it deems

⁴⁶ Civil Law Act, 1976, § 202, No. 76, Acts of Parliament, 1976 (Jordan).

⁴⁷ Administrative 29 September 1996, D 1996, 243 (The ruling of the Moroccan Administrative Court Casablanca in its judgment).

⁴⁸ MUHAMMAD AL-ANDALI, THE EFFECTS OF THE ADMINISTRATIVE CONTRACT IN JORDANIAN LEGISLATION A COMPARATIVE STUDY 67-77 (Master's Thesis, Al Al-Bayt University 2003).

to be in the public interest in terms of termination or continuation of the contract.⁴⁹

It was stated in a ruling of the Moroccan Administrative Court (Marrakesh) in its judgment No. (89) issued on (16/4/2003) that: "But since it was proven from the investigation that was carried out with the two parties, the representative of the contracting company that implements the project acknowledges that the contracting party stopped implementing the project since (1988), due to the non-performance of the project's dues by the institution that owns the project.... and since within the framework of administrative contracts, the contractor executing the project cannot stop completion due to non-performance".⁵⁰

IV. THE ROLE OF THE JUDICIARY IN MONITORING THE OBLIGATIONS OF THE CONTRACTING PARTY WITH THE ADMINISTRATION

The obligations of the contracting party with the administration are that it implements the contract according to the conditions specified in it, and that the contracting party fulfills its contractual obligations personally and within the period specified in the contract.⁵¹

A. The Obligation of the Contracting Party towards the Administration to Implement the Terms of the Contract.

The obligation of the contracting authority to implement the administrative contract is one of the fundamental obligations of the contractor, where the contractor is obligated to implement the contract in accordance with what it contains and according to the conditions stipulated in the contract in order to achieve the intended purpose of the contract, the contractor may not refrain from implementing it or stop it on the pretext that the administration has not fulfilled its obligations towards the contract, however, the contracting party may not be

⁴⁹ ABDEL-AL, HUSSEIN, *THE GENERAL THEORY OF ADMINISTRATIVE CONTRACTS* 75-77 (1th ed. Anglo-Egyptian Library 1958).

⁵⁰ Administrative 16 April 2003, D 2003, 89 (The ruling of the Moroccan Administrative Court Marrakesh in its judgment).

⁵¹ Taima Al-Jarf, *The Judicial Oversight of Public Administration Activities, Appeal Against Cancellation in the State Council* 233-237 (Modern Cairo Library, 1984). Mahmoud Al-Jubouri, *ibid* 187.

liable to the administration in the event of a force majeure preventing him from fulfilling its contractual obligations.⁵²

The Jordanian Supreme Administrative Court, in its decision No. (90/2019), issued on (17 April 2019), ruled the following:” The concept of an administrative contract as defined by jurisprudence and administrative judiciary is a contract in which one of its parties is a public legal person, its activity is related to public facility, and contains terms that are uncommon within the scope of private law, where the contract is considered administrative if it has three characteristics, namely that one of its parties is a public legal person, and that the conclusion of the contract relates to an activity related to a public facility, and that it includes conditions that are not common within the scope of private law, the administrative contract is distinguished by that the administration acts in its conclusion as a public authority that enjoys rights and privileges that the contracting party does not enjoy with the intention of achieving a public benefit or public interest, and if the contract loses one of the mentioned conditions , then it is a private law contract and is considered a civil contract in which the administration degrades to the status of individuals in its contract, and concludes civil contracts in which the means of private law are used, (Refer to the set of legal principles approved by the Supreme Administrative Court / the Egyptian State Council - Part (3), Page. (1991), Clauses: (4639 - 4644)), and by applying what was stated in the lawsuit, we find that the administration has concluded with the defendant a unified employment contract for employees that departs from the concept of the administrative contract, and that the first complained decision containing the termination of the service of the respondent against him based on the terms of the contract, and as with this lawsuit, it is a final administrative decision, in which all elements of the administrative decision are combined, as it is issued by an administrative entity competent to issue it and with its public authority, with the aim of establishing a legal center to achieve the public interest and not with the intention of canceling an administrative contract, this is because the administrative decision is issued by a unilateral will of the administration, and

⁵² Omar Abu Bakr, *The Judicial Oversight of the Administration’s Authority in Concluding Administrative Contracts by Bidding* 115-117 (Al-Halabi Human Rights Publications 2013). Abdul Aziz Khalifa, *The General Foundations of The Administrative Contracts*, *Ibid* 177-178.

therefore it is distinguished from the administrative contract that arises from the convergence of the administration's will with another will with certain conditions, and the dispute shall be in the application of the terms of the contract or agreement that concluded, (Refer to Dr. Majed Al-Helou "The Administrative Lawsuits, Pages (42) and beyond), and since the administrative contract is similar to the civil contract in terms of its basic elements, it is an agreement of two wills, by affirmative and acceptance to perform a contractual obligations based on mutual consent between the two parties, however, the administrative contract is distinguished from the civil contract in that it must meet the conditions mentioned above in the introduction to this decision, and since the above-mentioned conditions are not included in the appellee's employment contract, it is out the scope of administrative contracts, and that the dispute is the subject of this lawsuit within the jurisdiction of the administrative judiciary,(Refer to Decision No. (106/2011), Supreme Court of Justice, dated 29/6/2011)),and since the Administrative Court has reached a different conclusion from that of our court regarding the first complained , its contested judgment is subject to cassation from this aspect".⁵³

⁵³ Ali Al Lozy v. President of the International University of Islamic Sciences, Supreme Administrative admin 17 April 2019, D 2019, 90 (Judgment of the Jordanian Supreme Administrative Court) and the Jordanian High Court of Justice (Formerly) ruled the following: "The administrative contract has a special characteristic that makes it independent of the civil contract, where it based on meeting the needs of public facility so that they operate regularly, so that, if the contractor fails to implement its contractual obligations, the management has the right to take the necessary measures to ensure the implementation of the contract in accordance with the interest of the public facility, accordingly, the decision taken by the defendant (Amman Municipality-Supplies and Works Committee) which deprived the claimant from participating in the Municipality's bids and purchases for a period of one year, is in line with Article (49) of the Procurement and Works Regulations due to his negligence in maintenance and breach of his contractual obligations, which is a procedure consistent with the implementation of the contract in term the interest of the public utility, this is because the administration that imposes penalties on the contracting party when violating the terms of the contract aims the public interest, in addition to the insurance of the proper functioning of the public facility, to perform the required activities properly, as the contracting parties in administrative contracts are not equal, unlike civil contracts, where the rights and obligations of both parties are regulated. Supreme Justice admin 24 September 1997, D 1997, 181 (Decision of the Jordanian Supreme Court of Justice (Formerly).

B. The Personal Liability of the Contracting Party in Implement the Contract

The general principle that governs the contractual relationship between the administration and its contractors is that the administrative contract is executed by the contracting party personally, this obligation requires the contracting party to act appropriate effort in personal cooperation with administration in the performance of the contract, and not to withdraw from the contract in whole or in part or sub-contract it without the approval of the administration, where this personal obligation of the contracting party to implement the contract is subject to judicial oversight⁵⁴, where the Egyptian Supreme Administrative Court ruled that: "It has been established in the public law jurisprudence that administrative contracts are governed by its own rules that apply to it all, even if these rules are not stipulated in the contract, and one of these rules is that the obligations of the contractor toward the administration are personal obligations, that is, the contractor must perform them personally and by himself, therefore, the original contracting party is considered solely liable in front of the administration, and the administration always has the right to refer to the original contracting party in case of default in his obligation, whoever the defaulter may be, hence, the contracting party is not entitled to absolve him-self of the liability implied by the supply contract on the grounds that the act entailing liability was done by his representative without his knowledge or consent"⁵⁵.

C. The Obligation of the Contracting Party in Respecting the Time Periods (Time Limits) the Starting and the Completion Dates of the Contract

Each contract has a time period for its implementation stipulated in it in order to complete the execution activities that are the subject of the contract, therefore, if the activities subject of the contract are not completed within the period specified in the contract, in addition to the additional periods granted to the contractor by the administration, this means that the contractor has breached his obligations, this obligation is subject to judicial oversight, as the judiciary monitors the breach of obligations arising from the implementation of the

⁵⁴ Wissam Al-Ani, *The General Administrative Penalties: A Comparative Study*, 32 JOURNAL OF LEGAL SCIENCES, 116, 116-161 (2019). <https://jols.uobaghdad.edu.iq/index.php/jols/article/view/135>

⁵⁵ The Decision was mentioned by Hamdi Okasha, *Ibid* 352-353.

contract during the agreed period, so that the court monitors two things: the starting of the contract term, and the completion of the contract term.⁵⁶

The Jordanian Court of Cassation ruled that: "If the supply contract includes that in the event of a delay in the documentary credit notification issued for a period exceeding ten days from the date of signing the supply contract, the delay period applies to shipping dates without penalties, and as long as this condition is set in favor of the assignee of the supply offer, and it does not violate the law or public system, it is binding on the administration, therefore, the administration's delay in opening the credit requires calculating the delay period in favor of the assignee without imposing fines for the delay in supplying the goods included within the delay period for opening the credit"⁵⁷.

With regard to the start time of the contract, each contract has a specified period of time, and the contracting party with the administration is obligated to carry out its contractual obligation during the original period specified in the contract, and that any breach of implementation during the period will result in penalties, as for the completion of the contract term, the contract ends with the expiry of its term specified in the contract, i.e. at the end of the activities and the handing the subject of the contract, and this handing over is subject to monitoring to ensure that the activities conform to the technical specifications specified in the contract.⁵⁸

D. The Penalties for Breaching the Contracting Party to Implement the Administrative Contract

The delay of the contracting party in fulfilling his contractual obligations within the specified period entails penalties as he fails to fulfill its obligations, and the most important of these penalties is the delay fine.⁵⁹

⁵⁶ Muhammad Abd Al-Wahhab, " The Principles and Provisions of Administrative Law 490-493 (Al-Halabi Human Rights Publications 2005). Abdul Aziz Khalifa, The General Foundations of Administrative Contracts, *Ibid* 178-179.

⁵⁷ Cass civ 19 June 1996, D 1996, 825 (Jordanian Court of Cassation Decision).

⁵⁸ FATTOUH HINDAWI, THE ADMINISTRATIVE JUDGE AND THE FINANCIAL BALANCE OF THE ADMINISTRATIVE CONTRACT", A COMPARATIVE STUDY 599-601 (1th ed. The National Center for Legal Publications 2016). Mahmoud Al-Jubouri, *Ibid* 183-186.

⁵⁹ FAYYAD ABDUL MAJEED, THE THEORY OF SANCTIONS IN THE ADMINISTRATIVE CONTRACT 68-69 (Arab Thought House 1975).

The meaning of the delay fine is " A financial penalty of a threatening nature aimed at urging the contractor with the administration and forcing him to respect the implementation periods because of their importance in the field of establishing and managing public utilities."⁶⁰

If the administrative judiciary in (France and Egypt) is the competent authority to look after disputes related to delay fines in administrative contracts, the ordinary judiciary in Jordan is specialized in looking after these disputes because it has general jurisdiction in judicial disputes, considering that the Jordanian legislator has limited the competencies of the administrative judiciary, and administrative contract disputes are not among them.⁶¹

The administration approves this fine on its own and without the need to obtain a court ruling allowing it to do so as soon as it becomes clear to it that the contractor did not complete the obligation on time.⁶²

The Egyptian Supreme Administrative Court ruled that:" One of the accepted principles in the jurisprudence of administrative law is that fines for delays in administrative contracts are established to ensure the implementation of these contracts on the agreed dates, in order to ensure the smooth running of public utilities on a regular and consistent basis, therefore, the fines stipulated in those

⁶⁰ Ali Shatnawi, The Authorities of the Administration in Imposing Delay Fines against its Contractor 24 JOURNAL OF LAW KUWAIT UNIVERSITY, 74, 74-95 (2000).
<http://www.pubcouncil.kuniv.edu.kw/jol/homear.aspx?id=8&Root=yess&authid=913>

⁶¹ Muhammad Al-Maamari, The Judicial Oversight of Administrative Contracts in the Convening and Implementation Stages 172-173 (New University House 2011). Mansour Al-Atoum, *ibid* 380-381.

⁶² the instructions regulating the bidding procedures and the conditions for participation Act, 2008, § 68, No. 1, Acts of executive branch, 2008 (Jordan) stipulated the following: "If the contractor delays in implementing what he has committed to on the date specified in the contract, a fine of no less than (0.5%) half a percent of the value of the supplies that the contractor was late in supplying for each week or part of the week, regardless of the damage caused by the delay in implementation."

contracts are approved by the administrative authorities on their own without being obligated to prove the occurrence of the damage."⁶³

The Jordanian Court of Cassation also ruled that: "... The plaintiff has the right to demand a delay fine in accordance with the agreement concluded between the plaintiff and the defendant, which includes the date of delivery and the amount of the fine, without being required to prove the damage caused by the damage and has been achieved, which is the delay in delivery...."⁶⁴

V. CONCLUSION

Administrative decisions related to licensing, auctions, approval and ratification of the contract fall under the jurisdiction of the administrative judiciary, as they are administrative decisions separate from the contract and its implementation, then they may be appealed, and that the criteria related to determining the nature of the conflict related to administrative contracts have greatly evolved as a result of the development of the state's activity through its intervention and management of the activity of its facilities, whether directly or through a mixed economy, therefore, this development created many dilemmas due to the diversity and development of these contracts by defining the authority with jurisdiction to consider disputes, whether it is the ordinary judiciary or the administrative judiciary.

The solution to problems related to disputes related to administrative contracts is to establish a set of criteria to determine the competent authority to consider these disputes, and relying on several criteria and rules for distinguishing between the decisions taken by the administration, that related to the separate procedures for preparing, implementing and terminating these contracts, and

⁶³ The ruling of the Supreme Administrative Court on 21 March 1970, a set of legal bases decided by the Supreme Administrative Court in fifteen years 1965-1980 Part 2, 1883 (The Egyptian General Book Authority 1983).

⁶⁴ Cass civ 2 February 2003, D 2002, 3271 (Jordanian Court of Cassation Decision). Corresponding with the decision of Cass civ 19 June 1996, D 1996, 825 (Jordanian Court of Cassation Decision) the court ruled by saying: "The damage caused to the public administration as a result of the contractor's delay in supplying the materials or goods assigned to him and which he was obligated to supply under an administrative contract is presumed harm that cannot be proven otherwise, given the nature of the contract and its relationship to the public interest and its impact on the proper functioning of public utilities."

whether those decisions taken in this context are related to legal and regulatory texts that affect the legality of the administrative decision in order to be presented to the cancellation judiciary, or these decisions related to the implementation of the terms and conditions of the contract in order to present them to the ordinary judiciary, and the contracting party has the right to claim compensation due to the administration changing the terms of the contract, and if the administration has the right to amend the terms of the administrative contract, this right should not exceed the conditions related to ensuring the regular and steady functioning of the public facility.

Recommending the necessity of amending the text of Article (5/a) of Administrative Judiciary Law No. (27) of (2014), and for the Jordanian legislator to bridge the legislative gap in that text and work to bridge it by expanding the powers of the administrative judiciary, to include the consideration of administrative contract disputes, as the administrative contract and the legal theories that govern it have a special nature that differs from civil contracts, amending the aforementioned law by adding articles dealing with all types of administrative contracts, because of the importance of this amendment in limiting all disputes arising from administrative contracts to an independent judiciary that is competent to consider it, and relieves pressure on the ordinary judiciary.

The Jordanian legislator's return from the method of exclusively defining jurisdiction with regard to the administrative judiciary, keeping a margin for the administrative judiciary to determine judicial disputes of an administrative nature and disputes of a civil nature and granting the general jurisdiction of that authority, until the legal rules and principles that apply to administrative disputes are unified, and the administrative judiciary in Jordan has retracted its jurisprudence, which states that the competencies of the administrative judiciary are limited, as these competencies do not include disputes related to contracts of all kinds, including administrative contracts.

Policing Cyber Hate: A Comparative Analysis Between Malaysia and India

*Nadia Nabila Mohd Saufi¹, Saslina Kamaruddin²
and Dr. Niteesh Kumar Upadhyay³*

Abstract

Hate speech becomes prevalent phrase in modern times. It is utilised in political debates, and legal jargon. Recently, Southeast Asia has seen an increase in disinformation-driven hate speech. Such crime evolved into a new paradigm with the advances in ICT. Currently, social media platforms allow people to exercise their right to free speech. People publish sensitive content and provocative remarks on social media without any restraints or limitations, which jeopardises or threatens national security and peace. Many cyber-related crimes including hate speech are criminalised in India and Malaysia. However, both jurisdictions' laws have several flaws, and there is no explicit and comprehensive legislation to govern or punish online hate speech. It also analyses flaws in existing legal systems and proposes new techniques to regulate online hate speech in Malaysia and India. This study uses a doctrinal research technique, which analyses primary and secondary sources. The findings show that the use of social media platforms is on the rise, increasing the possibility to infringe on fundamental liberties such as hate speech and expression. Without legal oversight or effective governance, the problem could lead to poor governance and threaten the well-being of the nations.

Keywords: *Hate Speech, social media, Freedom of Speech, Governance, Covid19, India and Malaysia*

¹ Lecturer, Faculty of Business Management & Professional Studies, Management & Science University, 40100 Shah Alam, Selangor Darul Ehsan.

² Senior Lecturer, Faculty of Management & Economics, Sultan Idris Education University, 35950 Perak Darul Ridzuan.

³ Associate Professor, School of Law, Galgotias University, Uttar Pradesh, 203201, India and Research Advisor South Ural State University, Russia.

I. INTRODUCTION

The Internet has revolutionized communication with those around the globe. When the cyberworld and the real world clash, it degenerates into addiction. While the Internet is the essential human innovation, it still can be the most dangerous weapon in terms of affecting an individual's physical and mental health.⁴ The term "hate speech" enjoys great popularity today. It is used in colloquial speech or political disputes and as an element of lawyers' language and legal language.⁵ Over recent years, Southeast Asia has witnessed a surge of hate speech fueled by disinformation.⁶ However, in the current era and with Information and Communications Technology (ICT) development, hate speech has evolved into a new spectrum.⁷ Social media platforms currently act as a medium for the society to exercise their freedom of speech.⁸ However, when social media is used without any restrictions or limitations, it gave rise to the problem whereby its users post sensitive content and conflicting remarks that inflict or threaten the security and peace of the nation.⁹ In minimizing the dissemination of these threats of unregulated use of social media, the Malaysian government introduced the Communication and Multimedia Act 1998 (CMA 1998), which is still inadequate to govern hate speech.¹⁰

⁴ Saslina Kamaruddin et al., *Imposing Penalty for Internet Addiction in Malaysia: Lesson from South Korea*, INTERNATIONAL JOURNAL OF RECENT TECHNOLOGY AND ENGINEERING (IJRTE). ISSN: 2277-3878, Volume-7, Issue-6S5, April 2019.

⁵ Mahyuddin Daud & Sonny Zulhuda. *Regulating The Spread of False Content Online In Malaysia: Issues, Challenges And The Way Forward*, INTERNATIONAL JOURNAL OF BUSINESS & SOCIETY, 21 (2020).

⁶ Wok et al. "Internet and social media in Malaysia: Development, challenges and potentials." *The evolution of media communication*. IntechOpen, 2017.

⁷ Alsagoff et al. "The growth and development of the Malaysian media landscape in shaping media regulation." *Asian Journal of Applied Communication (AJAC)* (2014).

⁸ Khan et al. "Impact of PECA-2016 Provisions on Freedom of Speech: A Case of Pakistan." *Journal of Management Info* 6.2 (2019): 7-11.

⁹ Islam Md. Zahidul et al, *Internet governance: present situation of Bangladesh and Malaysia*, INTERNATIONAL JOURNAL OF RECENT TECHNOLOGY AND ENGINEERING 7 (2019): 176-180.

¹⁰ Siti Zabadah Mohd Shariff & Rohayu Kosmin. "Regulating Content in Broadcasting, Media and the Internet: A Case Study on Public Understanding of their Role on Self-Regulation in Malaysia."

Based on the statistics released by the Malaysian Communication and Multimedia Commission (MCMC), over the past five years (2016-2020), hate speech reports concerning Race, Religion, and Royal Institution (3R) have significantly increased. In 2017, there were many grievances, but in 2018, the number of complaints fell marginally. In 2019, the number of complaints rose by more than a hundred percent. Surprisingly, 929 grievances were registered in just half a year, from June 2020 to June 2021. The number of allegations is about a hundred thousand greater than the previous year, showing a significant rise in Malaysia's number of online hate speech complaints.¹¹ However, MCMC emphasized that all grievances were dealt with in compliance with existing procedures.

Two assumptions were made due to the substantial rise of online hate speech incidents in Malaysia. Primarily, in August 2019, it was reported that the public might channel all 3R complaints to MCMC's WhatsApp platform, making it more straightforward for people to complain and for MCMC to reply faster. Secondly, most Malaysians were homebound during the Movement Control Order (MCO) timeframe and spending more time on the Internet increases the likelihood of a higher number of complaints. More analysis is required to ascertain the cause of this surge, which may be the emergence of online hate speech or a greater understanding of the issue.¹²

¹¹ Ahmad Tajuddin Mohd Said, Online Hate Speech in Malaysia, September 9 2020, Official Website of Malaysian Institute of Defence and Security (MiDAS), Promoting Peace and Security, Perwira Dialogue 2020, Wisma Perwira A.T.M., Kuala Lumpur. (Feb. 14, 2022, 10.30 AM), <http://midas.mod.gov.my/gallery/publication/midas-commentaries/213-haze-managing-another-disaster-during-covid-19-by-lt-kol-dr-maimunah-omar-2>

¹² *Ibid*

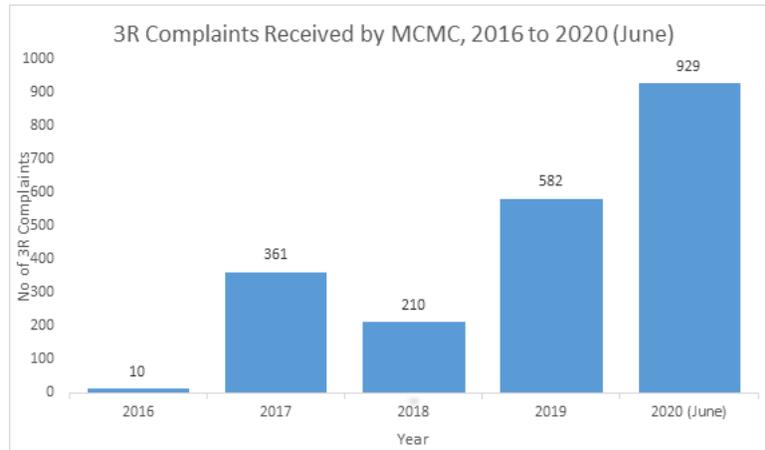


Figure 1: A statistic on the surge increment of reports of online hate speech complaints received by MCMC.

Another evidential incident is whereby during Covid19, the recent wave of 'hate speech and violent threats against the Rohingya appears to be driven by a perception among some members of the Malaysian public and politicians that the Rohingya community is demanding citizenship or other legal rights in Malaysia.¹³ These rights are protected by customary international law, binding on all states, and reflected in the Universal Declaration of Human Rights.¹⁴

The pandemic Covid19 has also resulted in children spending more time on devices, including social media, messaging apps, chat rooms, and video games. This will certainly encourage them to remain in contact with friends and make new acquaintances throughout the pandemic, but it will also make them more prone to online hatred.¹⁵ The abuse and threats are not merely those that we sometimes read of. Regularly, young children are constantly barraged with criticism, whether through Twitter abusers, individuals maligning

¹³ Ehmer, Emily, and Ammina Kothari. "Malaysia and the Rohingya: Media, migration, and politics." *Journal of Immigrant & Refugee Studies* 19.4 (2021): 378-392.

¹⁴ <https://reliefweb.int/>

¹⁵ Ziccardi, Giovanni. *Online political hate speech in Europe: The rise of new extremisms*. Edward Elgar Publishing, 2020.

personalities, or impulsive responses targeted at others. This risk is normalizing hostile online activity and jeopardizing the mental health and well-being of children¹⁶.

In view of the above issues arising, this paper will begin the discussions focusing on the concept and the context of online hate speech. Then, the paper will discuss the international law governing hate speech, the Indian and the Malaysian legal perspective on the said topic. The next part, which is the main crux of the paper, seeks to propose a new Independent Self-Regulatory Model (ISRM) as an alternative to the current policing approach of online hate speech in Malaysia, and the last part concludes the paper.

II. CONCEPTUALIZING ONLINE HATE SPEECH

The definition of "hate speech" consists of posting malicious online comments that insult a person or a group of people. Hate speech laws intend to protect people against any indignant feelings.¹⁷ The European Court of Human Rights has recognized the importance of protecting human feelings in which the limitation on the individuals' rights to "offend, shock, or disturb" others, was closely scrutinized by the Court. As a result, the right to freedom of expression safeguards a significant proportion of offensive speech. On the other hand, the Court has indicated in its case law that "in some democratic societies, it might be deemed appropriate to regulate or even preclude all means of expression that propagate, provoke, encourage, or excuse hatred based on intolerance...".¹⁸

The term may also be extended to hate speech on the Internet. Most social networking platforms, nonetheless, have their perception of hate speech.

¹⁶ *ibid*

¹⁷ Simpson, Robert Mark. "Dignity, harm, and hate speech." *Law and Philosophy* 32.6 (2013): 701-728.

¹⁸ Roels, Jo. "The Battle against Hate Speech and Freedom of Expression Online." *Charles University in Prague Faculty of Law Research Paper No* (2017) (Mar. 26, 2022, 8.30 AM), https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&scioq=%E2%80%9CImposing+Penalty+for+Internet+Addiction+in+Malaysia%3A+Lesson+from+South+Korea%E2%80%9D&q=Roels%2C+Jo.+%22The+Battle+against+Hate+Speech+and+Freedom+of+Expression+Online.%22+Charles+University+in+Prague+Faculty+of+Law+Research+Paper+No+%282017%29.&btnG=.

Facebook, for example, answers the question of what they consider to be hate speech as follows: "Content that attacks people based on their actual or perceived race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or disease is not allowed." "We may, however, accept simple attempts at comedy or parody that might otherwise be deemed a potential hazard or attack," they say. This contains information that certain people can find offensive".¹⁹

According to the international standards, online hate speech recognized that the same rights that people have offline must also be protected online; and that any limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as non-electronic or offline communications.²⁰ The strength of the Internet is that it can also lead to a new public sphere and challenge or be the alternative to other mass media such as print and broadcast media.²¹ Furthermore, it can be employed to threaten the intellectual life through debate which is offered by especially the print media. Freedom of speech should be absolute, with no restrictions and that it is the only speech that should be protected by the Constitution.²² For this reason, it should not be abridged even on the grounds of national security.

Online hate speech merits heightened protection because it is vital to a democratic society. Special protection of online hate speech caters for the grounds of the government's more significant incentives for self-interested political action.²³ When the government regulates political speech, it is most likely to be biased or to be acting based on illegitimate, venal or partial

¹⁹ Liina Laanpere, ELSA International Online Hate Speech Competition Participant 03, Estonia, Online Hate Speech: Hate or Crime?, Essay Competition Online Hate Speech: Right or crime? (Jan. 9, 2022, 10.30 AM), https://files.elsa.org/AA/Online_Hate_Speech_Essay_Competition_runner_up.pdf

²⁰ Chetty, Naganna, and Sreejith Alathur. "Hate speech review in the context of online social networks." *Aggression and violent behavior* 40 (2018): (Jan. 9, 2022, 10.20 AM) 108-118.

²¹ *Ibid.*

²² Meiklejohn, Donald. "Public Speech and the First Amendment." *Geo. LJ* 55 (1966): 234.

²³ George, Cherian. *Contentious journalism and the Internet: Towards democratic discourse in Malaysia and Singapore*. NUS Press, 2006.

considerations. Hence, the government is rightly distracted when regulating speech that might harm its interest and when the speech at issue is political, its interest is almost always at stake. In a sense, this requires both speaker and receiver to understand that the speech is political. It is enough if 'a few' understand it as such.²⁴

International standards recognized that regulatory approaches in the telecommunications and broadcasting sectors could not simply be transferred to the Internet. Instead, the legal framework regulating the mass media should consider the differences between the print and broadcast media and the Internet while also noting how media converge.²⁵ Therefore, there has to be a line drawn somewhere between where the "right to offend" other people ends and illegal hate speech starts.

In society, one must contemplate that not all voices are heard; the more vital members systemically silence the weaker members of society through hate speech. Victims constantly live in fear of being ridiculed and abused, so much so that they do not even consider speaking or standing up for their rights due to the possible repercussions they may receive from their tormentors. The sensitivities, paranoia, and fear paralyzing people's lives are directly caused by the continuous negative imaging propounded by the privilege.²⁶

III. ONLINE HATE SPEECH AND INTERNATIONAL LAW

Hate speech has become a global issue in recent years. With the emergence of social networking, emotions of animosity that might still occur in communities have been intensified. As a result, social networking firms have taken measures to restrict online hate content on their sites, using technical and human surveillance approaches. Despite this, the dilemma continues.

²⁴ *Ibid.*

²⁵ Tsesis, Alexander. "Hate in cyberspace: Regulating hate speech on the Internet." *San Diego L. Rev.* 38 (2001): 817.

²⁶ Nor, Murni Wan Mohd, and Ratnawati Mohd Asraf. "Freedom without Restraint and Responsibility: The Problem of Hate Speech in Malaysia." *Malayan Law Journal* 5 (2015).

Hate speech, like all other words, has no widely agreed meaning. However, hate speech is described by the United Nations (UN) as "any kind of contact in speech, writing, or action that opposes or uses pejorative or derogatory language concerning an individual or a community based on whom they are, in other words, based on their faith, ethnicity, nationality, colour, descent, gender, or other characteristics."

Article 19 of the United Declaration on Human Rights (UDHR) states that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".²⁷

Accordingly, Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) states that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice".

The European Convention does not contain any commitment for the States to prohibit any kind of enunciation. Nevertheless, the European Court of Human Rights believed that any form of dangerous articulation should be strictly regulated to protect the European Convention's overall objectives. In situations where the State has restricted criminal endorsements, the European Court has exerted stringent regulation, ruling in various cases that the burden of a criminal prosecution dismissed the communication standard. Consequently, resorting to criminal legislation cannot be used as the usual solution to instances of disruptive articulation where less severe permits will have the same impact. Regardless, restrictions on the likelihood of enunciation, including those focused on severely hate speaking, were enforced by an essentially unusual social affair of reference-based law and managerial policy.²⁸

IV. INDIAN PERSPECTIVE ON GOVERNANCE OF ONLINE HATE SPEECH

²⁷ Article 19 of the United Declaration on Human Rights (UDHR)

²⁸ Assimakopoulos, Stavros, Fabienne H. Baider, and Sharon Millar. *Online hate speech in the European Union: a discourse-analytic perspective*. Springer Nature, 2017 (Jan. 9, 2022, 10.20 AM IST).

While discussing hate speech, Benoit Frydman, mentioned two approaches adopted by the countries towards Hate Speech.²⁹ He called the first approach a "slippery slope", which is primarily seen in the case of the Constitution of the United States of America, under which any restriction on freedom of speech and expression fails to have legal ground. There is no Anti-Hate speech law in the USA, and most of the time, people who committed hate speech when free without any legal interference.³⁰ The second approach is known as "Fatal Slope", which is followed by most countries around the globe.³¹ In the fatal slope approach, hate speech is expressly banned by various legal interference ranging from criminal to civil legislation to punish those guilty. This approach also suggests a very stringent punishment for hate speech as it presumes that hate speech may incite violence, hatred, mass-scale killings and extermination.³²

Hate speech can also lead to various crimes like ethnic cleansing or genocide (United Nations, 2020).³³ UN Secretary-general António Guterres states that hate speech is an early sign in many situations that may lead to genocide, and hence it should be rejected in all its forms at all places.³⁴ He also emphasized that social media platforms and technology companies can also play a vital role in preventing hate speech. He also bestowed his faith on religious leaders and

²⁹ Yadav, A. (2018). *Countering Hate Speech in India: Looking for Answers beyond the Law*, ILI LAW REVIEW, 2, <https://ili.ac.in/pdf/csi.pdf> (Feb 10, 2022, 11.10 AM IST).

³⁰ Zoller, E. (2009). The United States Supreme Court and the Freedom of Expression. INDIANA LAW JOURNAL, 84, 885-916. http://ilj.law.indiana.edu/articles/84/84_3_Zoller2.pdf (Feb 13, 2022, 01.10 AM IST)

³¹ Yadav, A. (2018), *Countering Hate Speech in India: Looking for Answers beyond the Law*, ILI LAW REVIEW, 2, <https://ili.ac.in/pdf/csi.pdf> (Feb 8, 2022, 10.10 AM IST)

³² Myers, S., & Radhakrishna, V. (2017). Hate Crimes, Crimes of Atrocity, and Affirmative Action in India and the United States. https://www.hhh.umn.edu/sites/hhh.umn.edu/files/2021-01/hate_crimes_crimes_of_atrocity_and_aff_action_in_india_u.s_SMyers.pdf (March 8, 2022, 10.50 PM IST)

³³ Nitesh Kumar Upadhyay and Mahak Rathee, *Protection Of Cultural Property Under International Humanitarian Law: Emerging Trends*, BRAZILIAN JOURNAL OF INTERNATIONAL LAW, Vol. 17 No-3, pp390-409 (Apr. 13, 2022, 12.50 PM), <https://www.publicacoes.uniceub.br/rdi/article/view/7076/pdf>

³⁴ Strauss, E. (2018). The UN Secretary-General's Human Rights Up Front Initiative and the Prevention of Genocide: Impact, Potential, Limitations. *Genocide Studies and Prevention: An International Journal*, 11(3), 48-59, (Mar. 8, 2022, 10.50 PM), <https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1504&context=gsp>

civil societies for the prevention of Hate speech. The Jurisdictions following the fatal slope approach through their criminal legislations try to prevent hate crimes, extermination, and genocide³⁵.

India also adopts a fatal approach in regulating hate crime because of its great cultural, religious, caste, race and language-based diversity, making India more vulnerable to hate crimes.³⁶ The Constitution of India states that liberty cannot be absolute and hence makes provisions in clauses (2) to (6) of Article 19 (Freedom of Speech and expression) authorizing the State to restrict the exercise of the freedom guaranteed under Article 19 of Indian Constitution.³⁷ Article 19 clause 2 discusses all the reasonable restrictions on freedom of speech and expression in India, namely for protection of sovereignty and integrity of India, protecting friendly relations with foreign states, maintaining public order, decency or morality.³⁸ This clause also restricts freedom of speech and expression, keeping in mind Contempt of Court, defamation of any individual or organization including company, and incitement to an offence. As we can observe closely, hate speech is not defined under Article 19 clause 1, and clause 2 and neither the crime of Hate Speech was defined in the entire Constitution.³⁹

³⁵ Maneri, M. (2016). Study on hate Speech Online in Belgium, Czech Republic, Germany and Italy. (Mar. 28, 2022, 02.55 PM) https://www.bricks-project.eu/wp/wp-content/uploads/2016/10/relazione_bricks_eng2-1.pdf.

³⁶ Myers, S., & Radhakrishna, V. (2017). Hate Crimes, Crimes of Atrocity, and Affirmative Action in India and the United States. https://www.hhh.umn.edu/sites/hhh.umn.edu/files/2021-01/hate_crimes_crimes_of_atrocity_and_aff_action_in_india_u.s_SMyers.pdf (March 18, 2022, 04.50 PM IST).

³⁷ Kalra, K. & Tanwar, B. (2016), *Freedom of Speech and Expression and the Obligation of State to Protect Rights of Individual*, BHARATI LAW REVIEW, 144-162, (Dec 28, 2021, 10.50 PM), <http://docs.manupatra.in/newsline/articles/Upload/4F72F84B-E235-4893-9770-EDCDA76BA782.pdf>.

³⁸ Law Commission of India Report on Hate Speech (2017). <https://lawcommissionofindia.nic.in/reports/Report267.pdf> (Dec 17, 2021, 07.00 PM).

³⁹ S. S. & Somashekarappa. Freedom of Speech & Expression and the Issues of Intellectual Property and copyright (Dec. 23, 2021, 07.00 PM), <http://manupatra.com/roundup/370/Articles/Freedom%20of%20Speech.pdf>.

In India, various legislations penalize situations similar to that of hate speech. Indian Penal Code, 1860 under Section 124 Clause A penalizes Sedition.⁴⁰ The Indian Penal Code (hereinafter referred to as IPC) in Section 153 A penalizes doing acts prejudicial to maintaining harmony among various groups on the grounds of religion, race, birth, caste, residence, language, sex etc.⁴¹ In section 153 B of IPC, the acts which are prejudicial to National Integrity are penalized.⁴² Section 295A and Section 298 of IPC penalize 'deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs and anything which is intended to wound the religious feeling of any person or group or association'.⁴³ Many other provisions restrict freedom of speech and expression, like section 505 (1) of IPC, Section 8 of Representation of the People Act 1951, which disqualifies a person from contesting election based on proved hate speech.

Also, it can be contended that despite the various provisions attempted to define hate speech, after close observation, we can say that no single agreed legislation in India clearly defines hate speech. Therefore, a fundamental question that pops up in the ordinary person mind would be; if there is no legislation to regulate such crime effectively, how could the Indian judiciary try to define it as India is a common law country and the judicial decision has the force of law too? The above dilemma could be resolved by providing a clear standard definition for hate speech, which might lead to curtailment of the right of free speech, which prevented the Indian judiciary from defining hate speech.

Additionally, the Information technology Act 2000 under section 69 A provides that direction may be given to any agency or intermediary to block access to any

⁴⁰ Zoller, E. (2009). *The United States Supreme Court and the Freedom of Expression*, INDIANA LAW JOURNAL, 84, 885-916, (Nov. 03, 2021, 09:00 PM IST), http://ilj.law.indiana.edu/articles/84/84_3_Zoller2.pdf.

⁴¹ Farheen, S. & Patel, S. (2018). *The Republic of Hate Speech and Religious Sentiments*, CASIHR JOURNAL OF HUMAN RIGHTS PRACTICE, 1(2), 94-106. (Nov. 03, 2021, 08:05 PM IST), <https://rgnul.ac.in/PDF/9b99535b-578e-40cd-adb2-6361dc8a4612.pdf>.

⁴² Yadav, A. (2018). *Countering Hate Speech in India: Looking for Answers beyond the Law*. ILI LAW REVIEW, 2, (Nov. 03, 2021, 09:00 PM IST), <https://ili.ac.in/pdf/csi.pdf>.

⁴³ Patni, R. & Kaumudi, K. (2009). *Regulation of Hate Speech*, NUJS LAW REVIEW, 2, 749-777. (Nov. 13, 2021, 07:13 AM IST), <http://nujlawreview.org/wp-content/uploads/2016/12/ritika-patni.pdf>

information on any computer, computer system, computer network, computer database or software.⁴⁴ This provision protects against any kind of hate speech and hates mongering by putting an obligation on the intermediary to block hate speech. If the intermediary fails, they can be punished with imprisonment terms of up to 7 years and be liable to a fine.

In the social networking and digital applications era, hate speech and hate crimes are becoming more violent. Social media giants like Facebook, Twitter and Instagram tried their best to eliminate hate speech of all forms. Facebook alone removed around 3 million pieces of hate speech in 3 months between July to September in the year 2018.⁴⁵ Facebook divides hate speech into three different tiers and acknowledges that it also failed to detect many hate speech pieces but will try to do its best to reduce and control them in future. In September 2018, Youtube removed around 25,000 online videos that fail under the category of "hateful or abusive" content.⁴⁶

Journalist Kishore Chand posted a statement on Facebook stating that the Chief Minister of Manipur is a 'Puppet', and he was later arrested on Hate speech charges. His problem took a jump after getting bail in the present case when he was detained under National Security Act for the same offence. National Security Act is a very stringent statute and does not allow the right to bail within one year of accusation. The main aim of the National Security act is to prevent anyone from acting in any manner that is dangerous to the State's security or harmful for maintaining public order. This case very clearly reflects how the

⁴⁴ Bhandari, M. & Bhatt, M. (2012). Hate Speech and Freedom of Expression: Balancing Social Good and Individual Liberty. *The Practical Lawyer*, (Apr. 22, 2021, 08:23 PM), http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=22819.

⁴⁵ Facebook. (2021). Community Standards Enforcement Report. (Apr. 12, 2021, 05:23 PM IST), <https://transparency.facebook.com/community-standards-enforcement#hate-speech>.

⁴⁶ Fowler, G. & Harwell, D. (2018). 2018 was the year of online hate. Meet the people whose lives it changed, (Apr. 09, 2021, 09:23 PM IST), https://www.washingtonpost.com/business/technology/2018-was-the-year-of-online-hate-meet-the-people-whose-lives-it-changed/2018/12/28/95ac0558-f7dd-11e8-8c9a-860ce2a8148f_story.html?noredirect=on.

rights of citizens are in danger and need strict protection because of misuse of powers by different governmental types of machinery.⁴⁷

Within the Indian context, hate speech is not just used to hurt sentiments but also used by political and youth leaders as a shortcut to get famous, which often make the concept of hate speech more complex and dangerous to threaten the freedom of speech and expression. Freedom of speech and expression is a fundamental right under India's Constitution and various other international human rights instruments like UDHR, ICCPR, and ICESR.⁴⁸

Recently, it can be seen that a new trend in India about the filling of multiple first information reports in different police stations against the accused of a single instance of hate speech. Many researchers and jurists believe that this is done to overburden the accused with multiple cases and create a trap for the accused person.⁴⁹ In various instances, the Supreme Court of India has quashed multiple FIRs filed for the same crime in different states and jurisdictions. For example, in a recent *Amish Devgan v Union of India and others (2021) 1 SCC*. Several FIRs were registered against the anchor Amish Devgan across the country to call Khwaja Moinuddin Chisthi, better known as Khwaja Ghreeb Nawaz, an 'attacker 'lootera' during his news debate 'Áar Par'. In this case, the Supreme Court of India refused to quash the multiple FIRs registered indifferent jurisdiction and further observed that statements by the persons holding power or power to influence people should be considered while deciding in cases of hate speech.

Contrary to the above case court granted relief in the case of Republic TV Editor-in-chief Arnab Goswami when he made a statement about the opposition

⁴⁷ Anonymous. (2018). Misusing NSA: the detention of a Manipur journalist. THE HINDU, (April 21, 2021, 10:23 PM IST), <https://www.thehindu.com/opinion/editorial/misusing-nsa-the-detention-of-a-manipur-journalist/article25791811.ece>

⁴⁸ Bhandari, M. & Bhatt, M. (2012). Hate Speech and Freedom of Expression: Balancing Social Good and Individual Liberty. The Practical Lawyer, (Mar. 11, 2021, 07:09 PM IST), http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=22819.

⁴⁹ Verma, A. (2020). Review: The Supreme Court makes important observations on Hate Speech, (Mar. 11, 2021, 07:09 PM IST), <https://factly.in/review-the-supreme-court-makes-important-observations-on-hate-speech/>.

party leader concerning the mob lynching of two sadhus and their driver in the State of Maharashtra. Supreme Court, in this case, quashed all FIRs except one and stated that filing of multiple FIRs for the same incident amounts to abuse of judicial process.⁵⁰

V. MALAYSIAN PERSPECTIVE ON GOVERNANCE OF ONLINE HATE SPEECH

In Malaysia, Part II of the Federal Constitution formally assured freedom of speech under Article 10(1) entitled "Freedom of Speech, Assembly and Association". Article 10 and other laws such as the Sedition Act and Penal Code, however, have provisions that seek to limit and punish those who are found to be exceeding their right of expression by expressing controversial views on issues such as the special rights of the Malays and other indigenous people (*Bumiputera*), Islam as the national religion, the rights of immigrant ethnic (especially Chinese and Indians) to citizenship, the position of the King, and the status of the Malay language as the national language and a host of other issues that could potentially be sensitive in the context of the fragile ethnic relations in the country. It is argued that Malaysia, as a multi-ethnic society, liable to ethnic conflict, requires such laws to prohibit the propagation of ethnic prejudice and religious bigotry.⁵¹ Thus far, online hate speech does not have explicit enactment, although directly some law has been utilized to regulate online hate speech. However, it is undeniable that Malaysian laws cannot decipher how to function appropriately but extended to only act as an instrument for the government to take advantage and collect votes.⁵²

⁵⁰ Vishwanath, A. (2020). 10 free speech cases this year: In most, no relief from Supreme Court- except when Centre did not object. THE INDIAN EXPRESS, (Feb 11, 2021, 02:09 PM IST), <https://indianexpress.com/article/india/10-free-speech-cases-this-year-in-supreme-court-6564796/>.

⁵¹ Speech, Not Legitimate Political, And Mohd. Azizuddin Mohd. Sani, *Chapter One Constitutional and Legislation Practices In Protecting Ethnic Relations In Malaysia: Restrict Hate Speech*, DYNAMIC OF ETHNIC RELATIONS IN SOUTHEAST ASIA (2010): 9.

⁵² Ambiga Sreenevasan & Ding Jo-Ann, Does malaysia need hate speech laws? Malaysiakini (2019), (Mar. 26, 2022, 8.30 AM), <https://www.malaysiakini.com/news/460524>.

The Communications and Multimedia Act 1998 regulates online freedom of expression in Malaysia. However, there have been confirmed instances of malicious charges against human rights activists and political critics following the previous Malaysian General Election in 2018 (GE14). Section 233 of the Communications and Multimedia Act of 1998 enabled these arrests (CMA 1998). Although several prosecutions have been dismissed, the Royal Malaysian Police continue to apprehend citizens guilty of creating "violent internet posts." For example, Mohd. Hannan Ibrahim was arrested and convicted for allegedly making an insensitive joke about the deaths of two police officers in a car crash. At his hearing, the perpetrator was not served by an attorney.

Additionally, a freelance graphic artist was condemned to imprisonment and fined RM30,000 by the Sessions Court for transferring a comedian sketch of the former Prime Minister Datuk Seri Najib Tun Razak on his Facebook account for two years ago.⁵³ According to Bernama's reports, Judge Norashima Khalid passed a sentence on Mohd. Fahmi Reza Mohd. Zarin, 40, after finding that the defence had neglected to raise sensible uncertainty against the indictment's case. Despite that, the Court permitted a stay of the sentence pending an appeal in the High Court and Fahmi was permitted bail of RM10, 000 with one surety.⁵⁴ This was in response to Fahmi's application to the High Court to strike out his charges under the Communications and Multimedia Act 1998 because the charges were unconstitutional.⁵⁵ The prosecution obtained the order when they submitted a motion that only the Federal Court was empowered to address questions of constitutionality.⁵⁶

⁵³ Niteesh Kumar Upadhyay, & Mahak Rathee. (2022). Cyber Security in the Age of Covid-19: A Timeline and Analysis of Cyber-Crime and Cyber-Attacks during the Pandemic. *Medicine, Law & Society*, 15(1), 89-106. (Mar. 11, 2021, 07:09 PM IST), <https://doi.org/10.18690/mls.15.1.89-106.2022>.

⁵⁴ Fahmi Reza gets jail, fined RM30,000 over clown caricature - NST online, (Jul. 6, 2022, 11.30 AM), <https://www.nst.com.my/news/crime-courts/2018/02/337249/fahmi-reza-gets-jail-fined-rm30000-over-clown-caricature>.

⁵⁵ Amnesty International "Fahmi Reza Charged; Laws Must Not Be Used to Stifle Peaceful Dissent And Critique" (May. 16, 2022, 12.30 PM), <https://www.amnesty.my/2022/02/10/media-quote-fahmi-reza-charged-laws-must-not-be-used-to-stifle-peaceful-dissent-and-critique/>

⁵⁶ *Ibid.*

Chief Judge Abdoolcader elucidated that the term 'public order' is not specified anywhere. However, there must be inevitably a threat to humankind and welfare in addition to the disturbances of public tranquilly.⁵⁷ Therefore, the government and any part of the body making laws need to look forward to no specific legislation to regulate online hate speech in Malaysia.⁵⁸ Similarly, the issues and implications of online hate speech communication on Malaysian citizens are safeguarded and analyzed. Presently, the problems regulating hate speech and its transformation to cyberspace are still being discovered under Malaysian law. Also, it is undeniably resisted that the laws have lacunae, and it was scattered. Due to the absence of specific laws to cover online hate speech, it could cause a lot of disturbance towards society today, where people will find the difficulties to whom they should meet to solve their problems relating to hate speech. Several other laws are used to the topic of hate speech.⁵⁹

As previously stated, existing laws that may cover online hate speech include computer-specific legislation such as Section 233 of the Communications and Multimedia Act 1998 (CMA 1998) and traditional legislation such as the Penal Code and the Sedition Act 1948. However, Malaysia's current legal framework is distorted, as there is no specific law governing online hate speech, but the elements of the crime can be found in the Sedition Act 1948, the Penal Code, and the CMA 1998.

The problem with the current legal framework is that, compared to the Sedition Act and Section 233 of CMA, the Penal Code provisions are hardly ever invoked. Furthermore, the stipulations of the Penal Code are still open to abuse, and some argue that they need to be refined. The Sedition Act and the CMA 1998 have the following drawbacks on some correlation to violence; for

⁵⁷ Nadia Nabila Mohd Saufi & Siti Saidah Nafisah Omar "The Exercise Of Police Powers In Enforcing Public Order Legislations In Malaysia. In A. Abdul Rahim, A. A. Rahman, H. Abdul Wahab, N. Yaacob, A. Munirah Mohamad, & A. Husna Mohd. Arshad (Eds.), *Public Law Remedies In Government Procurement: Perspective From Malaysia*, vol 52. *European Proceedings of Social and Behavioural Sciences* (pp. 723-731). FUTURE ACADEMY. (Apr. 5, 2022, 10.30 AM), <https://doi.org/10.15405/epsbs.2018.12.03.73>

⁵⁸ *Ibid.*

⁵⁹ Omar Ali, "Hate Speech defined", (Jun. 8, 2022, 3.30 PM), <https://thecandor.wordpress.com/2018/09/12/why-online-hate-speech-is-more-problematic-than-offline-hate-speech>.

instance, the Sedition Act requires someone to "excite disaffection" against the Ruler or the government or to provoke feelings of "ill will or hostility" between different racial groups for a crime to be committed. Meanwhile, Section 233 of the CMA makes offensive postings intended to annoy others illegally, posing as the country's broadest restriction on freedom of speech. There is no requirement to prove the intent to provoke violence or the commission of any crime under either of these Acts.⁶⁰

On the other hand, several commentators argue that while freedom of speech is not absolute and can be regulated, such regulations cannot be so broad that the right becomes illusory. Restrictions must be necessary and proportionate, and they must serve a legitimate purpose. It is to protect other people's human rights, not the vested interests of those in power.⁶¹

VI. NEW INDEPENDENT SELF-REGULATORY MODEL (ISRM) TO GOVERN ONLINE HATE SPEECH

The United Nations states that various forms of social media regulation structures operate around the globe, respectively influencing the cultural, social, and political traditions of different countries (Universal Declaration of Human Rights, 2018). There are three major styles in general: initially, the Legislative Control Model (L.C.M.), which refers to all regulations, enacted by parliaments to govern the media and is distinguished by greater state involvement. Subsequent, the Co-Regulation Model, also known as "Controlled Self-Regulation," (CSR), usually involves aspects of a self-regulatory system backed up by legislation. Finally, the Self-Regulation system focuses solely on mutual compliance to implement such rules and regulations.⁶²

The position of regulations in upholding the applicable requirements is non-existent. Its mission is to keep its members accountable to the public, foster

⁶⁰ Ambiga Sreenevasan & Ding Jo-Ann, Does Malaysia need hate speech laws? (Aug. 8, 2022, 6.30 PM), <https://www.malaysiakini.com/news/460524>.

⁶¹ Hajjafari, Aria, Wan Asna Wan Mohd Nor, and Faridah Jaafar. "The Progress of the Freedom of Speech in Malaysia's Political Trajectories: A Review."

⁶² Gorwa, Robert. "The platform governance triangle: Conceptualising the informal regulation of online content." *INTERNET POLICY REVIEW* 8.2 (2019): 1-22.

awareness among its members, and establish and maintain ethical principles.⁶³ Companies and parties who commit to this form of legislation do so for beneficial motives, such as the intention to advance the growth and reputation of their discipline and industry, rather than fear of legal consequences. An alternative study of the traits for non-adopters to internet convention and their variations was performed by taking advantage of the skills of sociology, psychology, and social sciences. Five variables that influence the position of non-adopters have been analyzed; namely, power locus, autonomy, affective secondary education, perceived danger and self-assessment are all the ones.⁶⁴

Self-regulation models focus on participants sharing a mutual sense of the principles and ethics that govern their professional behaviour. To establish a complex and pluralistic broadcasting system, regulatory or co-regulation models have historically been considered appropriate for the news media, where the distribution of a limited natural resource spectrum necessitates the involvement of public authorities. For ten-print media, self-regulation is the chosen approach; press councils are a typical example of those structures.⁶⁵ Self-regulation is generally acknowledged as the least intrusive mechanism for efficiently controlling the press and the most efficient framework for promoting high expectations in the media.

Essentially, a robust self-regulatory system will help ease the strain on the courts and the judiciary. Legal trials are often required in the most extreme situations, and a vast majority of cases can be settled quickly and satisfactorily at a low expense. When an issue is efficiently handled by self-regulation, the need for government intervention is usually minimized. It safeguards employees of the industry (such as journalists) while also making them accountable to their profession and ensuring that news organizations are kept accountable to the

⁶³ Kormos, Ana, et al. "Ethical Considerations for Gene Drive: Challenges of Balancing Inclusion, Power and Perspectives." *Frontiers in Bioengineering and Biotechnology* 10 (2022).

⁶⁴ Tarofder, Arun Kumar, S. M. Azam, and Azrin Ali. *Characteristics of social media non-adopters: Lessons learned*, THE MARKETING REVIEW 18.2 (2018): 131-148.

⁶⁵ Gorwa, Robert, *The platform governance triangle: Conceptualising the informal regulation of online content*, INTERNET POLICY REVIEW 8.2 (2019): 1-22.

public.⁶⁶ Furthermore, self-regulation will only flourish in the sense of a legislative system that respects the constitutional rights to freedom of speech and knowledge. Several criteria for successful media self-regulation have been established, and an effective self-regulatory agency should, first and foremost, be independent of the State, financial interests, and special interests.

Consequently, it should be formed by a completely consultative and inclusive mechanism, with the primary constituent elements of their practice being formulated in an open, accessible, and participatory manner that allows for broad public participation. Fourth, in terms of delegate appointment and decision-making, it should be democratic and open. It is crucial to maintain the integrity of self-regulatory agencies, with a composition that involves members from civil society to ensure broad representation. It should also follow a code of ethics for the occupation or industry it aims to control as a fourth prerequisite. The company must therefore include comprehensive appeals process with consistent procedural guidelines to assess if ethical principles were broken in certain situations, as well as the authority to enforce just moral penalties.⁶⁷

Finally, it must serve public interests while both being transparent and accountable to the public. Moreover, self-regulatory bodies may play a significant role in promoting ethical rules awareness and comprehension within a business or occupation. They will accomplish that by adopting and transmitting suggestions and guidelines and vivid descriptions to their participants.⁶⁸ Thus, a minimal level of government aid may enhance the implementation of effective self-regulatory processes, as long as the intervention is limited to developing a legal framework for self-regulation and does not endanger the self-regulatory bodies' independence. Situations under which government bodies force private corporations to define and regulate speech

⁶⁶ Speech, Not Legitimate Political, And Mohd Azizuddin Mohd Sani, *Chapter One Constitutional and Legislation Practices In Protecting Ethnic Relations In Malaysia: Restrict Hate Speech*, DYNAMIC OF ETHNIC RELATIONS IN SOUTHEAST ASIA (2010): 9.

⁶⁷ Lai, Mirko, et al. *HaMor at the Profiling Hate Speech Spreaders on Twitter*. WORKING NOTES OF CLEF 2021-CONFERENCE AND LABS OF THE EVALUATION FORUM. Vol. 2936. CEUR Workshop Proceedings, 2021.

⁶⁸ R. BALDWIN, M. CAVE & LODGE, M. UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE, (Oxford University Press, 2011).

under the guise of self-regulation or co-regulation, on the other hand, are in clear contrast with international standards on freedom of expression.⁶⁹

The development of an autonomous self-regulatory authority for social networking (Social Media Council) will be the most ambitious challenge in this regard; it could be achieved at the national or foreign level or a mixture of both. It will contend with problems of content moderation which will be sufficiently supported by social network platforms and other involved parties.⁷⁰ The Council could create ethical principles related to online content delivery, including terms and conditions, user rules, and social media providers' content regulation practices.⁷¹ This system will establish a democratic platform for critical public debates on the control of online content sharing by having the work open to the public in general and by effective consultative processes.⁷² This body will track and encourage the implementation of acceptable ethical practices by social media platforms by utilizing light penalties and focusing solely on accountability, peer pressure, and public pressure. Transparency coupled with independence can provide the legitimacy that this mechanism needs to achieve public confidence.

VII. CONCLUSION

In conclusion, there has been an upsurge of hate speech and cyberhate crime during the pandemic Covid19. The tremendous rise of hate speech cases should be taken as a wake-up call for regulators to consider the concerns and obstacles

⁶⁹ Nor, Murni Wan Mohd, and Ratnawati Mohd Asraf, *Freedom without Restraint and Responsibility: The Problem of Hate Speech in Malaysia*, MALAYAN LAW JOURNAL 5 (2015).

⁷⁰ Quintel, Teresa, and Carsten Ullrich. "Self-regulation of fundamental rights? The EU Code of Conduct on Hate Speech, related initiatives and beyond." *Fundamental Rights Protection Online*. Edward Elgar Publishing, 2020. 197-229.

⁷¹ Flew, Terry, Fiona Martin, and Nicolas Suzor, *Internet regulation as media policy: Rethinking the question of digital communication platform governance*, JOURNAL OF DIGITAL MEDIA & POLICY, 10.1 (2019): 33-50.

⁷² Klonick, Kate, *The Facebook Oversight Board: Creating an independent institution to adjudicate online free expression*, YALE LJ 129 (2019): 2418, (Apr. 29, 2022, 8:19 AM), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ylr129&div=48&id=&page=>.

associated with regulating online hate speech in Malaysia and India. As a result of the severity of the effect of hate speech, many people of all races and nationalities continue to exist beneath the surface and have a significant impact on the victims and society. It is critical to remember that if the source of hatred is an incident occurring outside the country, the more significant problem is addressing the core cause. Within the Indian context, it has been observed that the country has failed to address critical concerns about hate speech and related restrictions. This raises the subject of introspection and study of laws and their implementation, or more particularly, the proliferation of laws that has resulted in the horrible scenario of overcriminalization of hate speech. Overcriminalization places the burden of proof on the State, which frequently fails to do so beyond a reasonable doubt. Numerous documented cases said that expressing one community's or group's feelings without making any reference to another community's or group's feelings is not considered hate speech. The Indian legal system needs improvement, and specific laws needed to be able to aid. For example, in Australia, hate speech complaints are settled through mediation.⁷³ Numerous countries also employ fines and compensating payments to the damaged party in cases of hate speech, which is an effective method of policing hate speech in some. However, the imposition of a fine might not be, in all circumstances, effective measures as the affluent individual may be worried about paying a charge, whereas a poor or middle-class individual will be impacted by it and added burden to them.

Additional efforts should be taken to foster critical thinking among Malaysians, particularly among our youth, to strengthen mental firewalls and general digital literacy abilities within the Malaysian legal context. Additionally, this may result in social disruptions due to a lack of legislation to regulate or manage internet hate speech. Citizens will have difficulty determining whom to consult with their internet hate speech concerns. Since Malaysia's persistent problem with online hate speech is poorly defined, generic, and lack of comprehensive legal framework that allows for the "improper use" of any expression. This is demonstrated by the fact that the Malaysian Communication and Multimedia

⁷³ Rosenfeld, Michel, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, CARDOZO L. REV. 24 (2002): 1523, (Apr. 5, 2022, 8:30 AM), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/cdozo24&div=53&id=&page=>.

Act and the Penal Code regulate hate speech crimes, with the law being so broad and imprecise. Thus, to mitigate the rise in hate speech criminality on social media, a new self-regulation paradigm is required.

Functioning of Indian Courts and Litigants' Right to Justice: A Critical Reflection on Norms and Practice

Prof. (Dr.) Sanjay Prakash Srivastava¹

Abstract

As per the constitutional mandate judiciary is crafted as an independent organ of the government and it is considered as trustee of last hope of the people. However, the efficiency of the working of courts are always questioned. Albeit the institution of judiciary is placed on higher echelon in India yet administrative conduct of the Indian Judiciary is viewed with suspicion and in common man perception it is an institution of elite or richer class. This paper is an attempt to unearth what forces are obstructing, or working as a barrier in achieving the goal set by preamble of the Indian Constitution and preventing implementation of statutory obligations relating to speedy justice and tries to analyze how despite government effort; latent favour to elite became norms? Why in perception of the litigants the norms of courts conduct and prompt action is alleged as tilted in favour of rich? From top to bottom almost every section of the people in India raised concern with regards to functioning of courts. The researcher has tried to analyze the scope and nature of people's aspirations and actual functioning of rule of law in reference to right to speedy justice which is not merely an ideal of the constitution but a tool to render complete justice to all.

Keywords: *Working of Courts, Speedy Trial, Biasness in Indian Judiciary, right of litigants', Rule of law and Speedy Justice, Court Management, Procedural Justice.*

I. INTRODUCTION

The judiciary is the repository of public faith. The disputant approaches the judiciary as a last resort; after every knock of all the doors fail. It is considered

¹ Professor and Former Head & Dean, School of Law and Governance, Central University of South Bihar, Gaya

as trustee of last hope of the people. Albeit the institution of judiciary is placed on higher echelon in India yet the administrative conduct thereof is viewed with suspicion and in common man perception it is an institution of elite or richer class.² In India as per the constitution mandate judiciary is crafted as an independent organ of the government but in series of cases we witness that it requires a substantial amount of goodwill in order to make and implement decisions against the political will of the legislature.³ The dispensation of justice is losing its significance as it is not able to satisfy the will of majority disputant and it is alleged all is not well. A new study on access to justice in India has found that majority of disputant didn't prefer formal judicial system for conflict resolution.⁴ Strictly speaking a delayed justice; frustrating the cause thereof and generating apprehensions and suspicion too.⁵

In several cases apex court has observed that every accused is entitled to be heard without unnecessary delay.⁶ However, inadequate attention is given to enhancing the quality of administrative functions. Despite the several rights given to the high court and Supreme Court of India and recognition of *suo moto* rights of court; seldom it has been recognized that the rule of law also depends on the quality of administration of justice.⁷ So far, no serious effort is made to achieve the goal of effective court management and the studies conducted to

² Tarique Anwar, "Justice Delayed Again: Former Chief Justice of India Explains Why Cases Like Salman Khan Drag On", FIRSTPOST (May 8, 2015).

Ex CJI V.N. Khare, in an interview about Salman Khan Cases, observed that "The case was delayed just because the government did not want to bring the actor to book.

³ M. P. Rammohan, et al, *Public Perception of Courts In India: Unmeasured Gap Between The Justice System and Its Beneficiaries*, IIMA W. P. No. 2020, 1-27, (Nov. 2020).

⁴ Aarefa Johari, *The Indian Justice System Is Too Slow, Too Complex and Too Costly, Says New Study*, SCROOL.IN (Jan 24, 2018). <https://scroll.in/article/866158/the-indian-justice-system-is-too-slow-too-complex-and-too-costly-says-new-study>.

⁵ MS.Anmol Jain, *Right To Speedy Justice In India*, 2(8) LAW MANTRA 1 (2020), (Jan. 19, 2021), <http://journal.lawmantra.co.in/wp-content/uploads/2015/05/26.pdf>. Harish Narasappa, "Justice delayed is justice denied" HINDUSTAN TIMES (Nov. 13, 2019).

⁶ See, Mr. Kamal Kumar Arya, "Right to Speedy Trial and Mercy Petitions in India" V(III) (Jan. – Mar., 2016), BHARATI LAW REVIEW 168.

⁷ Rameshwer Dayal, "Remedies, Administrative and Judicial, Relating to Administrative Functions of High Courts" 4 (4) (Oct.-Dec., 1962), JOURNAL OF THE INDIAN LAW INSTITUTE 537-551.

examine the back-end administrative functions for efficient performance of the judicial functions are not executed in letter and spirit. Growing voices have been raised that everything is not alright and in India all cannot enjoy the rights equally. Charges of biasness were leveled against the functionaries of the courts and judges. Even in few studies it is submitted that perceptions of equal treatment by the courts affect overall confidence of the disputants.⁸ Moreover, time to time even the agencies of the government and some stakeholders alleged that there is tacit understanding between bar and bench and in a connivance, both have served only the elite. Furthermore, it is generally alleged that judicial complex, costly and tardy procedure placed others to struggle within the procedural jargons. This is why the poor is developing a detachment for the justice delivery system of India and functionaries thereof.⁹

This paper is an attempt to unearth what forces are obstructing, or working as a barrier in achieving the goal set by preamble of the Indian Constitution and preventing implementation of statutory obligations relating to speedy justice and tries to analyze how despite government effort; latent favour to elite became norms? Do we need any structural and procedural change in reference to policy or legislation to redesign the administration of judiciary and members associated thereto?

Furthermore, the researcher has also tried to analyze the scope and nature of people's aspirations and actual functioning of rule of law in reference to right to speedy justice which is not merely an ideal of the constitution but a tool to render complete justice to all.

II. WORKING OF COURTS, JUSTICE AND CHARGES OF PRIORITY

The recent political discourse¹⁰ and uproar of people towards the working of Judiciary in India has raised serious question regarding sanctity of courts, their office bearers, its independence and right of litigants with regard to procedure of trial; i.e., it lacks the spirit of rule of law in administration of justice. Whereas procedural justice theory posits that authority should treat citizens in a fair and

⁸ S. C. Benesh & S. E. Howell, *Confidence in the Courts: a Comparison of Users and Non-users*, BEHAVIOURAL SCIENCES AND THE LAW, 204 (2001).

⁹ Justice S.B. Sinha, *Judicial Reform in Justice Delivery System*, 4 SCC (JOUR) 35 (2004).

¹⁰ After the Supreme Court's Sabarimala judgment, the Attorney General of India has named Constitutional Morality as a 'Dangerous Weapon'.

respectful way, make neutral and unbiased decisions, display trustworthy motives, and allow the citizen a 'voice' in their interactions.¹¹ However, in India at every platform the people asked, when the Supreme Court could work till late night to hear the rights of accused involved in terror attack; why common man face; technical and procedural barrier? What is the policy priority in administration of justice to litigants? From top to bottom almost every section of the people in India have raised concern with regards to functioning of courts. In a latest study it was submitted that judicial officers are entrusted with the combined administrative and judicial functions without proper training in management principles and which is the cause for inefficiencies in court administration.¹² Even, the courts were charged for the apathy of judges toward the common man or due to arbitrary exercise of discretion by the administrative wing many a times poor remain either unheard or justice is done after inordinate delay. During first lockdown every day, we heard of migrant labourers walking hundreds of miles, many dying in the process but even the Supreme court of India failed to look out for their interests.¹³ It is alleged that the political class and elite always gets edge in hearing and their matters are disposed of with benefits. Even some of the research work identified that the enforcement and administration of justice get compromised when accused have political power.¹⁴ The Indian judiciary so called claim for judicial independence is exposed by post retirement appointment of judges and their judgement at the brink of retirement. Justice Deepak Gupta from the Supreme Court of India opined that the country's laws and legal systems favour the rich and the powerful.¹⁵ In this

¹¹ Jonathan Jackson, *Norms, Normativity and the Legitimacy of Justice Institutions: International Perspectives*, LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS (1/2018).

¹² Shruti Naik, "Judges in India's High Courts Waste Precious Time Heading Committees on Furnishings, Cars", THE PRINT (4 Nov., 2019), (23 Feb, 2021) <https://theprint.in/opinion/india-high-court-judges-waste-time-heading-committees-on-furnishings-cars/315258/>.

¹³ Ajit Prakash Shah, "Failing to Perform As A Constitutional Court", THE HINDU (May 25, 2020). (23 Feb, 2021), <https://www.thehindu.com/opinion/op-ed/failing-to-perform-as-a-constitutional-court/article31665557.ece>.

¹⁴ Rubén Poblete-Cazenave, "Do Politicians Receive Special Treatment in Courts?" *Ideas for India* (26 August, 2019). <https://www.ideasforindia.in/topics/governance/do-politicians-receive-special-treatment-in-courts1.html>, (Accessed on 25 Feb, 2021).

¹⁵ Scroll Staff, *India's Legal System Favours The Rich and Powerful, Says Retiring Supreme Court Judge*, SCROLL.IN (July 27th 2021).

backdrop the Common litigants are questioning, why, the judiciary in India is very slow in responding to their litigations.¹⁶ Although the Law Commission of India in its 221 Report raises serious concern on mounting of arrears of cases in courts, particularly in High Courts and District Courts.¹⁷ But, hardly any stakeholders of the judicial system have advanced steps or suggestions for rectifying inordinate delay. Perhaps the time has come to review the procedure of working of courts and to determine the role of functionaries in serving the interest of all the stakeholders.

Ex Law Minister of India opined thatin India the Supreme Court mostly composed of the element from the elite class who lacked sympathy for the have nots. He further suggested that the letters of equality; equal opportunities must be translated in reality and it could satisfy the just aspiration of every disputant in accessing the court if the trial therein have been finished in reasonable duration. He argued that the width and amplitude of these simply worded rights are wide.¹⁸

There is no dispute that rule of law is integral part of access to justice and it is essential ingredients of the justice delivery system but few researchers observed that it is fashion to talk that in India every organ works within the letters and spirit of rule of law¹⁹; but people claim justice system is dying. Ideals of the rule of law must go hand in glove; in ensuring that its aura reaches the contours of

¹⁶ India was ranked 62nd among 113 countries in the World Justice Project's 'Rule of Law' index that was published in January. India was placed 98th in the ranking for order and security, 97th for civil justice, 75th for fundamental rights, and 66th for criminal justice. *See*, Kiruba Munusamy "The Nauseating Nepotism and Caste-Based Discrimination That Exists in Indian Judiciary" THE PRINT (Aug. 1, 2020).

¹⁷ Law Commission 221st Report On Need For Speedy Justice, (Aug. 01, 2020), <https://indiankanoon.org/doc/66233467/>.

¹⁸ It can take nearly 20 years if a case goes all the way from the subordinate court to the high court and then the Supreme Court. Twenty years means multiple generations of litigants, enormous cost and frustration - a case taking this long to be resolved is symptomatic of an inefficient and ineffective judicial system; any 'justice' delivered after a span of 20 years would be bereft of its true meaning. *See*, Harish Narasappa, "Justice delayed is justice denied", HINDUSTAN TIMES (Nov. 13, 2029).

¹⁹ LOKENDRA MALIK (ED.), RULE OF LAW AND HUMAN RIGHTS IN INDIA, 104-114, (Universal law Publishing Co. New Delhi, 2011).

the entire population of a country.²⁰ However, the occurrence of long delay in completion of litigation and huge arrears of cases has shaken the confidence of people of India.²¹ There is a serious allegation regarding infirmity of the legal and judicial system which is responsible for this gross denial of justice to the under-trial prisoners in India which is solely responsible for notorious delay in disposal of cases.²² The mango-men consider that the aspiration of the people of India for justice; embedded in Indian constitution has been forgotten²³ and even the judicial officials and advocates do not consider it as their duty (Table 1). More than 50% delay is directly related to judicial officer and advocates; which is evident from the data of National Judicial data Grid. It is established fact that the rights of citizens – and non-citizens – to access to justice is imperiled on many occasions through various means, may be joint collusion of bar and bench, failure of higher courts to prioritize, disconnect of rich and poor or class supremacy.

Reasons for Delay

Types of Delay	Number of Cases
Stayed	718423 (31.06 %)
Unattended	480690 (20.78 %)
Awaiting Record	388460 (16.79 %)

²⁰ Hon'ble Mr. Justice F.M. Ibrahim Kalifulla, Rule Of Law & Access To Justice, NJA South Zone Regional Judicial Conference on "Role of Courts in upholding Rule of Law" on 31.01.2014 to 02.02.2014. (Aug. 1, 2020) <https://www.latestlaws.com/wp-content/uploads/2015/04/Role-of-Courts-in-upholding-Rule-of-Law.pdf>.

²¹ Amir Ullah, "Delays, Costs and Glorious Uncertainty - How Judicial Procedure Hurts the Poor".

<http://www.delhihighcourt.nic.in/library/articles/mid%20day%20meal/Delays,%20costs%20and%20glorious%20uncertainty%20-%20how%20judicial%20procedure%20hurts%20the%20poor.pdf>, (Accessed on 28 August 2021).

²² Abir Chattraj, "Justice Delayed-Justice Denied - The Right to Speedy Trial in India" (6 Sep 2011). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1919493, (Accessed on 23 July 2021).

²³ Smaran Shetty and Tanaya Sanyal, *Fraternity and the Constitution: A Promising Beginning in Nandini Sunder v. State of Chattisgarh*, 4 NUJS L.REV. 439 (2011).

Securing Presence	366594 (15.85 %)
Frequent Applications	274943 (11.89 %)
Execution	83733 (3.62 %)
Bulky Cases	178 (0.01 %)

Table 1 Source: National Judicial Data Grid

III. RIGHTS OF LITIGANTS IN INDIA

The preamble of the constitution of India in explicit language promises that the people of India enjoy the right of socio, economic and political justice. Which through series of judgments been endorsed by the highest court of India. This has been placed in highest status and considered as the guiding force in working of Indian Constitution²⁴. Every individual in principle is entitled for the unbiased trial. However, the big question is who is preventing implantation of justice in just manner. Whether the citizens are getting or enjoying those rights unfettered. In this section we are looking in factual status of working of right to speedy justice, defendants' right to speedy trial, and rule of law existence in justice delivery.

A. Right to Speedy Justice

For better understanding of the issues the researcher has taken into consideration the evolutionary process with regard to right to speedy justice. Jurisprudence of speedy trial is based on a simple principle that innocent (suspect) person should not be harassed by legal system to an unreasonable period and victim should get justice as early as legal system can provide it.²⁵ It has been universally recognized and reiterated by the Supreme Court that timely justice and speedy trial are facets of the right to life under the Constitution. Access to speedy justice and trial is a part of the right to life and personal liberty.²⁶ Many international conventions have also approved the importance of the right to

²⁴ Liav Orgad, *The Preamble in Constitutional Interpretation*, 8(4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (I-CON)724 (2010).

²⁵ *Supra* note 4 at 169.

²⁶ Dr. Sasikalapushpa & Dr.B. Ramaswamy, "Speedy Justice: Right to be Respected, India Legal Stories That Count" (Oct. 28, 2018), INDIA LEGAL LIVE (5 Aug. 2020), <https://www.indialegalive.com/viewpoint/speedy-justice-a-right-to-be-respected>.

speedy trial.²⁷ However, the Courts are clogged with enormous backlogs, and cases take very long time from start to finish. The slow progress of court cases has adverse consequences for Indian democracy and economy²⁸

Despite several judicial pronouncement and serious observation of the Supreme Court of India; the right to speedy justice is day dreaming. In series of cases the apex court ²⁹ held that the procedure should be 'reasonable, fair and just'. In *Hussainara Khatoon v. Home Secretary, State of Bihar*³⁰, the court declared that trial should not be arbitrary or oppressive. Even in *M.H. Hoskot v. State of Maharashtra*³¹ the court observed that it is the constitutional obligation of the State to devise such a procedure as would ensure speedy trial to the accused. In *A. R. Antulay v. R.S.Nayaik*³² and *Sheela Barse v. Union of India*,³³ again the Supreme Court reiterated that violation of rights of speedy trial puts prosecution as violators of fundamental right.

The symptoms are known to everyone who come into contact with judiciary but all efforts about visible reasons such as numbers of judges, infrastructure etc. But the problem is the administration, courts and the judicial procedure is very complex and sluggish, putting the common man at a squad.³⁴ But it's not enough that the law treats all persons equally, irrespective of the prevalent inequalities but the law must function in such a way that all the people have access to justice in spite of economic disparities.³⁵ Hon'ble Justice V. N. Khare raised concern over the fairness in the probe process saying, "fair and speedy trial and justice depend on how unbiased the investigation conducted by the police or other agencies has never been taken seriously."³⁶ The major concern here is why and

²⁷ Article 14 of the International Convention on Civil and Political Rights, 1966, and Article 3 of the European Convention on Human Rights, 1950.

²⁸ Pratik Datta at al., *How to Modernise the Working of Courts and Tribunals in India*, NATIONAL INSTITUTE OF PUBLIC FINANCE AND POLICY WORKING PAPER No. 258, 3 (New Delhi (2019).

²⁹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 579.

³⁰ AIR 1979 SC 1369.

³¹ AIR 1978 SC 1548.

³² AIR 1988 SC 153.

³³ 1986 SCALE (2)230.

³⁴ Manpreet Kaur, *Constitutional Perspective of speedy Justice in India*, 5(3) INTERNATIONAL JOURNAL OF LAW 115 (May 2019).

³⁵ *Ibid.*

³⁶ *Supra note 1.*

what is behind the curtain. Do courts in India are so helpless as alleged by him and failing to render their duty as considered by majority mango-man that the Indian courts are actually working as custodian of elite and indirectly protects the interest of richer.

Despite the repeated observation of the apex court again and again that access to justice is part and parcel of right to life guaranteed under Indian Constitution and in all civilized societies around the globe; class discrimination is prevalent almost in every courts.³⁷ There is no answer with anyone why political parties' conflict can be heard and disposed of in one day why not for common man. In social perception media trial is more effective means to resort justice.

B. Rights of Defendants to Receive a Speedy Trial

When we got independence, our priority was not towards accused and the framers of the constitution did not include in an explicit language enshrining a defendant's right to a speedy trial. Even we witness that initially the under trial-prisoners were forced to serve for extended periods of confinement. Indeed, in the first two decades after independence, concern for the length of time under trial-detainees spent in prison did not seem to be a focus for the Court.³⁸ Thousands of defendants had been languishing in jails, awaiting trial; for longer than a formal sentence would have brought. In *P. Ramachandra Rao v. State of Karnataka*³⁹, the Supreme Court of India categorically laid down that whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the following factors: (1) length of delay, (2) the justification for the delay, (3) the accused assertion of his Right to Speedy Trial, and (4) prejudice caused to the accused by such delay⁴⁰. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, enquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can

³⁷ Anita Kushwaha v. Pushap Sudan, AIR 2016 SC 3506.

³⁸ Krishnan, Jayanth K. and Kumar, C. Raj, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, 42 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 758 (2011).

³⁹ AIR 2002 SC 1856.

⁴⁰ Kartar Singh v. State of Punjab (1994) 3 S.C.C. 569, para 92.

be averted.⁴¹ But in the subsequent judgment the apex Court remarked that it is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in earlier cases are not good law. The court further observed that the criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time.⁴²

In *Machander v. State of Hyderabad*, the Court refused to send the case back to the trial court for a fresh trial because of a delay of five years between the commission of the offence and the final judgment.⁴³ Albeit we know that the speedy trial of criminal act is one of the basic objectives of the criminal delivery justice system, because long delay can defeat justice.⁴⁴

However, there are certain instances where courts talked about fixing of responsibility. In *State of Maharashtra v. Champalal Punjaji*⁴⁵, the apex court held that In deciding the question whether there has been a denial of the right to a speedy trial, the court is entitled to take into consideration whether the defendant himself was responsible for a part of the delay and whether he was prejudiced in the preparation of his defense by reason of the delay.

With the perusal of several judgment, it is evident that defendant right to speedy trial in practice is denied or put in abeyance for he is not in position to approach the highest court either due to want of money or he is not given proper attention while conducting hearing process.

C. Rule of Law and Right to Speedy Justice

To prevent any short of discrimination against any individual the constitution of India has adopted democracy⁴⁶ and rule of law as an ideal of our governance. It is generally conveyed by every testamentary in Indian legal system that the State

⁴¹ *Ibid.*

⁴² *Infra* note 33 at 1869.

⁴³ AIR 1955 SC 792.

⁴⁴ *Supra* note 4 at 168.

⁴⁵ AIR 1981 SC 1675.

⁴⁶ According to L. Diamond out of the four basic elements of democracy third and fourth includes: (3) the protection of human rights of all citizens; (4) the rule of law, in which the laws and procedures apply equally to all citizens". See, L. Dimond. "What is Democracy", Lecture at Hilla University for Humanistic Studies. In: Stanford [online]. 21. 1. 2004. (Aug. 1, 2020)

as a guardian of the fundamental rights of its people is duty bound to ensure speedy trial and avoid any excessive long delay in trial of criminal cases that could result in grave miscarriage of justice.⁴⁷ The dispensation of justice has little meaning if it is not delivered in a reasonably short time, strictly speaking a delayed justice, frustrating the cause thereof, is no justice at all.⁴⁸ Delay in trials affects the faith in Rule of Law and efficacy of the legal system.⁴⁹ The apex Court in CBI case observed that wherever stay is granted, a speaking order must be passed showing that the case was of exceptional nature and delay on account of stay will not prejudice the interest of speedy trial in a corruption case. Once stay is granted, proceedings should not be adjourned and concluded within two-three months.⁵⁰ However, in practice many a times we witness that many petty offences criminal are behind the bar because they cannot comply with procedural formality; whereas rich or celebrity are getting bail on priority.

IV. STATE RESPONSE WITH REGARD TO PENDENCY OF CASES

In welfare state it is the duty of government to discharge its responsibility in such a manner that citizens get justice in letter and spirit. The mandates have obligated that necessary policy framework is prepared and executed through the judiciary.⁵¹ But all the effort are named as eye wash exercise. Contrary the state claims that the increasing awareness among peoples about their rights is the major cause of increase in litigation. However, apathy of the government organs in improving efficiency of courts and delay in delivery of justice is taking serious turn. In the decade of 2010-2020 people have resorted non judicial method or criminal means to settle their dispute, in some cases on the spot justice mechanism were reported. Although the government of India had referred the matter to Law commission of India but so far satisfactory steps had not been initiated and fruitful progress is not made.

⁴⁷ Bharat Singh Saini, *Speedy Justice: A constitutional Norm*, 4(5) INTERNATIONAL JOURNAL OF LAW 57 (Sept. 2018).

⁴⁸ *Supra* note 2.

⁴⁹ *Asian Resurfacing of Road Agency v. Central Bureau Of Investigation*, AIR 2018 SC 310, para 28.

⁵⁰ *Ibid.* para 30.

⁵¹ The 2017 economic survey of the finance ministry pointed out that the slow resolution of economic and commercial cases was one of the biggest stumbling blocks in reviving the investment cycle in the country.

Every year the number of cases is increasing by 10 to 12 per cent⁵². It is a most burning problem before the country especially in the age of globalization. A huge pending case (Table 2) affects the healthy judicial administration in the country and making people helpless. Moreover, it is threat to law abiding people because it is giving impression that the law-abiding people voice shall not be heard and it is heaven for the law avoiding peoples.⁵³ Even the international investors are not finding that Indian Courts can protect their right. The Judiciary remains a low priority when it comes to state funding.⁵⁴ India Justice Report 2019 submits that:

“On average, no state or UT apart from Delhi spent even 1 per cent of its budget on the judiciary. Nationally, India spends 0.08 per cent. All states combined (excluding the central government) spent 0.54 per cent of their total expenditure on the judiciary in 2015–2016.”

The Report further states:

Not a single High Court or state’s subordinate judiciary had reached its complete appointment of sanctioned judicial posts.

Pendency of Cases: Status

Particulars	Civil	Criminal	Total
Pending Cases			
0 to 1 Years	2857964(27.53%)	8075859(28.29%)	10933823(28.09%)
1 to 3 Years	3434099(33.08%)	8711119(30.52%)	12145218(31.2%)
3 to 5 Years	1710532(16.48%)	4665725(16.35%)	6376257(16.38%)

⁵² Chief Justice of India (CJI) K G Balakrishnan, Saturday, April 10, 2010, 22:10 Kottayam.

⁵³ Archisman Dinda, “The rich and famous are above the law in India”, GULF NEWS (June 22, 2015). Available at: <https://gulfnews.com/opinion/op-eds/the-rich-and-famous-are-above-the-law-in-india-1.1538904>, (Accessed on 20/08/2021).

⁵⁴ Meera Emmanuel, “India Justice Report on the Judiciary: Average case pendency in subordinate courts is 5 years” (08 Nov. 2019). <https://www.barandbench.com/news/india-justice-report-on-the-judiciary-average-case-pendency-in-subordinate-courts-is-5-years>, (11 Nov. 2020).

Particulars	Civil	Criminal	Total
5 to 10 Years	1661299(16%)	4480426(15.7%)	6141725(15.78%)
10 to 20 Years	561945(5.41%)	2171673(7.61%)	2733618(7.02%)
20 to 30 Years	117140(1.26%)	373558(1.26%)	490698(1.26%)
bove 30 Years	37794 (0.36%)	64928(0.23%)	102722(0.26%)
Total	10380773	28543288	38924061

In *State of Maharashtra v. Champalal Punjaji*⁵⁵, the apex Court tried to identify the reason as defense tactics. With the passage of time, witnesses cease to be available and memories cease to be fresh. Vanishing witnesses and fading memories render the onus on the prosecution even more burdensome and make a welter weight task a heavy weight one. The judiciary and state so far had not taken any serious effort to minimize the procedural restraints related with litigation in India. The previous UPA Government through Law Minister Dr. Salman Khurshid⁵⁶ opined to adopt some measures to minimize the pending cases. But it will take time and we have to wait for the result. So, we have to evolve other alternative mechanism to minimize the litigation.

V. THE GROWING CONCERNS IN CIVIL AND CRIMINAL JUSTICE SYSTEM

It is alleged that working of the constitutional courts are biased and anti-poor. Differential approach can be inferred from the recent orders of the Supreme Court. In Cases relating to movement of migrant labourer on the roads during

⁵⁵ AIR 1981 SC 1675.

⁵⁶ Replying to a question in Rajya Sabha, law minister Salman Khurshid said government was working towards reducing the pendency. He said government had launched a National Mission aimed at harnessing Information Communication Technology for disposal of cases. Khurshid also said a National Arrears Grid had been set up to manage courts better, adding that pendency could also be reduced by increasing the period for which judges sit, allowing morning and evening shifts in courts, using Gram Nyayalayas and using alternative dispute resolution.

lockdown the SC rejects plea seeking relief for migrants and observed that it cannot stop or monitor their movement on road. Even during lockdown, the apex court allows Air India to operate non-scheduled flights with middle seat bookings for 10 days. Rather protecting interest of common man and ensuring implementation of fundamental rights relating to health the Court have shown obvious faith in the stand of the Government.⁵⁷ In the recent judgments related to conducting of examination of the final semester students taking time and giving unnecessary time to MHRD and UGC suggest the court has permitted to fabricate facts.⁵⁸ Even there are instances of complain against the fellow colleague regarding class and caste discrimination. Justice Karnan complained to the SC/ ST Commission that “The judge, sitting cross legged next to me, touched me with his shoes deliberately and then said sorry. Two other judges were watching it smiling”. It is suggesting towards unconscious caste biases does either exist or felt by the judges.⁵⁹ A pointer to the relation between caste and the judiciary is a 2006 interview of noted constitutional expert and jurist Fali Nariman during the release of his book *India’s Legal System* where he states, “Former law minister P. Shiv Shankar, a Dalit, told me that as policy, in some states, if two justices have to be sworn in on the same day, the guy from the preferred community is sworn in first, so that the guy from the non-preferred community doesn’t supersede him in becoming chief justice.”⁶⁰ Some of the researchers claim that the biasness is unbridled in judiciary of India and There are numerous cases that highlight the extent to which implicit caste biases creep into Indian courts.

In Arushi Talwar Murder Case the Hon’ble Supreme Court Observed, “The learned trial judge has prejudged things in his own fashion, drawn conclusion by embarking on erroneous analogy conjecturing to the brim on apparent facts telling a different story propelled by vitriolic reasoning, The trial judge was

⁵⁷ Alok Prasana Kumar, “India’s Supreme Court Has a Class Bias And It Takes Whatever The Govt Says At Face Value” THE PRINT (27 May, 2020).

⁵⁸ Bhadra Sinha, “UGC won’t alter decision on final-year exams, tells SC the move will protect academic future” THE PRINT (30 July, 2020).

⁵⁹ Rakesh Shukla, “To Remove Caste Bias from The Judicial System, Judges Need to Self-Correct” THE WIRE (Mar. 23, 2017).

⁶⁰ *Ibid.*

unmindful of the basic tenets of law....”,⁶¹ The Court has made scathing remark against the CBI Judge. There are series of cases where we witness media trial or the lower judiciary has been guided by biasness whereby many a times accused were put behind the bar and succumbed to other consideration and basic principles of criminal justice system have been ignored. Such miscarriages of justice run the entire gamut of the criminal justice system in India. Be it the police, investigators, advocates, media, even the judiciary — the weak and powerless find the system stacked against them. Filing an FIR is a struggle; the recent Mohammad Harris Nalapad case in Bengaluru being a case in point. Chargesheets are almost never filed within the stipulated 60-day period. Evidence is often tampered with, either deliberately or through callousness.⁶²

A. Judges Conduct during Litigation

The social perception of litigants about the bench are not good and their opinion got endorsement in the statement of Ex Supreme Court Justice Raveendran; when he remarked, “within legal circles, judges are branded as acquitting and convicting kinds, pro labour, pro capitalist, pro employer, anti-landlords, anti-tenant and of late and even pro government and anti-government, depending on the nature of their past verdict”⁶³ But it appears more worse if we see the allegation of Advocate Manish Kumar Khanna; who in his research paper in legally India alleged that I saw cases like BMW, Manu Sharma, Uphaar, Jayalalitha, Avnish bajaj of DPS MMS case, Abu Salem, etc. and found that the hon'ble courts giving very patient hearing to them at every stage from remand to hearing in SC itself. However, I found that in ordinary cases the attitude was normally adjournment; even when the accused are in jail or it is a bail matter. The judges would not allow to argue properly by saying "come to the point" or "are we sitting in court only for you", even before you had taken a minute. It is alleged by many that it is resulting because of misplaced priorities by the bench and common man aspiration and constitutional morality and complete justice

⁶¹ Choodie Shivaram, “Criminal Justice System In India Skewed Against The Poor; Judiciary Losing Credibility Due To Repeated Legal Oversight” FIRST POST (March 23, 2018).

⁶² *Ibid.*

⁶³ Farheen Hussain, “Judges are Labelled Based on Their Biases: Former Supreme Court Judge” TIMES OF INDIA (Nov. 23, 2019).

concept has been used on selective cases.⁶⁴ However, in *Ritesh Sinha v. State of Uttar Pradesh & Anr*⁶⁵, the court observed, “Until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India.”⁶⁶ The allegation of the senior advocate or lordship may be motivated by some personal consideration but the charges are of serious nature and directly hitting the respect of Institution and faith of common people, such facts need to be investigated and rectified either by policy change or redesigning the administrative working of the judiciary. We need to adopt steps to convey justice is not merely done but it involves complete justice without any bias.

B. Challenges before the Judiciary

As far as the delay in trial and disposal of cases is concerned, there are many bottlenecks. When the matter comes to the court, there is no proper scrutiny at any stage and proceedings keep going on. In *Ranjeet Singh v. Ravi Prakash*⁶⁷, the Supreme Court itself observed that it is well known fact that trials of corruption cases are not permitted to proceed further easily and a trial of corruption case takes anything up-to 20 years in completion. We have seen in charges of corruption leveled against the then Governor of Madhya Pradesh Late N. D. Tiwari, and his son in Vyapam case where the approval for cognizance under section 197 of the Cr.P.C. were delayed. Despite hue and cry deliberately in many criminal cases where government officials or politicians are involved; approval is delayed or denied. One major reason for this state of affairs is that the moment charge is framed, every trial lands into High Court and order on charge is invariably assailed by the litigants and the High Court having flooded itself with such revision petitions, would take any number of

⁶⁴ Adv. Manish Kumar Khanna, “Judicial Bias and Its True Impact on India” LEGALLY INDIA (Nov. 20, 2013). Prashant Bhushan, “Misplaced Priorities and Class Bias of the Judiciary” 44(14), ECONOMIC AND POLITICAL WEEKLY, 32-37 (Apr. 4 - 10, 2009).

⁶⁵ 2019 SCC OnLine SC 956.

⁶⁶ *Ibid.* para 25.

⁶⁷ AIR 2004 SC 3892.

years in deciding the revision petitions on charge and the trials would remain stayed. Legislature looking at this state of affairs, enacted provision that interlocutory orders cannot be the subject matter of revision petitions.

Moreover, the ratio of courts per 1000 population is very small in comparison to Developed Country. The ratio of judges is abysmally low at 12–13 per one million persons, compared to 107 in the United States, 75 in Canada and 51 in the United Kingdom.⁶⁸ If the number of outstanding cases were assigned to the current number of judges, caseloads would average 1,294 cases per Supreme Court judge, 4,987 per high court judge and 1,916 cases per judge in the lower courts. Consistent failure to fill vacancies compound the problem. In August 2021, there were Eight vacancies in the Supreme Court, 264 out of 829 sanctioned in the high courts.⁶⁹ Moreover, in lower courts high level of discretion in various proceedings and paperwork during a trials are creating scope for misuse of discretion resulting entry of corruption at every level from registry to the judicial officers.

C. Court Craft and Court Conduct

The fact of the matter is that today there is a big question mark on the entire administrative system of the country.⁷⁰ Even a layman will laugh if in ad-hoc appointment matter where tenure is six months the next date after admission is beyond maximum duration of appointment. It is not a hidden fact that Indian Courts, their officials are poor in court craft and management. How you manage the scene on the ground while inside a court is what ‘court craft’ is all about. You must always be alert to the surroundings and be able to respond promptly in a manner beneficial to you.⁷¹ Perhaps the most significant aspect of Court Craft and Court Conduct is sound knowledge of law and facts on the file which you

⁶⁸ Committee on Reforms of the Criminal Justice System (Malimath Committee Report) (Bangalore: Ministry of Home Affairs, March 2003).

⁶⁹ <https://doj.gov.in/sites/default/files/Vacancy-Statement-01.08.2021.pdf>.

⁷⁰ Justice R. B. Mehrotra, *Court Management*, IJTR JOURNAL Sep. 1995, (Aug. 29, 2021), <http://ijtr.nic.in/articles/art10.pdf>.

⁷¹ Uzair Ahmad Khan, “How relevant is court craft in appearing before the National Company Law Tribunal?” *blog.ipleaders.in* (November 16, 2019), (28 Aug. 2021), <https://blog.ipleaders.in/craft-appearing-national-company-law-tribunal/>.

are going to deal with instantly.⁷² With a fair comprehension and rounded view of the relevant law, you would develop the capacity of sifting the ‘substance’ from the ‘frivolous’.⁷³ However, the factual situation is very grim and it can be inferred from the apex court recent order where the hon’ble bench directed a matter to High Court to pass an order which we can understand. The bench remarked that on perusal of the impugned order, we find it is unintelligible and we could not decipher what has been decided by the court. We accordingly set aside the order and remit the matter to the High Court.⁷⁴ Here the delay is not for the pendency or infrastructural scarcity it is linked with inefficiency and non-seriousness. The court room is microcosm of the society and peoples’ lives are affected day-in and day-out immediately and instantly in most fundamental ways by judicial decision-making.⁷⁵ The functionaries of justice system are not engaged in management of leisure play their attitudinal luxury may spoil the whole life of a family or individual. Francis Bacon in his Essay on Judicature wrote, “Soloman's throne was supported by lions on both sides: Let them be lions, but lions under the throne, being circumspect, they do not oppose any points of sovereignty”.⁷⁶ In P.D. Gupta v. Ram Murti and Others, the Court said that A lawyer owes a duty to be fair not only to his client but also to the court as well as to the opposite party in the conduct of the case. Administration of justice is a stream which has to be kept pure and clean. It has to be kept unpolluted. Administration of justice is not something which concerns the Bench only. It concerns the Bar as well.⁷⁷ A just judgment given by the bench, may lead to admission of a deserving student to medical college, whereas an unjust judgment in the same case might change the course of his life and play havoc.

⁷² JUSTICE M.M. Kumar, “Sensitization of Judicial Officers In Dispensation of Justice With A Focus On Court Craft & Court Conduct And Bench & Bar Relationship” *Abstract from the Lecture delivered at Chandigarh Judicial Academy* 1-12 (2010), (Aug. 29, 2021), https://highcourtchd.gov.in/sub_pages/left_menu/publish/articles/articles_pdf/Article%20of%20Justice%20M.M.pdf.

⁷³ *Ibid.*

⁷⁴ *Surekha Nitin Kapse v. The State of Maharashtra*, SLP (CrI.) No 8350 of 2019 (Nov. 04, 2019).

⁷⁵ *Supra* note 71.

⁷⁶ *Supra* note 69.

⁷⁷ AIR 1998 SC 283.

Conduct of both bar and bench with effective management of the cases may improve the face of justice system.

VI. CONCLUSION AND SUGGESTION

On the basis of above discussion it is evident that it is high-time that the judiciary must take utmost care to see that temple of justice do not crack from inside, because it may lead to catastrophe in the justice delivery system of India; resulting in the failure of public confidence in the system.⁷⁸ The justice delivery system is under an obligation to deliver prompt and inexpensive justice to its Consumers, or the persons presented before it.⁷⁹ Mandates emanating from the preamble of the Constitution have no significance if the individual residing therein lost faith in institution and the judges working therein. Albeit the statutory obligations created in Criminal Procedure Code, 1973, provide that the court must facilitate the accused with a lawyer to defend him at the cost of the state, in case the accused lacks the required financial means to engage a lawyer for himself but the empirical data in respect of it convey lamenting story. The Quality of justice suffers not only when an innocent person is punished or a guilty person is exonerated even when there is enormous delay in deciding cases. It is the need of the time that the direction enumerated in Ramchandra Rao should be implemented in letters and spirit.

Although the intensity of the problem is very serious but efforts made by the parliament in form of enactments of laws, or by the executive in form of enhancement of meager budget for increasing number of courts and judges and other facilities are not sufficient and the issue was not addressed in reference to class difference or attitude of superior or priority for certain segments. Delay is mainly seen as an HR perspective with a recommendation appoint more judges and delay will automatically reduce. But a little attention is paid towards addressing the mindset of judges and culture of courts.

There is an untouched part which may play a very important role to address the issue that how to ensure that bar and bench is imparting decisive responsibility and there are wings of emergency cases courts and date bound trial courts for every litigant. While pronouncing a judgment, no court gives reasons why and

⁷⁸ *Supra* note 1.

⁷⁹ *Supra* Note 25 at 116.

how the conclusion of the matter got delayed and who was responsible for it – the police, prosecution or the accused or advocate or judges. If anyone is not honestly and diligently pursuing the case, his or her responsibility should be fixed and court must make observation proposing action against them if any. The apex court hesitation to fix outer limit of trial has worsen the situation of litigants. There should be case movement digital diary mentioning where it got delayed. Fix punitive charges to all who have contributed in delay of trail from their own pocket may be one of the steps but the government should extend legislative sanction, substantive protection to litigants otherwise the concept justice for common man would be dream in India.

It will not be worthwhile to sketch the attempt which has been made by the Parliament and the Supreme Court as well as Law Commission of India⁸⁰ in this regard. Though, the Parliament has made some amendments in C.P.C. and Cr.P.C. on the basis of the recommendation of the Law Commission of India. The Concept of evening court is a good concept and it has been implemented in the Delhi but evaluation has to be done. Recently, introduced ‘*Gramya Nyayalay*’ is also a good effort in some of the State in order to find solution to remove these problems⁸¹. But, Needless to say that these efforts taken by the Parliament and Supreme Court of India are merely lip service and not enough to improve the system up to satisfaction.

There is an urgent need to increase the number of courts, but the action has to be taken by the government to increase to the number of courts along with budget, infrastructure and technical and professional assistance to the judiciary. It needs huge investment in terms of new buildings, Judicial Magistrates and other Court’s staffs. No doubt it is hard task for any government but what we are losing makes us to enthuse system with target-based commitment.

Moreover, we also need to acknowledge that there are faults within the judiciary, especially at the lower level. These causes are several and deep-

⁸⁰ Report No. 230, August 2009 for detail see <http://lawcommissionofindia.nic.in/reports/report230.pdf>

⁸¹ As said by Law Minister V. Moily on November 13th, 2010 that “The setting up of ‘Gram Nyayalay’ and introducing mobile courts were significant steps to reduce arrears of legal disputes. The new systems are likely to reduce around 50 percent of the pending cases in subordinate courts,”

rooted, and require courage of self-criticism and resolve to identify them and eradicate them. The entire process starting from filing to disposal and archiving of cases can be digitalized using available technology.⁸² This needs to be done by everyone, the bench, the bar, the government, the lawmakers, the people, and the society as a whole.⁸³

Every new incident spur new laws which get jaded in course of time as nobody wants to look back what earlier legislation provided and why did they fail. An attitudinal change is required in the thinking of judges and lawyers with the application of nudging. They must realize that moving the court is not a luxury for anyone. The abhorrent practice of adjournments must be done away with. It must not be granted even in the rarest of circumstances as Indians have ingenious minds that enlarge a needle hole into a tunnel through which even trains can pass. If a lawyer cannot appear due to some unavoidable reason, s/he may submit written arguments and wherever the litigants are able to communicate and present their matter judges should patiently promote them to explain the issues.⁸⁴

At the end the researcher submit that free legal aid has gone some way towards opening access to the courts; but there is still a long way to go to achieve speedy trial for common man and to convert aspirations of the preamble and constitutional morality into reality.

⁸² Process re-engineering *i.e.*, use of information technology requires to be used for the better management of court's time.

⁸³ *Supra* note 2 at 17.

⁸⁴ Sudhanshu Ranjan, "Rule of Law v. Lynch Law: Deliver Speedy Justice" *Asian Age* (Dec 16, 2019). <https://www.asianage.com/opinion/oped/151219/rule-of-law-vs-lynch-law-deliver-speedy-justice.html>, (Aug. 19, 2020).

Manual Scavenging Practices in South Asia: A Review from India, Pakistan, Bangladesh and Nepal

*Prof. (Dr.) Namita Singh Malik¹
Dr. Smita Gupta²*

Abstract

The constitutional ethos of a nation aims to treat people across all sections of the society with equality, justice and fairness. The multi-cultural and multi layered society absorbs such values in proportion to its understanding of constitutional mandate, socio-cultural norms and economic progression. All nations are expected to provide basic human rights & dignified, hygienic working conditions to its people, but unfortunately sanitation services and hygiene practices in South Asia have been quite alarming. Large numbers of people in developing countries are forced to work under endangered conditions, which threatens their life and violates their right to earn livelihood with dignity and safety. This Paper aims to present a comparative analysis of manual scavenging practices in South Asia focusing on India, Pakistan, Bangladesh and Nepal. Additionally, paper delves into legal institutional mechanisms available in these countries to address the problem of manual scavengers. It also proposes workable solutions to put an end to this obnoxious prevalent practise.

Keywords: *Manual Scavenging, India, Pakistan, Bangladesh, Nepal*

I. INTRODUCTION

The development index of SAARC Countries (India, Afghanistan, Bhutan, Pakistan, Bangladesh, Maldives, Nepal and Sri Lanka) is lagging behind on many fronts as compared to developed countries of the world.³ The challenges

¹ Dean & Professor, School of Law, Galgotias University.

² Associate Professor, Delhi Metropolitan Education, affiliated to GGS IP University, Delhi.

³Anand, S. and Sen, A., 1994, *Human Development Index: Methodology and Measurement, Human Development Report*; (May 2, 2022),

faced by South Asian countries in terms of resources, population, technology, social cultural construct is strikingly different from developed nations. Among all the SAARC nations, the country at the bottom in terms of population and resources is Maldives, followed by Bhutan, Sri Lanka, Nepal, Afghanistan, Bangladesh, Pakistan and then India. The kind of resources and technology available with developed nations for waste management and sanitation is more robust and effective, result of which lies in the fact that standards of sanitation and waste management is higher in developed nations⁴. Developed countries are managing the solid waste by use of advanced technologies and recovering energy from wastes. Most of the developed countries are using advanced management techniques, like Mechanical Biological Treatment Plants & Enhanced Resolution, Mobile Sorting, etc. which enables better recycling of waste without human interaction. On the other hand, developing countries attempts to grapple with sanitation trouble, which is exacerbated by water crisis, behavioural issues and rapid urbanisation with fewer resources⁵.

Another challenge to adoption of strategy in dealing with sanitation practices and waste management is the socio-cultural and religious arena in which a nation flourishes. If we look at the SAARC countries; Bangladesh, Afghanistan, Pakistan and Maldives are Islamic nations. India, Nepal and Bhutan are secular nations and Sri Lanka is a Buddhist nation.

India though secular in nature and a melting point of culture, practices and customs; is predominantly consists of Hindus. Indian society has maintained its traditional roots and practise in the name of caste and cultural distinctions. Although our law makers have ensured that no discrimination takes place with respect to fundamental rights in the name of religion, caste, or creed, even then

<https://hdr.undp.org/en/content/human-development-index-methodology-and-measurement>.

⁴ Srivastava, Rishabh, *Waste Management: Developed and Developing Countries*, INTERNATIONAL JOURNAL OF SCIENCE AND RESEARCH, (2013); ISSN (Online: 2319-7064).

⁵Maharaj, N., Maharaj, B. (2021), Sanitation Challenges and Policy Options in Developing Countries: A Critical Review. In: Thakur, B., Thakur, R.R., Chattopadhyay, S., Abhay, R.K. (eds) Resource Management, Sustainable Development and Governance, Sustainable Development Goals Series. Springer, Cham. https://doi.org/10.1007/978-3-030-85839-1_24.

society is trapped in clutches of varnas in terms of occupational stereotypes. One such outcome of occupational stereotype is manual scavenging.

“Manual Scavenging is the worst surviving symbol of untouchability”⁶. It pertains to an exercise wherein human excreta is manually cleaned from dry latrines. It also includes carrying or disposing or handling in any manner, human excreta from dry latrines and sewers.⁷ This practice is a blot and disgrace on rich, pious social and cultural fabric of India.⁸ Apart from stigmatized practices, other reasons for manual scavenging are poverty, lack of resources, lack of intention and apathetic attitude of the government towards manual scavengers. Waste picking (Scavenging) is also stimulated by financial needs in many parts of the world.⁹

Globally, sanitation services and hygiene practices in South Asia have been quite alarming. Large chunk of population is circumstantially forced to live in inhumane conditions violating human rights and a great risk to their health. Although sanitation is an essential public service which extremely crucial to shield good human health but they are most who are most discriminated, poor and marginalised doing their jobs for society in absence of any protective gears and secured legal rights.¹⁰

Sanitation workers' pathetic condition in this region is not hidden. “They have long been marginalized across South Asia because of stigma around the nature

⁶National Advisory Council resolution, October 23, 2010, (Mar. 24, 2022), <https://www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india>.

⁷Breaking Free: *Rehabilitating Manual Scavengers, United Nations in India*; (Aug 9, 2021), <https://in.one.un.org/page/breaking-free-rehabilitating-manual-scavengers/>.

⁸ B. N. SRIVASTAVA, “MANUAL SCAVENGING IN INDIA: A DISGRACE TO THE COUNTRY, (Sulabh International Social Service Organisation, New Delhi, 1997), ISBN 81-7022-639-2

⁹ Ibrahim, Salilu, “*An assessment of the implications of Scavenging as emerging enterprise on the urban development of Minna Town*”, International Journal of Innovative Science and Research Technology, Vol. 6, Issue 5, May 2021; <https://ijisrt.com/assets/upload/files/IJISRT21MAY164.pdf> (Feb. 27, 2022)

¹⁰News report exposes horror of working conditions for millions of sanitation workers in the developing world, News release, World health organisation, Nov 14, 2019; <https://www.who.int/news/item/14-11-2019-new-report-exposes-horror-of-working-conditions-for-millions-of-sanitation-workers-in-the-developing-world>(Mar. 5, 2022)

of their work and discrimination based on caste, ethnicity and religion”¹¹. Whether it's open defecation or inappropriate hygiene practices or poor menstrual hygiene management or poor conditions of drinking water or health care for sanitation workers, South Asian countries are highly vulnerable for millions of people and the situation is worse when it's about manual scavenging practice.

In South Asian countries, manually cleaning of excreta from open drains and public dry toilets is the practice of manual scavenging¹². Usually, workers physically enter sewers and main holes, drains, septic tanks and dig out the excreta. While cleaning these sewers it is piteous that these manual scavengers use basic tools like brooms and baskets. A prima facie study of SAARC nations depicts that manual scavenging is still prevalent in India, Pakistan, Nepal and Bangladesh.

This paper intends to make a comparative analyses of manual scavenging practices in South Asia among countries of India, Pakistan, Bangladesh and Nepal. Paper aims to provide workable solutions to deal with this inhuman practice.

II. METHODOLOGY

This is a conceptual paper which has been split into seven parts. The first part of this paper explains the concept of manual scavenging and sanitation practices and uses integrative approach of literature review in introducing the topic and questioning the discourse surrounding practices of manual scavenging. The second part deals with practise of manual scavenging in India. Third part examines manual scavenging in Bangladesh. Fourth part introspects the condition of manual scavenging practices in Pakistan. Fifth part takes up manual scavenging in Nepal and discusses comparative challenges in this region. Sixth

¹¹Safety and wellbeing of sanitation workers during COVID-19 in South Asia: A Rapid assessment from Bangladesh, India, Pakistan and Nepal in lockdown, WaterAid global website, (May 2, 2022), <https://washmatters.wateraid.org/publications/safety-wellbeing-sanitation-workers-south-asia-covid>.

¹²Cleaning Human waste, Human Rights Watch news release, Aug 25, 2014, (Mar.19, 2022), <https://www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india>.

& the concluding part deals with comparative challenges in South Asian region and proposed some workable solutions towards the end of research paper.

III. MANUAL SCAVENGING IN INDIA

“What is guaranteed by the fundamental right is not the mere existence or vegetative survival but rightful opportunity to unfold the human potential and share in the joy of creative living.”¹³

This quote by Justice Krishna Iyer reminds us of the ethos which our constitution aims to uphold for the joyful living and development of humankind. Indian Constitution which came into effect on 26 January 1950 gave several fundamental rights to its people. These rights were understood as vital to the life of a human being and our constitution as a custodian of fundamental rights spelled out these rights under different article of the constitution. Particularly Article 14 (Right to Equality), Article 15 (Right against discrimination), Article 17 (Right against Untouchability) & Article 21 (Right to Life & Personal Liberty) are very relevant to understand the backdrop in which we intend to unfold the issue of manual scavenging. Our constitution has provided to its people all the above-mentioned rights and specifically abolished practice of Untouchability which was deep rooted in our social and cultural construct.¹⁴ Even after untouchability getting abolished, it persists in various shapes and sizes. One such way in which it is still practiced in our society is manual scavenging.¹⁵

After 73 years of successful independent democratic history of our country wherein great strides have been taken in science, technology, innovation as a global international power player. It is indeed unacceptable that Manual scavengers are still clutched in modern slavery, untouchability and live in

¹³ V. R. KRISHNA IYER, LAW AND SOCIAL CHANGE AND INDIAN OVERVIEW, (Punjab University, Government Press 2001).

¹⁴ Anshika Singh, *Manual Scavenging: A Mephitic Heredity of Social Stratum*, 5 (1) IJLMH Page 73 - 86 (2022), (Mar. 24, 2022), DOI: <https://doi.org/10.1000/IJLMH.112430>.

¹⁵ Shahid, M. (2015), *Manual Scavenging: Issues of Caste, Culture Violence and Social Change*, 45(2), 242–255, (Apr. 14, 2022), <https://doi.org/10.1177/0049085715574187>.

extremely backward conditions¹⁶. Manual Scavengers are one who are involved in cleaning dry latrines and sewers. Their work also includes emptying pits, septic tanks, manholes, operating pumping stations and treatment plants¹⁷. Although manual scavenging in India is banned but still in many parts of the country it is being practised. This section of society has inter-linkages with caste system, human inequality, gender biases and with those links they stand off for a messiah who can grant them social, economic and political rights for a respectable and honourable life as envisioned by Aristotle.

Gupta, Abhishek (2016)¹⁸ argues that rights of people hailing from socially and economically weaker people is denied by the society. Manual scavenging is still in practice and enslaves around 1.2 million people in India¹⁹. They have to suffer severe pain on many grounds from mental, to physical, social to economic. They carry out the work of lifting and many times loading this excrement in buckets to designated sites and that too without proper tools²⁰.

Brooms, small tin plates and baskets are the only tools available to them for manually cleaning dry latrines. “It would be no surprise to know that among the major population of manual scavengers in India, 95% to 98% are women. The working conditions are extremely unbearable. While doing their job, they have to many times clear it by removing of dead animals, even performing funeral

¹⁶ Pradhan, S., Mittal, A., *Ethical, Health, and Technical Concerns Surrounding Manual Scavenging in Urban India*. *J Public Health (Berl.)* 28, 271–276 (2020); <https://doi.org/10.1007/s10389-019-01039-7> (Apr. 19, 2022)

¹⁷ New report exposes horror of working conditions for millions of sanitation workers in the developing world, News release, World health organisation, Nov 14, 2019; <https://www.who.int/news/item/14-11-2019-new-report-exposes-horror-of-working-conditions-for-millions-of-sanitation-workers-in-the-developing-world> (Apr. 28, 2022).

¹⁸ Gupta, Abhishek “*Manual Scavenging: A Case of Denied Rights*”, *ILI Law Review*, Summer Issue (2016)

¹⁹ Kumar, Shubham & Preet Priyanka, “*Manual Scavenging: Women Face Double Discrimination as Caste and Gender Inequalities Converge*”, *Economic & Political Weekly*, ISSN (Online) 2349-8846, Vol 55, Issue No 26-27, June 2020.

²⁰ *Sharing her awful feelings, a manual scavenger from Mainpuri, UP shares how she is compelled due to poverty and helplessness to clean 20 toilets every day, using tin plate and broom, removing human excrement from houses and collecting all in a basket*. Full report can be accessed at: <https://www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india> (May 02, 2022).

related activities and sometimes also cleaning placentas after delivery.²¹ Children of manual scavengers also undergo discrimination at every social sphere.

*“The people who do the manual scavenging work are from scheduled castes and marginalized communities. Their voices are never strong. They don’t have a political representation. Using machines requires money. For politicians, departments that fetch commissions and vote banks are more important. They say issues like manual scavenging are not national issues. Love for nation and language is considered a national feeling.”*²² Manual Scavenging is socio-economic political issue, wherein a dignified life is denied to manual scavengers. Attempts to address this issue have been in vain and livelihood programs have failed to eradicate it. Even after legislation of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 (PEMSR 2013) which prohibited the practice but even after prohibiting, many follow as a hereditary vocation in India. In *Safai Karamchari Vs Union of India* 2014, Supreme Court gave strict instructions to State Governments for enforcement of PEMSAR law. It was taken as a violation of Article 17, which abolishes untouchability. Besides, on September 18, 2019, the Supreme Court observed *“In no country, people are sent to gas chambers to die. Every month four to five people lose their lives in manual scavenging”*.²³

Manual scavenging, deeply embedded in hierarchical caste system and adversely affects women and girls of low strata. Many times, these are forced for manual scavenging and have to face multiple vulnerabilities. They lead a denied life wherein they are denied basic rights and justice in all spheres of life. It has been observed that generally manual scavengers are forced to reside on isolated outer regions of the cities or villages. It is to observe that the habitation

²¹Study Report: Inclusion and Exclusion of Dalit in Health and Education (2008-09), Jan Sahas-UNICEF, (May 02, 2022), <http://www.dalits.nl/pdf/ExclusionAndInclusionOfDalitCommunity.pdf>

²²Bezawada Wilson, Founder of Safai Karamchari Andolan, Magasasay Awadee shared his views on work, dignity and being human, December 2017; (May 12, 2022) [Thehindu.com/society/bezwada-wilson-in-conversation-with-perumal murugan/article22260315.ece](http://Thehindu.com/society/bezwada-wilson-in-conversation-with-perumal-murugan/article22260315.ece).

²³ *Revisit PEMSAR 2013 to uplift manual scavengers*, S. Jyotiranjana, July 5, 2021, THE PIONEER, State Edition; (May 11, 2022), <https://www.dailypioneer.com/2021/state-editions/revisit-pemsr-2013-to-uplift-manual-scavengers.html>.

of people in cities/villages depicts hierarchical order of the society wherein upper caste people occupy better locations, followed by other castes. Manual scavengers face serious health concerns due to the type of work they do. They get exposed to various kinds of diseases like cholera, hepatitis, meningitis, skin infections, cardio-vascular problems, etc.²⁴

In spite of putting a ban on this practise of manual scavenging since 1993, it has been continued.²⁵ Employment of Manual Scavengers and Construction of Dry latrines (Prohibition) Act, 1993, has not been completely implemented due to lack of commitment. The prohibition of Employment as Manual scavengers and the Rehabilitation Bill, 2020 is awaited to take shape of Act. Despite all such constitutional rights and legal frameworks, manual scavengers remain victims of discrimination and are killed in sewers at large. Although the govt. refused to acknowledge existence of this practice anymore, but news reports coming from corners of the country shows a different picture.²⁶ The practice can vanish only when the government takes it on priority and take laudable steps curbing this most obnoxious act.²⁷

IV. MANUAL SCAVENGING IN BANGLADESH

Bangladesh has come into existence as a nation in 1971, and as of now it is on the eleventh position in terms of the most densely populated countries of the

²⁴Sweepers and scavengers of third world cities, R R Pandey, 2014; https://www.duo.uio.no/bitstream/handle/10852/15970/Sweepers_and_Scavengers.pdf?sequence=2 (May 02, 2022).

²⁵ Noronha, K. M., T. Singh, and M. Malik. 2018, "Manual Scavenging in India: A Literature Review" CPR Research Report; (Apr. 13, 2022), <http://cprindia.org/research/reports/manual-scavenging-india-literature-review-annotated-bibliography>.

²⁶ *No manual scavenging deaths, 161 died while cleaning sewers in 3 years: Government*, Tamil Naidu has the highest number of deaths in septic tanks and holes as per the report, published on 6 April 2022, HINDUSTAN TIMES (May 21, 2022), <https://www.hindustantimes.com/india-news/no-manual-scavenging-deaths-161-died-while-cleaning-sewers-in-3-years-govt-101649247631971.html>.

²⁷ *The long march to eliminate manual scavenging*, INDIA EXCLUSION REPORT, Wilson, B., & Singh, B., 2017, (May 11, 2022), <https://indianculturalforum.in/2017/07/07/the-long-march-to-eliminate-manual-scavenging/>.

world.²⁸ The country is progressing steadily towards economic growth, scientific advancement and poverty reduction,²⁹ but lack of political will and prioritization is not letting the country free from the clutches of inhuman practices.

It is grim scenario that Bangladesh which is counted in fastest growing economies of the world is also dependent on the practice of “manual scavenging” for urban sanitation. These workers in the country are employed by city corporations or privately. Firstly, there is no separate law regulating practice of manual scavenging. The Bangladesh Labour Act 2006, defines “labour as a worker who works in any establishment or industry either directly or through a contractor. On the basis of it, manual scavengers fall under both formal and informal labour”.

The Bangladesh Labour Act, 2006 & 2015 have rules and regulations applicable on manual scavengers. Section 46& 47(2) of 2015 Act laid down that “a worker should use a mask when he/she working in dust and in case the inspector finds it necessary, then inspector can take up a supplementary step for disposal of solid garbage or liquid faecal, respectively”. Section 67(2) of the same law affirms that “to ensure personal safety, protective gear should be provided like shoes, hand gloves, mask, goggles, apron, earplugs etc.” “The National Occupational Health and Safety Policy 2013 and the Dhaka Institutional and Regulatory Framework for Faecal Sludge Management 2017 includes guidelines about occupational health and safety for pit emptying service but that is not satisfactory enough to eradicate the practice. Specific law and regulation for the well-being of sanitation worker is still non-existence although much has already been talked about enforcing mechanism for the well-being of manual scavengers”³⁰.

²⁸Countries by Population Density, (May 01, 2022), <https://worldpopulationreview.com/country-rankings/countries-by-density>.

²⁹Gimenez, Lea; Jolliffe, Dean; Sharif, Iffath; *Bangladesh, a Middle-Income Country by 2021: What Will it Take in Terms of Poverty Reduction?* World Bank, 2014, Washington, DC., <https://openknowledge.worldbank.org/handle/10986/18668> License: CC BY 3.0 IGO. <http://hdl.handle.net/10986/18668> (May 07, 2022).

³⁰ Biswas, Manisha., *The occupational health and safety of manual scavengers in Bangladesh*, THE BUSINESS STANDARD, Nov 11, 2020. <https://www.tbsnews.net/thoughts/occupational-health-and-safety-manual-scavengers-bangladesh-156466> (Apr. 22, 2022).

Another issue is that Bangladeshis also struggling to resolve the problem of waste disposal. Cleaning of septic tanks and sewers are dependent on manual labourers. According to the “Dhaka Water Supply and Sewerage Authority, only 20% of the city is served by a piped sewer network and the city relies on individuals and private contractors to manually remove septic tank sludge”

V. MANUAL SCAVENGING IN PAKISTAN

Islamic Republic of Pakistan is a developing nation which has not enacted any law to regulate this practice. Manual Scavenging persists in Pakistan. “Although India has outlawed caste-based discrimination with mixed success, in Pakistan it is almost encouraged by the State, The New York Times reported citing an example where the Pakistani military, last July, had placed newspaper advertisements for sewer sweepers with the caveat that only Christians should apply”.³¹ It has been stated “that the descendants of lower-caste Hindus who converted to Christianity centuries ago still find themselves marginalized and subjected to menial labor, including manual scavenging in Pakistan”.³² “Municipalities in Pakistan rely heavily on Christians for manual scavenging as Muslims refuse to clean the gutters and the Christian minorities have few other employment options. According to one estimate by the rights group, even though Christians constitute 1.6% of the population, they account for 80% sanitation workers”.³³

In one of the reports of Indian Express, a 30-year-old worker, fell unconscious while cleaning a septic tank and later was reported dead because his “dirty body” was refused to touch by doctor³⁴. Pakistan is also undergoing the same

³¹*Manual scavenging: A caste-based discrimination that persists in Pakistan*, THE INDIAN EXPRESS, May 5, 2020. (Feb 11, 2022), <https://www.newindianexpress.com/world/2020/may/05/manual-scavenging-a-caste-based-discrimination-that-persists-in-pakistan-2139413.html#:~:text=Home%20World-,Manual%20scavenging%3A%20A%20caste%2Dbased%20discrimination%20that%20persists%20in%20Pakistan,the%20state%20continues%20to%20persist.>

³² *Ibid.*

³³*Minority Christians are forced to do manual scavenging work in the Islamic Republic of Pakistan: Report*, May 5, 2020. (Apr. 15, 2022), <https://www.opindia.com/2020/05/pakistani-minorities-non-muslims-christians-hindus-jobs-forced-conversions-discrimination/>.

³⁴*Pakistan sewer cleaner dies as doctor refuses to touch his dirty body*, World News, THE INDIAN EXPRESS, June 4, 2017. (Apr. 13, 2022),

stinking practice as other countries of this region. “As per the report published in Dawn in March 2018, Karachi produces more than 1,703 million litres of sewage every day. Pakistan Supreme Court ordered all sewers to be cleaned before the monsoon. A month earlier, the court-appointed judicial commissioner on water and sanitation dismissed workers who refused to clean sewers”.³⁵

Looking at this kind of condition in the South Asian region, one of the Report of WHO, states “Poor sanitation causes up to 4,32,000 diarrhoea deaths annually. Also, it is linked to the transmission of other diseases like cholera, dysentery, typhoid, hepatitis A and polio”. This report was jointly authored by the International Labour Organisation, Water Aid, World Bank and WHO, 2019, titled as *Health, Safety and Dignity of Sanitation Workers. An initial Assessment*.

VI. MANUAL SCAVENGING IN NEPAL

Across South Asian countries, the workers clean latrine pits without any specific tools or protective gears. Nepal is also one such country. Workers here have been highly stigmatized and discriminated against. Nepal has undergone the same situation like many other countries of South Asia. “A news report states that in Nepal, one of the waste management’s groups which work with the Nepal government claimed that it provided hundreds of masks and gloves to the employees. More than one thousand sanitation workers set out on their duty in over 250 trucks every day. It said that 700 employees are deployed by the Kathmandu municipality and 1000 from private organizations. It has been said that dozens of companies and organizations including the municipality, did not provide protective gear saying they had only limited masks and gloves”.

“Although Nepal Prime Minister KP Oli did announce that every sanitation worker will get life insurance but the news disappeared soon”³⁶. There were no

<https://indianexpress.com/article/world/pakistan-sewer-cleaner-dies-as-doctor-refuses-to-touch-his-dirty-body-4688420/>.

³⁵How do other countries clean their sewers and is there something India can learn from them? Vijayta Lalwani, Sept 23, 2018, (Apr. 15, 2022) <https://scroll.in/article/895013/how-do-other-countries-clean-their-sewers-and-is-there-something-india-can-learn-from-them>.

³⁶Raman Paudel, *Nepal sanitation workers fight COVID-19 unarmed*, DOWN TO EARTH, May 11, 2020. <https://www.downtoearth.org.in/news/health/nepal-sanitation-workers-fight-covid-19-unarmed-71033> (April 17, 2022).

check-ups, no follow-up, no COVID-19 tests were conducted. If anyone of the worker gets the virus, who was responsible for such things? said Padam Bahadur Shresth, an advocate for labourers.³⁷

VII. COMPARATIVE CHALLENGES AND WORKABLE SOLUTIONS

Condition of sanitation workers and manual scavengers is similar in majorly all South Asian countries. Sanitation workers have been working unarmed, without protective gears or gloves or masks. Conditions in COVID have been more challenging wherein millions of people have been affected.

“New research by Water Aid in India, Pakistan, Nepal and Bangladesh shows that the COVID-19 pandemic has made the situation worse for the vast majority of these workers. Some have even been redeployed to service COVID-19 quarantine centres with limited training on COVID19 related risks or how to use PPE. Their financial security has also been affected either due to increased but non-compensated working hours in some cases, and reduced demand for their services in others. Their transportation costs increased due to lockdowns and many had to buy face masks and other equipment that their employers did not regularly provide”³⁸. This region, already face bleak conditions of working for sanitation workers and in present of pandemic times have exacerbated life-threatening conditions along with risk to dignity with stigma of discrimination.

Manual scavengers have been on higher risks during pandemic times rather exacerbated risks and extremely poor conditions of these sanitation workers. Sanitation workers have been long marginalized in this region. In spite of safety risks and financial challenges, manual scavengers face stigma and discrimination. Few of the countries, it is further associated with lower caste and religious minorities. In the pandemic, health workers contribution in society was appreciated but the one who cleaned dustbins, cleared the dirty stuff, cleaned quarantine centres were not even named, still they remain doing their jobs by

³⁷ Raman Paudel, *Nepal sanitation workers fight COVID-19 unarmed*, DOWN TO EARTH, May 11, 2020. <https://www.downtoearth.org.in/news/health/nepal-sanitation-workers-fight-covid-19-unarmed-71033> (Apr. 19, 2022).

³⁸ *South Asia: Authorities must urgently protect sanitation workers risking their lives on the Covid -19 frontlines*, AMNESTY INTERNATIONAL, Water aid and International Dalit Solidarity Network, Joint Public Statement, Nov 19, 2020. <https://www.amnesty.org/download/Documents/ASA0433492020ENGLISH.pdf> (Apr. 20, 2022)

cleaning hospital waste, streets and sewer systems in spite of unprecedented risks. Working in the absence of protective gears, gloves, tools etc. is a normal feature in these countries and portrays a bigger challenge in providing a happy and honourable life.

Major challenge was posed by the scarce availability of protective gears. Manual scavengers received very few protective gears for their safety and even absolute absence of training to deal with such kinds of conditions. Reports from Bangladesh, Pakistan and India mentioned shortage of protective gears, overheating of PPE in high temperatures. Hand hygiene was an issue which was manageable in a better manner in Pakistan and Nepal in comparison to the countries of Bangladesh and India wherein there was more limited access to facilities.³⁹

Impact on livelihood has been absolutely adverse. These manual scavengers have worked even during lockdowns. These informal workers were the worst hit of the pandemic, who had no regular income to fall back on and even no available opportunity to do any kind of labor work during these times. Covid lockdowns undoubtedly deepened the existing inequalities. “Only 35% of workers in India and 42% in Nepal reported being covered by any form of insurance; no workers in Pakistan or Bangladesh, and no informal workers in any of the countries, had any insurance coverage”⁴⁰.

It was even observed that these workers have faced changed social attitudes. Where on one side, at some of the places they have got public recognition for providing these services while at other places like in Bangladesh where such people had pressure from their localities to not to return back from their work to homes. In country of Nepal there were reports, which reported that sanitation workers were asked to vacate their homes. Such societal pressures surmount pestering lives of these human beings.

³⁹*Comparative challenges & required action to be taken faced by Asian countries like India Nepal and Pakistan.* <https://washmatters.wateraid.org/blog/sanitation-workers-in-south-asia-on-the-margins-of-society-on-the-frontline-of-covid-19> (Apr. 23, 2022).

⁴⁰*“Comparative challenges & required action to be taken faced by Asian countries like India Nepal and Pakistan”,* (April 24, 2022), <https://washmatters.wateraid.org/blog/sanitation-workers-in-south-asia-on-the-margins-of-society-on-the-frontline-of-covid-19>

Although there have been contextual differences in making a comparative point of these countries, still there is an urgent need to cope up with pandemic, and proactive roles to be played by regional, national, municipal authorities and non-governmental players as well.

Few suggestions are suggested to propose a solution to this blot of manual scavenging practice:

- i. Proper Identification of engaged number of workers in this work. Every country has to bring out such schemes so that these manual scavengers' data can be maintained wherein accurate number is identified. A unified data system can be helpful which can serve as a single source of truth on sanitation work and workers⁴¹.
- ii. Local administration needs to be empowered. It becomes extremely essential to empower the local authorities and attempt to search for solutions to this practice. Like in India, it is questionable that where funds are available for smart cities and swachh bharat mission and urban development, it provides a strong case for approaching resolving the issue of manual scavenging.
- iii. Understanding the practice of manual scavenging is interlinked and driven by caste, class and income divides of the society. Although majorly all countries have tried to end the practice by various legislations but still the stigma and discrimination is yet to be vanished from social fabric. A comprehensive rehabilitation package has recently been put together that includes livelihoods and skill development, access to education, access to education for children of former manual scavengers and alternate livelihoods⁴².

⁴¹ *No progress for sanitation workers: What must change*, Anahitaa Bakshi, Keshav Kanoria and NiratBhatanagar, Developing India, Times of India webpage, Aug 22, 2021. <https://timesofindia.indiatimes.com/blogs/developing-contemporary-india/no-progress-for-sanitation-workers-what-must-change/?source=app&frmapp=yes> (Apr. 25, 2022).

⁴² *Breaking Free: Rehabilitating Manual Scavengers*, Webpage United nations in India, <https://in.one.un.org/page/breaking-free-rehabilitating-manual-scavengers/>.(May 15, 2022).

- iv. Stringent laws are the need of the hour. Statutory laws need to build more stringent laws to provide sanitation services on the part of state agencies, expecting these sanitation workers to have their rights.
- v. It has now become extremely necessary to have strict laws deal with manual scavengers and completely eradicate the practice. It has been recommended that country need to have provisions for better protection for these sanitation workers and at least compensation in case of accidents. Mechanism of sewer cleaning can prove to bring an immediate difference to manual scavengers. Like in India, Delhi Government's endeavour to convert sanitation workers to 'sani-entrepreneurs' who are supposed to become the owners of sewer cleaning machines is a step further. This has been inspired by a project launched in Telangana and both the projects are the brainchild of the Dalit Indian Chamber of Commerce and Industry⁴³.
- vi. This could be new approach to the problem. Social Justice and Empowerment of India in Dec 2020 has launched a mobile application to identify and geotag insanitary latrines. It claims to identify manual scavengers for rehabilitating. It is an application wherein citizens can provide details of any of the manual scavenger they identify or notice or can give information about insanitary latrines.⁴⁴
- vii. Some kind of financial support must be provided for their safety and welfare.
- viii. Legislations, protocols must be established to make these workers conditions safe along with some kind of training.

⁴³Revisit PEMSAR 2013 to uplift manual scavengers, THE PIONEER, S Jyotiranjana, July 5, 2021, <https://www.dailypioneer.com/2021/state-editions/revisit-pemsr-2013-to-uplift-manual-scavengers.html> (Apr. 13, 2022).

⁴⁴ *Mobile app launched to identify, geotag insanitary latrines, manual scavengers*, Outlook, the news scroll, Dec 24, 2020. (May 13, 2022), <https://www.outlookindia.com/newscroll/mobile-app-launched-to-identify-geotag-insanitary-latrines-manual-scavengers/1998730>

- ix. Social security schemes and health schemes must be strengthened to recognize these manual scavengers work in public service⁴⁵.
- x. Public awareness must be raised to reduce the discrimination and stigma attached to sanitation.
- xi. Technological intervention can promote reducing this practice⁴⁶. For example, The Bandicoot Robot, developed by GenRobotics, Kerala, India for cleaning manhole and septic tank.⁴⁷

VIII. CONCLUSION

There has been an intense demand for strengthening of laws to put an end to this stinking practice. Water Aid India, along with Association of Rural and Urban Needy (ARUN) and Centre for Equity Studies (CES) and supported by the European Commission – European Instrument of Democracy and Human Rights (EC-EIDHR), is implementing a three-year (2018-21) project on ‘Strengthening rule of law to advance rights and freedoms of Manual Scavengers in India’. The project aims to study issues around implementation of PMSR 2013 and demonstrate potential community-based measure to strengthen its implementation⁴⁸.

The situation of this class of society is indeed dark and grim. “Manual scavengers are at a double disadvantage. They are members of lower castes and as such, face enormous discrimination in society and second are disadvantaged

⁴⁵ *Impact of Scheme of Training and Rehabilitation on Socio-economic Improvement of Scavengers in Rajasthan*, https://niti.gov.in/planningcommission.gov.in/docs/reports/sereport/ser/ser_istr.pdf (May 12, 2022)

⁴⁶ *Manual Scavenging and Technological Solution to Eradicate It. (Turning Scavengers to Engineers): IOSR JOURNAL OF MECHANICAL AND CIVIL ENGINEERING (IOSR-JMCE)* e-ISSN: 2278-1684, p-ISSN: 2320-334X, Vol. 11, Issue 3 Ver. II (May-Jun. 2014), PP 08-15.

⁴⁷ *New Report: Justice Denied-Death of workers engaged in manual scavenging*, (Rastriya Garima Abhiyan), ISDN webpage; <https://idsn.org/new-report-justice-denied-death-of-workers-engaged-in-manual-scavenging-rashtriya-garima-abhiyan/> (May 13, 2022)

⁴⁸ *UN High Level Political Forum 2019: An opportunity to protect the human rights of sanitation workers and manual scavengers*, Avinash Kumar, July 9, 2019. <https://washmatters.wateraid.org/blog/un-high-level-political-forum-2019-an-opportunity-to-protect-the-human-rights-of-sanitation> (May 15, 2022).

because they are manual scavengers who clean human excreta”⁴⁹. We need to raise social consciousness for their social and economic reformation.

Modern society of South Asian countries will not be able to manage without sanitation workers and therefore an urgent need to pay heed on this issue. A recent study conducted by WaterAid, World Bank and WHO states that a third of sanitation workers experience violence, and half of them still experience untouchability and discrimination⁵⁰. If world wish to achieve Sustainable Development Goal 6 (to bring clean water, decent toilets and good hygiene by 2030, world has to have more sanitation workers with safe, healthy and dignified working conditions.⁵¹ Safe sanitation must go hand in hand with a safe and dignified working environment for those who run and maintain the sanitation services that protect our health⁵². Towards the end, leaders of all developing countries need to remind themselves of the following quote while keeping development as a vital for progressive society “*Development is about transforming the lives of people, not just transforming economies*” – Joseph. E. Stiglitz.

⁴⁹ Anahitaa Bakshi, Keshav Kanoria and Nirat Bhatanagar, *Breaking Free: Rehabilitating Manual Scavengers*, Webpage United nations in India. (May 15, 2022), <https://in.one.un.org/page/breaking-free-rehabilitating-manual-scavengers/>.

⁵⁰ *No progress for sanitation workers: What must change*, Developing India, TIMES OF INDIA webpage, Aug. 22, 2021. <https://timesofindia.indiatimes.com/blogs/developing-contemporary-india/no-progress-for-sanitation-workers-what-must-change/?source=app&frmapp=yes> (Accessed on May 17, 2022).

⁵¹ *Transforming denial into deliberation: The case of manual scavenging*, YOUNG VOICE 2021. <https://www.orfonline.org/expert-speak/transforming-denial-into-deliberation-the-case-of-manual-scavenging/> (May 19, 2022).

⁵² *New report exposes horror of working conditions for millions of sanitation workers in the developing world*, News, World Health Organization, Nov 14, 2019. <https://www.who.int/news/item/14-11-2019-new-report-exposes-horror-of-working-conditions-for-millions-of-sanitation-workers-in-the-developing-world> (May 23, 2022).

**Protection of Traditional Knowledge in India by Sui Generis Laws of
Geographic Indications and The Protection of Traditional
Knowledge Bill, 2022**

*Dr. Shambhu Prasad Chakrabarty¹
Abhisekh Rodricks²*

Abstract

This research paper explores the potential of protecting Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE) under the modern Intellectual Property Law Regime with special reference to Geographical Indications (GI). It also highlights the process of registering GI under the Indian GI legislation with special regard to ancestral knowledge. The paper also highlights the limitations of GI protection concerning protecting TK/TCE as a whole. Protecting TK has always been a challenge under the modern legal system, and this limitation has irretrievably damaged this knowledge base. Efforts have been made to preserve and protect TK through IPR, but this approach achieved very limited success. The absence of TK protection as a whole by TRIPS has left a sui generis approach to protecting TK. The proposed Protection of TK Bill 2022 could be criticised at length, including the absence of synchronisation between Intellectual Property Rights (IPR) safeguards, including GI as a mode of protecting TK has also been noticed.

This research paper identifies some of the TK that has been protected under the GI Act in India encourages the indigenous and tribal peoples to explore the limited potential of GI protection to their ancestral knowledge. It also assists the legislature in reconsidering certain aspects of the Protection of the TK Bill, 2022.

Keywords: *Traditional Knowledge, Traditional Cultural Expressions, GI, TRIPS, TK Bill, 2022*

¹ Professor of Law, Department of Law, University of Engineering and Management, Kolkata

² LL.M, candidate at University of Wroclaw, Poland

I. INTRODUCTION

There has been an unprecedented loss of indigenous and traditional knowledge across the world in the last century. The discontinuation of ethical standards prevalent in traditional practices has exposed nature to catastrophic consequences. Only 10% of big ocean fishes remain, according to a report³ published in the Nature journal in 2003.⁴ How much more has been lost in the next 20 years is yet to be assessed.⁵ We have lost 60% of wildlife in less than 50 years. Freshwater species have also faced cruel consequences. 81% of freshwater species disappeared between 1970 to 2012⁶. 64% of world wetlands have vanished since 1900.⁷

Tribal and indigenous peoples have been the last repository of ancestral and traditional knowledge, which included ethics and ethos that helped nature to retain its goodness for life on earth. Modern science has evolved dramatically and brought us to a technologically superior era bereft of moral commitments for sustainable coexistence. The prior mentioned facts are testimony to this technologically superior era.

It is not that the voice raised to protect traditional standards has fallen on deaf ears in recent years. Still, this undermining can be noticed in the non-acceptance of the Havana Charter of 1948 and previously by ignoring the Forest Charter of 1217.⁸

³ Myers, Ransom & Worm, Boris. (2003). Rapid Worldwide Depletion of Predatory Fish Communities. *Nature*. 423. 280-3. 10.1038/nature01610.

⁴ SeaWeb. (May 15, 2003). *Cover Study of Nature Provides Startling New Evidence That Only 10% Of All Large Fish Are Left in Global Ocean*. SCIENCE DAILY. (Aug. 5, 2022) www.sciencedaily.com/releases/2003/05/030515075848.htm.

⁵ We've lost 60% of wildlife in less than 50 years, World Economic Forum, <https://www.weforum.org/agenda/2018/10/weve-lost-60-of-wildlife-in-less-than-50-years/>.

⁶ *Freshwater species populations fall by 81% between 1970 and 2012*, LIVING PLANET REPORT, 2016, <https://www.worldwildlife.org/pages/living-planet-report-2016>.

⁷ Global Wetland Report, <https://www.global-wetland-outlook.ramsar.org>.

⁸ Forest Charter of 1217, <https://www.bl.uk/collection-items/the-forest-charter-of-1225>.

The radical change in the climatic condition invoked an urgency in exploring avenues to counter this crisis leading to the Stockholm Conference and 'Our Common Future'.⁹ Experts have highlighted the role of indigenous and local communities in resolving this complex crisis during the 1970-the 80s. Still, it has not been acted upon by the overwhelming commercialisation movement, including the growth of companies like Monsanto, which is considered to have singlehandedly been responsible for introducing monoculture and extinction of thousands of indigenous crop varieties. This has eradicated innumerable rare species of plants and crops and the ancestral knowledge inherent in them.

Indigenous and tribal communities have played a significant role in preserving and continuing their traditional and ancestral practices. However, the era of colonisation coupled with neo-colonialism in recent times has created a political system of destroying traditional practices in general and ancestral knowledge in particular. The International Labour Organisation, in their Convention (ILO) 107, promoted the essence of assimilation of tribal and indigenous peoples with the mainstream and undermined their right to self-determination and a homogenous approach to life. Affirmative actions and the introduction of compulsory formal education amongst the tribal peoples have de-stabilised the much-needed homogenous existence of indigenous and tribal peoples. This dangerous move had a much-anticipated consequence, and as expected, ILO Convention 169 admitted the mistake made in ILO C-107. The damage has already been done in many jurisdictions. It continues in some countries which never adopted ILO C 169, like India, where traditional knowledge continues to deplete with every passing day.

With the World Trade Organisation and World Intellectual Property Organisation flourishing in their respective wings leading to the adoption of Trade-Related Aspects of Intellectual Property Rights, the commercial model of protection of private intellectual properties became predominant and enforceable in developing and least developed countries. However, the fatal flaw in this system was 'undermining traditional knowledge as a form of IPR.

⁹ Report of the World Commission on Environment and Development: Our Common Future, <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>.

II. BIOPIRACY AND THE INTELLECTUAL PROPERTY RIGHTS BOOM

Rampant cases of biopiracy were detected amongst the European and Western companies where patents have been granted to many commonly known natural products and by-products. Inadequate legal protection in member countries or a centralised legal regime to combat this situation was severely felt. Movements to incorporate a general guideline like patent or trade mark to protect Traditional Knowledge was growing momentum. However, this never materialised, irrespective of the initial outburst of interest in the establishment of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). This prompted the activists and experts to explore alternative avenues to bring TK/TCE within the purview of legal protection in general and IPR in particular. Every intellectual property domain (for example, patent, copyright, designs) was explored to expand to include T.K. with very little success, with a few exceptions in the copyright and designs laws. Irrespective of this failure, the approach of finding ways to protect T.K. with the IPR regime led the focus towards Geographical Indication, which can play a promising role in protecting T.K. in India.

III. GEOGRAPHICAL INDICATIONS AS AN EVOLVING LAW TO PROTECT TRADITIONAL KNOWLEDGE (TK)

A Geographical Indication (G.I.) is a legal norm which originated in Europe. This norm was transplanted to countries worldwide through the WTO's TRIPS Agreement in 1995, including the countries of Asia. The norms laid down in the TRIPS were generally adopted, irrespective of inadequate consciousness about the G.I. norms prevailing in Europe. During this stage, India was mandated to implement the TRIPS Agreement without any similar domestic practices prevalent in the past. Consequently, efforts were made to understand the concept of G.I. and explore avenues to use it in our jurisdiction.

This effort led to identifying products similar to those protected by G.I. in European countries. Elite Indians by then have come across Champagne sparkling wine or Roquefort cheese. Darjeeling Tea looked identical to fit into the domain of G.I.

Consequently, the journey of G.I. started in India with the registration of Darjeeling Tea in 2004-05 after the enactment of Geographical Indications of Goods (Registration & Protection Act, 1999) in 2003. The journey since then has been quite fascinating. However, to know more about G.I., it is essential to understand what it is.

G.I. is an identifier which associates a product to a particular region. It is a designation indicating quality, reputation, or other characteristics essentially attributable to its geographic origin. This norm migrated to Asian countries in general and India in particular, with the specific adoption theory at its very best in Section 2 (e) of the G.I. Act.

“Geographical Indication, in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.”

¹⁰

A. The Paradigm Shift

Irrespective of the norms pertaining to G.I. being inherited from Europe, Asian countries soon realized the potential of this unique form of protection being extended to their indigenous domestic interests. An immediate economic interest could be seen in mushrooming indigenous geographical indications associated with such names. Tulaipanji rice or Joynagar Moya (consignments of Jaynagar Moya and Mihidana are exported regularly to the Kingdom of Bahrain) are examples of such exposition in recent years in the state of West Bengal.

Today the makers of Bengal Rosogolla have benefitted immensely in the larger Indian market and beyond. The increase in popularity of this sweetmeat has triggered an encouragement to popularise other similar products. Tulaipanji rice or Joynagar Moya (consignments of Jaynagar Moya and Mihidana are exported

¹⁰Section 2 (e) of the G.I. Act, 1999.

regularly to the Kingdom of Bahrain) are examples of such exposition in recent years in the state of West Bengal.

B. The hope! Community Benefit Sharing!

Successful registration will entitle a product to a much-hyped G.I. tag which promises more hope of livelihood opportunity over mere legal protection against infringement. G.I. tag does attract a premium and quality-conscious customer base who consistently look for the authenticity of origin of a product and, with that, a global platform to showcase local delicacies and expertise.

The tag also assures strategic and more robust protection of the artisans, small-scale farmers and business owners in that bigger platform challenging counterfeit and fake products from deceiving prospective customers.

C. The Checklist

An applicant must be aware of specific indications which are non-registerable under the G.I. Act. An indication which would likely confuse, contrary to law, scandalous, obscene, likely to hurt any religious susceptibilities, or any other conditions laid down in Section 9 of the Act. An application for G.I. may also fail at the registration stage if the applicant fails to reply (counter statement) to an objection raised within two months of the said objection. The applicant should understand the provisions of the Act before applying for a G.I. tag.

D. Local Issues

With the evolution of extending G.I. protection to local products, two simultaneous challenges must be addressed. How to give domestic geographical indications the same protection given to non-domestic ones, and secondly, find ways to harmonize domestic business conflicts over uses of the same geographical indication.

Things got complicated with the G.I. registration of Rosogolla, a popular sweet delicacy of West Bengal and Orissa. The former was granted the G.I. thanks to the documentary and research support of Historian Haripada Bhowmik.

D. The G.I. Limitations

Traditional Knowledge has a very broad and inclusive interpretation. It contours within its domain far broader than the geographic location where it evolved or

practices. For instance, the benefits arising out of neem leaves have a clear geographical periphery beyond the domain of Darjeeling Tea for comparison.

Internationally, G.I. in a mechanism within the domain of IPR and TRIPS has clearly in Article 24.1, obliges members.

*“To enter into negotiations aimed at increasing the protection of individual geographic indications under Article 23”.*¹¹ And in Article 23.4 for protecting wines,

*“Negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.”*¹²

TRIPS, however, ignores T.K. altogether. It is in the Doha Declaration of 2001 in Clause 19 that requires the TRIPS Council to *“examine the relationship between the TRIPS Agreement, and T.K. and folklore”*¹³ and to *“fully tak[ing] into account the development dimension”*.¹⁴

WIPO website quotes T.K. in the following words:

*“Many indigenous peoples, local communities and governments seek intellectual property (I.P.) protection for traditional knowledge (T.K.) and traditional cultural expressions (TCEs) as intangible assets. Such assets range from traditional medicine and environmental knowledge to art, symbols and music.”*¹⁵

To G.I.s, Article 24.1 of TRIPS obliged Members *“to enter into negotiations aimed at increasing the protection of individual geographic indications under*

¹¹ TRIPS AGREEMENT,
https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art24_jur.pdf.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions,
<https://www.wipo.int/tk/en/>

Article 23”.¹⁶ In order to facilitate the protection of G.I.s for wines, Article 23.4 provides that,

*“Negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.”*¹⁷

WIPO explains G.I. in the following words,

*“A geographical indication (G.I.) is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a G.I., a sign must identify a product as originating in a given place.”*¹⁸

The role G.I. can play in protecting T.K. is made in a study by Panizzon and Cottier where they observed,

*“Traditional Knowledge (T.K.) and Geographical Indications (G.I.s) share a common element insofar as they both protect accumulated knowledge typical to a specific locality. While T.K. expresses the local traditions of knowledge, G.I.s stand for the specific geographical origin of a typical product or production method. G.I.s and T.K. relate a product (G.I.s), respectively a piece of information (T.K.), to a geographically confined people or a particular region or locality.”*¹⁹

Irrespective of the fact that G.I. has to some extent, effective in protecting T.K., it falls short of the desired level T.K. would require for effective and adequate protection. But where does G.I. falls short? To unravel this puzzle, it is important to explore the first objective of the IGC Secretariat of ‘Recognising Value’, which is defined as:

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Supra* note 13.

¹⁹ Cottier, T. and Panizzon, M. (2004), *Legal perspectives on traditional knowledge: the case for intellectual property protection*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW, p.371.

*“recognise the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important for indigenous and local communities and have equal scientific value as other knowledge systems.”*²⁰

The reference drawn to the ‘holistic nature of T.K. is to identify the non-economic ideals. G.I., on the other hand, *“refer to the contribution which they can make to non-trade issues such as to the preservation of rural landscapes and rural lifestyles.”*²¹

The evolving debate regarding the protection of T.K. within the IPR regime revolves around patent or industrial property-related matters. Protection of TCE, including folklore, is debated in and around the context of copyright. *“The inappropriateness of this bifurcation is illustrated in the debates concerning the extension of the additional protection of G.I.s to handicrafts.”*²²

*“Handicrafts may be characterised equally either as aspects of T.K. or as TCEs. A number of commentators have noted the obvious impact of the terrain upon the availability of which raw materials for the fabrication of handicrafts”.*²³ These handicrafts have evolved from ancestral knowledge limited to certain communities and, in some cases, to specific families.

Thus, G.I. can be an interesting way forward in legally protecting T.K. in various countries, including India. However, a more comprehensive protection for T.K. would be through the international adoption of a mandatory sui generis system which is illusive to date. According to many experts, TK can best be

²⁰ The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, (Aug. 7, 2022), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf.

²¹ Blakeney, Michael. (2009), *Protection of Traditional Knowledge by Geographical Indications*, INT. J. OF INTELLECTUAL PROPERTY MANAGEMENT. 3. 357 - 374. 10.1504/IJIPM.2009.026912.

²² *Ibid.*

²³ Gangjee, D.S. (2002) *Geographical Indications Protection for Handicrafts under TRIPS*, MPhil Thesis, Faculty of Law, University of Oxford, Held at St Peter’s College, Oxford University, p.14.

protected by sui generis legislations passed by respective countries with the sole objective of TK and TCE.

IV. SUI GENERIS MODELS PROPOSED IN INDIA: PROTECTION OF TK BILL, 2022

Sui generis efforts to protect TK in India have faced criticism in the past with the introduction of the Protection of Traditional Knowledge Bill in 2016. Experts and activists critically acclaimed this Private Bill.

After around six years, the second TK Bill was re-introduced in 2022. A comprehensive study of the said provisions of the TK Bill 2022 may also raise some complicated issues.

- a. Traditional Knowledge has been defined in the proposed Bill in Section 2 (ix) as,

“S.2 (ix) ‘traditional knowledge’ means knowledge and expression of culture, which may subsist in codified or oral or other forms, whether publicly available or not, that is dynamic and evolving and is passed on from generation to generation, for at least three generations, whether consecutively or not, which is associated with group or groups who are maintaining, practising or developing it in the traditional cultural context and includes know-how, skills, innovations, practices, learning, medicinal preparations, method of treatment, literature, music, art forms, designs and marks but does not include any traditional knowledge covered by any law for the time being in force providing for its preservation, promotion, the management or unauthorized commercial exploitation.”²⁴

What seems arbitrary in the definition is the incorporation of “for at least three generations”. Some may argue the rationale of three and debate over it as not being at least four or ‘five’ or ‘six’ generations.

- b. Knowledge Society has been defined in Section 2 (iii) of the Bill as under:

²⁴ Protection of Traditional Knowledge Bill, 2022, https://shashitharoor.in/private_member_bills.

“S.2 (iii) ‘knowledge society’ means a group of people or family, whether indigenous, tribal or otherwise, residing within the boundaries of the national territory, who may be identified as a separate group from other groups or other members of the society by reason of their exclusive association with one or more forms of traditional knowledge.”²⁵

The definition introduction of the concept of ‘exclusive association’ creates confusion. How would this concept be interpreted? Would we strictly interpret the word ‘exclusive’ or use the purposive rule of interpretation? What type of association (actual, constructive, symbolic or all of them) is referred to here is also, to some extent, puzzling.

V. IPR AND T.K. UNDER THE NEW TK BILL

A very interesting provision has been inserted to address biopiracy. However, the provision prohibits IPR protection of T.K. in the following words in Section 8.

“S.8. (1) No patents or any other form of intellectual property protection shall be granted or applied for by any person, within India or abroad, on any traditional knowledge or aggregation thereof, on any traditional knowledge obtained or derived from India, whether in the custody of the knowledge society or the public domain.

(2) Subject to subsection (1), an invention, according to clause (j) of sub-section (1) of section 2 of the Patents Act, 1970, which is the output of advanced research on traditional knowledge, may be patented:

Provided that prior to submitting an application to the patent office for acquiring a patent for such invention based on the traditional knowledge, the applicant shall acquire permission from the NATK.”²⁶

The proposed TK Bill with this provision creates an embargo on protecting T.K. through IPR. The limited way of protecting T.K. through G.I. may be disturbed with the passing of this Bill to an Act unless altered otherwise.

A. Access and Benefit Sharing (ABS) Provisions

²⁵ *Ibid.*

²⁶ *Ibid.*

Surprisingly, the new Bill fails to synchronise the ABS objectives laid down in the Convention of Biological Diversity²⁷ and the Biological Diversity Act²⁸ of India. A reading of the proposed Section 10 makes the point clear.

“S.10. Where traditional knowledge has been misappropriated, the appropriate Government shall, subject to sub-section (8) of section 3, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.

*Where TK gets misappropriated, it should not be the Government who shall be entitled to damages, but should act as a custodian of the money received for the communities which shall be the ultimate beneficiary.”*²⁹

VI. TRADITIONAL KNOWLEDGE DIGITAL LIBRARY

“With biopiracy being rampant and the cost of fighting litigation to combat such white-collar pirates running into millions of dollars, a strategy was developed by the Government of India (GOI), which took around eight years to materialize and be effective. Traditional Knowledge Digital Library or TKDL was established with the objective of incorporating a list of codified TK practices of India.”³⁰

The proposed law can make the good work done by TKDL complicated by vesting the proposed ‘knowledge society’ on whose prior consent TKDL can identify, classify, codify and catalogue their traditional knowledge. In numerous cases, TKDL acted as a repository of “prior art”, leading to the rejection of many patent rights applications.³¹

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Protection of Traditional Knowledge Bill, 2022, https://shashitharoor.in/private_member_bills; <https://ipjagruti.com/2022/04/07/according-to-bill-traditional-knowledge-is-outside-the-scope-of-patent-and-ipr-regimes/>.

³⁰ Chakrabarty, S.P., Kaur, R. A Primer to Traditional Knowledge Protection in India: The Road Ahead. *Liverpool Law Rev* **42**, 401–427 (2021). <https://doi.org/10.1007/s10991-021-09281-4>.

³¹ Chakrabarty, S. P., Tanoue, M., & Penteado, A. (2022). The Trouble Is, You Think You Have Time: Traditional Knowledge of Indigenous Peoples in Japan and India, the Reality of Biodiversity Exploitation. *Environmental Management*, 1-13.

“S. 37. (1) The Traditional Knowledge Digital Library unit under the Council of Scientific and Industrial Research (CSIR) shall maintain, protect and develop India’s Traditional Knowledge Digital Library (TKDL) for the purposes of identifying, classifying, codifying and cataloguing the traditional knowledge that is obtained or derived from India.

(2) The TKDL unit shall attempt to identify, classify, codify and catalogue India’s traditional knowledge, which is in the custody of the appropriate Government.

*(3) The TKDL unit shall attempt to identify, classify, codify and catalogue the traditional knowledge in the custody of any knowledge society if the knowledge society provides consent to the TKDL unit prior to its use.”*³²

VII. Conclusion

“While natural resources are shared quite unevenly among nations, every country has at least one undeniable resource: its geography.”³³ The sovereign nations, inter alia, have specific geographical areas. Each government would understandably be interested in protecting GI, especially for the developing countries, which are rich in biodiversity and cultural diversity. “Because many traditional goods with a specific geographical origin come from developing countries, the protection of geographical indications has normative heft in countries that are ‘TK-rich’.”³⁴

This potential approach will ultimately assist countries in promoting using GI protection for various TKs, which GI may protect in their respective territorial jurisdictions. The Government of India has also taken affirmative steps, including framing appropriate guidelines.³⁵

³² *Supra* note 23.

³³ Gervais, D. (2009). *Traditional knowledge: are we closer to the answer(s) the potential role of geographical indications*. ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW, 15(2), 551-568.

³⁴ *Ibid.*

³⁵ Govt issues guidelines to promote use of GI logo, tagline, https://economictimes.indiatimes.com/news/economy/policy/govt-issues-guidelines-to-promote-use-of-gi-logo-tagline/articleshow/69944193.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

Unprecedented efforts are required to protect TK in every possible way to protect our biodiversity, and cultural heritage and GI can come in handy in this effort. It is expected that the recent actions of the government, coupled with the right intent of the legislators, shall help not only the indigenous and tribal peoples but also address the climate crisis the world is going through.

Dimensions of International Legal Regime of Changing Space Security

Ms. Jinia Kundu¹

Prof. (Dr.) Bhavani Prasad Panda²

Abstract

The modern debate on space debris emphasizes on state liabilities from the prism of technological commercialization along with state liability questions emanating from the existing international conventions, treaties and agreements. With increased technological dependence, their pitfalls are causing obstacles. For instance, there is reliance on cyber infrastructure and proportionate vulnerability through cyber-attacks like Distributed Denial of Service (DDOS). While the 'new space movement' has augmented manifold private participation, there is consistent divergence between outdated treaties enforcement and the techno-legal narratives leading to interpretative challenges. This has implications for orbital debris. For instance, if a satellite relies on artificially intelligent algorithm to determine whether a potential breach could cause orbital debris, questions of state liability are inevitable. Further, technology induced interpretative issues having a bearing on space debris liability within Conventions such as the Outer Space Treaty, 1967 have emerged on account of lack of coherent provisions. Therefore, lack of harmony between outdated legal provisions and technology has distorted the debate on orbital debris state liability enforcement. The present paper is an attempt to analyze the aforesaid changed paradigms of techno-legal framework of orbital debris and provide suitable suggestions within the space security ambit.

Keywords: *Space debris, state liability, space security, techno-legal narratives, new space movement, technological commercialization, artificially intelligent algorithm.*

¹ Assistant Professor-II, KIIT School of Law, Bhubaneswar, Odisha, India

² Director, KIIT School of Law, Bhubaneswar, Odisha, India.

I. INTRODUCTION

‘The use of space and space-based assets and services’ are now prevalent to an extent that the international fraternity has become accustomed and extensively reliant on them³. This is an inevitable reality for numerous sectors such as telecommunication industry, environmental assessment and resource governance which are critical in managing different aspects of space security. The space industry is a complicated integration of evolving dynamics and ideas⁴. Space security is a multi-dimensional concept having widespread ramifications for the state sovereignty, the corresponding geo-political environment and the commercial industry applications. Corporations are focused on venturing into innovative technologies experimenting them with different space infrastructure. This has technological and legal implications for an evolving space security paradigm on account of greater investments in research and development which produces new imperatives and applications into the debate on space security, because the incumbent legal framework will have to adapt to technological consequences.

II. SPACE SECURITY: THE CONCEPT

Conventionally, space security as a concept has remained confined to the military security of the States which comprises of the genesis of space security. In addition to this, the military security is also reflective of State behavior, and in this context, space security has been expanded to apply to human space activities. Outer space has become a domain where a prominent quantum of States are dependent upon jurisdictional space assets⁵ keeping in mind military and civilian functions. Moreover, space security has embraced the concept of autonomy of access and use of space by different jurisdictions who express interest to use outer space for military, socio-economic and commercial purposes.

³ Kai Uwe Schrogl, INTRODUCTION IN HANDBOOK ON SPACE SECURITY 9 (Peter L. Hays et al. eds., 2nd ed., Springer 2014).

⁴ M. Manulis et al., *Cyber security in New Space: Analysis of Threats, Key Enabling Technologies and Challenges* 20 (3) INT’L J. INFO. SEC. 288, 287-311 (2020).

⁵ Lutfiie Ametova, *International interest in space assets under the Cape Town Convention* 92(2) ACTA ASTRONAUTICA 213, 213-225 (2013).

Commercial and military activities were augmented by United States and erstwhile USSR. However, in the modern-day space age, many jurisdictions participate in space activities either directly or indirectly⁶. An important traditional component of space-security is the risk of impairment of outer-space environment and its consequent extent of state liability attached with it. On account of use of space by multiple states through space assets like satellites, and space weapons like the Anti-Satellite weapons (ASAT)⁷, the outer space has been engulfed with enormous quantum of space debris generated through years of unrestricted access and experimentation with the outer-space environment. The quantum of orbital debris in the space-environment is proportional to the extent of damage not only from collision but also other factors like outer space activities that includes debris generated from stages of satellite launch, natural space debris (meteoroids, asteroids), etc.⁸

It may be noted that outer space debris causes damage not only to the space environment but also impacting the earth's atmosphere when making contact with the same. For instance, orbital debris generated out of satellite collision can cause the remnants to damage the marine or aquatic life and impact the ecosystem on earth⁹. The orbital debris crisis also poses a risk to Earth when orbital debris enters the Earth's atmosphere and collides upon the surface of the land or water below¹⁰. In contrast with the earth's environment, outer-space environment differs in relation to of inability to measure and take remedial steps to reduce the negative environmental impact by the debris generated.

⁶ Hong-Je Cho, *Militarization of Space and Arms Control* 33 (2) J. AEROSPACE POL'Y & L. SOC'Y 444, 443-469 (2018).

⁷ Sandeepa Bhat & Kiran Mohan V, *Anti-Satellite Missile Testing: A Challenge To Article Iv Of The Outer Space Treaty* 2 NUJS L. REV.205,205-212 (2009).

⁸ Meghan R. Plantz, *Orbital Debris: Out of Space*, 40 GA. J. INT'L & COMP. L., 594, 585-618 (2012).

⁹ Michael Clormann & Nina Klimburg-Witjes, *Troubled Orbits and Earthly Concerns: Space Debris as a Boundary Infrastructure* 47(5) SCI. TECH. & HUM. VALUES 970, 960-985 (2022).

¹⁰ *Id.* at Meghan R. Plantz, *Orbital Debris: Out of Space*, 40 GA. J. INT'L & COMP. L., 594, 585-618 (2012).

As opposed to the Earth's habitat which can be cleared-up and reinstated to earlier condition, outer-space is subject to celestial mechanics¹¹ which creates uncertainty regarding the methodology to mitigate space debris in an attempt to restore the stability through natural orbital decay of outer space environment. Another major environmental concern is in relation to radioactive components¹² which can be a consequence of emanating chemical release into earth's atmosphere resulting in re-entry and leading to ozone layer depletion and the resultant debris becomes an impediment for future space exploration activities.

III. SPACE SECURITY AND EVOLVING PARADIGM

Positive correlation may be inferred between increased quantum of satellites with space commercialization. This is further evidence of proliferated usage of space infrastructure by corporations representing different jurisdictions. However, it may be observed that owing to the aforesaid correlation, there is a discernible pattern, wherein satellites, remains of space rockets, etc. are contributing to quantifiable space debris and raising questions of remediation from the perspective of incumbent state liability. Having said that, increased commercialization has induced technological dependence in terms of existing and emerging technologies. Therefore, this has introduced debates on standardization, regulation of new technologies and data protection which has influenced the methodologies for determining space debris remediation and state liability. Consequently, space law is witnessing heightened friction between regulations and technological progress.

Law and technology are two seemingly inherent contractions which must always be in synchronization with each other, the opposite consequence of which is the technology-law conundrum. The phenomena refer to the legal framework's inability to be at par with the technological developments impacting enforcement of the incumbent legislative setup. From this perspective, technology epitomizes a tool of liberation and collaboration¹³ wherein the

¹¹ Rada Popova & Volker Schaus, *The Legal Framework for Space Debris Remediation as a Tool for Sustainability in Outer Space* 5(55) AEROSPACE 3, 1-17 (2018).

¹² Gershon Hasin, *Confronting Space Debris Through the Regime Evolution Approach* 97 INT'L L. STUD. 1079, 1073-1159 (2021).

¹³ Sara M. Smyth, *The Facebook Conundrum: Is it Time to Usher in a New Era of Regulation for Big Tech?* 13 (2) INT'L J. CYBER CRIMINOLOGY 581, 578-595 (2019).

regulatory framework must find its rightful place. From an orbital debris and space security perspective, technical challenges are prevalent. An important illustration in this regard is the widely documented inherent defects in the design of satellites such as them being large and conspicuous¹⁴ and having room for minimal manoeuvrability. In such scenario, scope for collision is likely to increase leading to space debris.

A. Space Security and Cyber Security: An Emerging Paradigm

A dominant contentious issue in international space regulatory regime is whether a uniform definition of ‘peaceful purposes’ and ‘weapon’ can be agreed upon. The terms are vaguely agreed upon and in terms of space security perspective, they assume special significance considering that cyber infrastructure constitutes a critical component of space industry¹⁵ in areas like launch vehicles, satellites, secondary equipment to primary infrastructure, and the like. Strictly speaking from a space security perspective, the potential of usage of new kinds of technology, including emerging technologies, the rise of data economy and the proliferation of cyber-attacks on critical infrastructure, raise fundamental questions about space security from a new dimension.

Presently, developing security obstacles in the outer-space context have caused an unparalleled negative impact upon the foundation of the international space framework¹⁶. For instance, if SpaceX has developed a launch vehicle and a satellite system, both heavily reliant on complicated security protocols functioning on the basis of complex algorithms, however they go a step further and start appropriating resources from the moon, asteroids, etc. among others, the real question which arises for consideration is whether such kind of property rights are permissible within the existing legal regime. The quagmire is pertinent

¹⁴ David A. Koplow, *The Fault Is Not in Our Stars: Avoiding an Arms Race in Outer Space* 59 (2) HARV. INT'L L.J. 345, 331-388 (2018).

¹⁵ James Pavur & Ivan Martinovic, *Building a launchpad for satellite cyber-security research: lessons from 60 years of spaceflight* 8(1) J. Cybersecurity 1, 1-17 (2022).

¹⁶ Fabio Van Loon, *Codifying Jus in Bello Spatialis-The Space Law of Tomorrow*, STRATEGIC STUD. Q. 2, 1-18 (2021).

and undetermined. Certain response would epitomize the future of billion-dollar sector which presently stands on an unpredictable regulatory foundation¹⁷.

Generally, it is increasingly becoming a prerogative to design space infrastructure with prominent reference to the cyber-related aspects associated with the functional and operational elements of that infrastructure¹⁸. In light of the fact that satellites in space have been hacked before and resulting in outer space debris, it would be safe to presume that a space weapon does not necessarily have to be a physical weapon but instead demolishes the target's command, control, and space surveillance equipment¹⁹ making all of them *sine qua non* for smooth operation of spacecraft and satellites. Hence, the real question for consideration is the extent up to which the OST along with other related instruments can be considered useful for bringing into the fold such categories of weapons within their ambit. This would further lead to a more contentious issue of the nature of the liability that is to be borne by the private entities and the nation states to which such entities must be registered.

Private participation in this technologically advanced industry resulted in an influx of a diverse space infrastructure such as radio frequency spectrum, slots in geostationary orbits (GSO)²⁰ making such space infrastructure vulnerable to cyber-attacks. However, the multitude of standards and regulations do not provide for a uniform mechanism to deal with eventualities when such attacks happen. In fact, it has been documented that there are considerable differences among States' approaches to remote sensing regulations, depending on their perceived needs for security, access to information and other factors²¹.

¹⁷ Melissa J. Durkee, *Interstitial Space Law* 97 (2) WASH. U. L. REV. 450, 423-481 (2019),

¹⁸ Steven Freeland, *The Limits of Law: Challenges to the Global Governance of Space Activities* 150 (1) J.& PROC. ROYAL SOC'Y NEW SOUTH WALES 72, 70-82 (2020).

¹⁹ Sa'id Mosteshar, *Space Law and Weapons in Space*, Planetary Science (May 15, 2022, 8:02 PM), <https://oxfordre.com/planetaryscience/view/10.1093/acrefore/9780190647926.001.0001/acrefore-9780190647926-e-74?print=pdf>.

²⁰ K.R. Sridhara Murthi & V. Gopalakrishnan, *Trends In Outer Space Activities—Legal And Policy Challenges*, in RECENT DEVELOPMENTS IN SPACE LAW: OPPORTUNITIES AND CHALLENGES 37 (R. Venkata Rao et al. eds., Springer Nature, Singapore 2017).

²¹ Sa'id Mosteshar, *Regulation of Remote Sensing by Satellites* in ROUTLEDGE HANDBOOK OF SPACE LAW 158 (Ram S. Jakhu et al. eds., Routledge UK 2017).

IV. SPACE WEAPONIZATION AND SPACE DEBRIS: AN INTERPRETATIVE DILEMMA

Space weaponization is intricately connected with the quantum of space debris generation because the different modes of weaponry are directly proportional to the typology of space debris that can be prevalent. Two of the most prominent examples of this phenomenon are the deliberate destruction of the Chinese *Fengyun-1C*²² in 2007 by ASAT and collision of COSMOS 2251 with IRIDIUM 33²³ in 2009, causing complete disintegration of both the satellites²⁴ and generating substantial orbital debris. With the passage of time as more countries have entered the space race, the scope for such orbital debris has increased in myriad proportions, thereby distorting the legal certainty created through the existing instruments of international space law. For instance, commentators have opined that on account of the international legal framework remaining unchanged, the scope for international responsibility and liability²⁵ has also remained unpredictable.

Therefore, questions on state liability can arise due to the inability of the existing international legal instruments to incorporate technological consequences. For instance, a space satellite equipped with complex data analysis algorithm and telecommunication infrastructure if malfunctions and becomes an object of space debris can raise questions of state liability. Therefore, the necessity of examining space security from this contemporary stand point cannot be undermined. This is further exacerbated by the fact that

²² Arjun Tan and Mark Dokhanian, *Velocity Perturbations Analysis of the Fengyun-1C Satellite Fragmentation Event* 3 (1) ADVANCES IN AEROSPACE SCI. & APPLICATIONS 35, 35-46 (2013).

²³ A. Tan, T.X. Zhang et.al., *Analysis of the Iridium 33 and Cosmos 2251 Collision using Velocity Perturbations of the Fragments* 3 (1) ADVANCES IN AEROSPACE SCI. AND APPLICATIONS 13, 13-25 (2013).

²⁴ Habimana Sylvestrea & V. R. Ramakrishna Paramab, *Space Debris: Reasons, Types, Impacts and Management*, 46 INDIAN J. OF RADIO & SPACE PHYSICS 21, 20-26 (2017).

²⁵ Lawrence Li, *Space Debris Mitigation as an International Law Obligation* 17 (3) INT'L COMMUNITY L. REV. 297, 297-335, (2015).

several countries are headed towards an overt weaponization of space²⁶, from which orbital debris is an inevitable reality.

V. REGULATORY FRAMEWORK: EXISTING DIVERGENCE

The incumbent international legal instruments are a reflection of the efficacy of international collaboration within the realm of outer-space exploration in its peaceful use. This is essential to propagate uniformity and cohesiveness among nation states with regards to a holistic outer-space access and the consequent implications from a technical and legal perspective. From a regulatory standpoint, legal perspective encompasses questions on state liability, rights and obligations of multiple stakeholders.

Much of the international space law regime was drafted keeping in mind state liability as the focal area. As a result, though, the ‘new space movement’ has brought in a paradigm shift in the space industry with private participation as different stakeholders, the legal interpretation on certain issues pertaining to their roles and liabilities still remains a question mark²⁷. This is of special relevance from the space security perspective as for instance, if a Low Earth Orbit²⁸ satellite in outer space²⁹ funded by private investors malfunctions on account of harmful interference leading to severe data breaches³⁰, there is an incoherence between the determination of liability and interpretation of existence legal instruments.

Problems may arise when outer space explorations are executed through the non-state entities as the development of commercial space activities is given effect to by private enterprises which are registered in a launching state. From

²⁶ Joan Johnson-Freese and David Burbach, *The Outer Space Treaty and the Weaponization of Space*, 75 (4) BULL. OF THE ATOM. SCIENTISTS 137, 137-141 (2019).

²⁷ MELISSA DE ZWART, INTELLECTUAL PROPERTY, INNOVATION AND NEW SPACE TECHNOLOGY 144 (G. Austin et al eds., ACROSS INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF SAM RICKETSON Cambridge Univ. 2021).

²⁸ Hereinafter mentioned as LEO.

²⁹ Majority of the space satellites are operational in the LEO which proportionately increases the scope for greater orbital debris.

³⁰ Paul Larsen, *Small Satellite Legal Issues* 82 (2) J. AIR L. & COMM. 277, 275-309, (2017).

this perspective, the debate on the extent of state liability assumes significance in the context of the international instruments discussed hereinafter:

A. United Nations³¹ and Existing International Legal Instruments: Framework and Predicaments

The Outer Space Treaty, 1967

The importance of outer space sustainability has gained a new international dimension from a technical and policy standpoint. Given a background about orbital debris challenges, apt consideration for legal framework emphasizing upon mitigation and remediation of orbital debris constitutes a viable mechanism contributing to space sustainability. It is pertinent to mention that the term 'debris' has not been defined under the Outer Space Treaty, 1967³² even though they are classified as space objects³³. This is amplified by the fact that the idea of launching state under the OST does not entertain the notion of 'non state entity'. However, Article VI of the same treaty defines 'launching state' by referring to the space exploration executed by a non-state entity on the authorization of the state, based on its outer space activities.

Aforementioned problem is further exacerbated in the scenario of the Cold War, the socialist and capitalist ideas were put in contrast of each other. These prominent political and socio-economic contradictions impacted the execution of the property rights proposition in the OST³⁴. Thus, though the OST envisioned private participation through the idea of 'non state entity', the nature and extent of liability of private actors was not within the realm of the same³⁵. Since, in the modern space age, states engage in competitiveness through private entities, the lack of holistic inclusion of such non state actors within the OST

³¹ Hereinafter mentioned as UN.

³² Hereinafter mentioned as OST.

³³ Scott Michael Steele, *Space Debris: A Basis for Actively Removing Objects Under an International Legal Order* 8 (2) AM. J. AEROSPACE ENG'G 45, 45-60 (2022).

³⁴ Evarist Jonckheere, *The Privatization of Outer Space and the Consequences for Space Law*, (May 2018) (unpublished LL.M Dissertation) (Faculty of Law and Criminology, Department of European, Public and International Law, Ghent University) (on file with the Ghent University).

³⁵ A Ferreira Snyman, *Challenges to the Prohibition on Sovereignty in Outer Space - A New Frontier for Space Governance*, 24 POTCHEFSTROOM ELECTRONIC L. J. 3, 1-50 (2021).

will create hurdles for enforcing state liability. This is further compounded on account of increased influence of cyber technologies.

Strictly speaking from a space security perspective, the potential of usage of new kinds of technology, including emerging technologies, the rise of data economy and the proliferation of cyber-attacks on critical infrastructure, raise fundamental questions about space security from a new dimension. Presently, developing security quagmire in the outer-space context have created an unparalleled impact upon the robustness of the international space regime.³⁶ A case in point is the extension of the idea of the property rights jurisprudence from states to non-state actors like private corporations, especially SpaceX, Moon Express, Blue Origin, among others joining the global space race and looking for newer ways to exercise property rights in space³⁷. For instance, if SpaceX has developed a launch vehicle and a satellite system, both heavily reliant on complex security protocols functioning on the basis of complex algorithms, however they go a step further and start appropriating resources from the moon, celestial bodies, asteroids, among others, the real question which arises for consideration is whether such kind of property rights are permissible within the existing legal regime. The question is both pertinent and unanswered. A settled response would determine the future of a burgeoning, billion-dollar industry that currently exists on an unstable legal foundation.³⁸

Such kind of uncertainty can also get entangled in municipal laws and their sketchy implementation leading to regulatory issues and shying away of private players from certain areas of the industry. An illustration of this is the nature of the agreements with the DoS³⁹ and ISRO⁴⁰ which are often not in a standard format⁴¹ adding to the roadblocks for effective contract negotiations with government entities, especially when India does not have a dedicated space

³⁶ Fabio Van Loon, *Codifying Jus in Bello Spatialis— The Space Law of Tomorrow*, 15 STRATEGIC STUD. Q. 2, 1-18 (2021).

³⁷ Andrew J. Cannon, *The Great Space Rush: Regulating Space Mining*, 39(1) AUSTRALIAN RESOURCES AND ENERGY L. J. 3, 1-19 (2020).

³⁸ Melissa J. Durkee, *Interstitial Space Law* 97 WASH. U. L. REV. 450, 423-481 (2019).

³⁹ Department of Space, Government of India.

⁴⁰ Indian Space Research Organization.

⁴¹ NITIN SARIN et al., INDIA, 69 (Joanne Wheeler MBE ed., Law Business Research Ltd 2020).

legislation. This has the potential to stall any kind of technological progress made on the space security front by the private entities.

Private participation in the space-sector has induced in an influx of a broad spectrum of space infrastructure such as radio frequency spectrum, slots in geostationary orbits (GSO),⁴² making such space infrastructure vulnerable to cyber-attacks. However, the multitude of standards and regulations as discussed in the previous chapter, do not provide for a uniform mechanism to deal with eventualities when such attacks happen. In fact, it has been documented that there are considerable differences among States' approaches to remote sensing regulation, depending on their perceived needs for security, access to information and other factors.⁴³

One of the most contentious debates in international space legal jurisprudence is whether a uniform definition of the phrases 'peaceful-purposes' and 'weapon' can be consented to. The terms are vaguely agreed upon and in context of space security perspective, they assume special significance considering that cyber infrastructure constitutes a critical component of space industry in areas like launch vehicles, satellites, secondary equipment to primary infrastructure, and the like. Moreover, it is imperative to construct space-infrastructure with regard to the cyber-related aspects relevant to the execution, operation and utilization of the infrastructure.⁴⁴

In light of the fact that satellites in space have been hacked before and resulting in outer space debris, it would be safe to assume that a space weapon does not necessarily have to be a physical weapon but instead demolishes the target's command, control, and space surveillance equipment,⁴⁵ all of which are sine qua

⁴² K.R. Sridhara Murthi & V. Gopalakrishnan, *Trends in Outer Space Activities—Legal and Policy Challenges* in Recent Developments in SPACE LAW: OPPORTUNITIES AND CHALLENGES 37 (R. Venkata Rao et al. eds., Springer Nature Singapore 2017).

⁴³ Sa'id Mosteshar, *Regulation of Remote Sensing by Satellites* in ROUTLEDGE HANDBOOK OF SPACE LAW 158 (Ram S. Jakhu et al. eds., Routledge UK 2017).

⁴⁴ Steven Freeland, *The Limits of Law: Challenges to the Global Governance of Space Activities* 150(1) J.& PROC. ROYAL SOC'Y NEW SOUTH WALES 72, 70-82 (2020).

⁴⁵ Sa'id Mosteshar, *Space Law and Weapons in Space*, Planetary Science (May 15, 2022 8:02 PM) <https://oxfordre.com/planetaryscience/view/10.1093/acrefore/9780190647926.001.0001/acrefore-9780190647926-e-74?print=pdf>.

non for smooth operation of spacecraft and satellites. Hence, the real question for consideration is the extent up to which the OST along with other related instruments can be considered useful for bringing into the fold such categories of weapons within their ambit. This would further lead to a more contentious issue of the nature of responsibility which is to be incurred by the states and private corporations to which such entities must be registered.

Articles VI and VII articulates international liability for national activities irrespective of being conducted by state agencies or by non-state actors. It propagates international liability on each state party which engages in launching a space-object and consequently affecting the corresponding member-state to the OST. The liability is restricted to activities against the other state party and not to actions that leads to pollution in outer space.

Every State Party to the OST that engages in launching or to procure to initiate to launch of a space-object and an individual State Party which provides a platform for commencing a launch, is internationally accountable for causing detriment to the other State Party or to its natural persons or artificial personalities⁴⁶. The impact may be perpetrated by a space-object or its constituent fragments either on earth's surface or in air or outer-space.⁴⁷

The Rescue Agreement, 1968

Relying upon Articles V and VIII of the OST, it enumerates that member-States shall ensure application of reasonable measures to assist in astronaut rescue and immediately restore those back to the launching State. Further on the request, if necessary, the States must ensure cooperation to launching-States in retrieving space-objects upon re-entry to Earth outside the State's territorial jurisdiction which launched the said objects. It is pertinent to mention that the Rescue Agreement, 1968 is one of the foundational treaties⁴⁸ in international space law. It can be said that considering the timeline in which the treaty was drafted and

⁴⁶ Article VII of the Outer Space Treaty, 1967.

⁴⁷ *Id.*

⁴⁸ Ram Sarup Jakhu & Steven Freeland, *A Vital Artery or a Stent Needing Replacement?: A Global Space Governance System without the Outer Space Treaty?* 513, 505-519 (2019), cited in the Proceedings of the International Institute of Space Law, IISL (2019).

the needs of the contemporary space industry, a strong divergence is observable between the language of the treaty and enforcement.

For instance, the term ‘space object’,⁴⁹ a critical component of space security debates, has not been defined in the said Agreement, even though the generally accepted idea is that the nomenclature applies to the Liability Convention and the Registration Convention expressly. Despite the aforesaid anomaly, it is interesting to observe that the jurisdictional competencies for state parties with respect to ‘space objects’ has been given recognition in that the state facilitating a space object to launch shall maintain jurisdiction⁵⁰, regardless of the launch commissioned by the state directly or through private participation.

The Liability Convention, 1972

It primarily addresses the issue of state-liability, the importance to deliberate upon robust international rules and procedures in relation to the liability arising from injury due to space-objects. It must take into account the necessity for payment immediately to the extent of a full and equitable amount of pecuniary claim to aggrieved in case such loss occurs. However, space debris, being able to be generated due to factors such as technical satellite malfunction, portions of space rockets in space, among others, presents unique enforcement challenges for the said Convention. The present regime was developed in a time frame when states took precedence in outer space exploration. In the spirit of states taking predominance, the following discussion enumerates the nature and extent of the liability.

i. Absolute Liability and Fault Liability

State parties shall not be exempted from liability when it becomes absolute on account of loss to a space-object either on earth’s surface, or to an aircraft in-flight mode⁵¹. However, fault liability standards, arguably are hinged upon the below mentioned thresholds. State liability must only follow if the damage is caused either by the virtue of one launching State’s space-object which is

⁴⁹ Frans G. von der Dunk, *A Sleeping Beauty Awakens: The 1968 Rescue Agreement after Forty Years* 34 J. SPACE L. 422, 411-434 (2008).

⁵⁰ Christina Isnardi, *Problems with Enforcing International Space Law on Private Actors* 58 (2) COLUM. J. TRANSNAT’L L. 504, 491-509 (2020).

⁵¹ Article II of the Liability Convention, 1972.

subject to that jurisdiction, or to any persons, property on board such a space object wherein the injury caused is on account of a space object belonging to another state party to the launch⁵².

ii. *Joint and Severable Liability*

Such liability as articulated in law of torts, takes precedence under the Convention if two or more states⁵³ are simultaneously parties to the launch⁵⁴. If damage is caused at a place other than on the surface of the Earth such as⁵⁵ to a space-object wherein one member-state can claim liability because of the launch, or to persons or property on board by virtue of a space-object belonging to another launching state-party, and of damage created to a third-party State or its natural or artificial personalities.

The Convention ensures that the first two States⁵⁶ must comply with being jointly and severally liable to the third State for the proportion that in case the loss has been incurred to another member-State not actively involved in the launch, however on the surface of the Earth or to aircraft in flight, such a state can expect the damage causing states to be absolutely liable. If the injury has been perpetrated upon a space object with ownership claims by another third-party state or to persons or property on board at a place other than on the surface of the Earth, there shall arise fault liability⁵⁷ to the third State based on direct fault attributed to the damage causing states or to any person for whom the state perpetrating the launch is directly responsible.

If an international intergovernmental organization is responsible for loss by virtue of any provisions of the aforementioned Convention, then the said entity and members that are state-parties are jointly and severally liable⁵⁸. Any pecuniary claim shall be at the earliest apprised to the entity. In case the entity

⁵² Article III of the Liability Convention, 1972.

⁵³ Marco Pedrazzi, *Outer Space, Liability for Damage* 4, 1-9, Max Planck Encyclopedias of International Law, Oxford University Press, 2015.

⁵⁴ Article 5 of the Liability Convention, 1972.

⁵⁵ Article 4 of the Liability Convention, 1972.

⁵⁶ Trevor Kehrer, *Closing the Liability Loophole: The Liability Convention and the Future of Conflict in Space*, 20(1) CHI. J. INT'L. L. 207, 178-216 (2019).

⁵⁷ Guoyu Wang & Chao Li, *Applicability of the Liability Convention for Private Spaceflight*, 2021 SPACE: SCI. & TECH. 6, 1-11 (2021).

⁵⁸ Article 22 (3) of the Liability Convention, 1972.

has not paid, within a six months' time-period, any quantum of money consented upon or determined as damages, the claimant State may invoke the liability of the state parties to this Convention who are the members.

iii. Apportionment of Compensation

Every instance of joint and several liability follows the norm of proportionate distribution of compensation between the first two State parties contingent upon the extent to their fault⁵⁹. In case, if the nature of the States fault liability is incapable to be proved, the burden of damages has to be divided equitably between the parties. Such division must commence without compromising third party's right, State to claim the wholesome quantum of pecuniary damages from any of the member states who are active to the launch.

The compensation which such states are responsible to pay for injury are benchmarked upon international law⁶⁰ and equitable principles⁶¹. It is imperative to mention that the goal of such claim of quantum of compensation is establishing restoration of the natural or artificial personality affected, or the state or the intergovernmental institution which has been impacted. A launching State, which has compensated for the injury, has the right of indemnification⁶² from other member states in regards to the collaborative launch⁶³. A state which provides territory or facility provides a platform for launching space object is considered as a participant in a joint-launching⁶⁴.

iv. Process for Claiming Compensation

A claim for damages for injury can be presented to a state actively involved in the launch within one year since the date of happening of the event leading to injury or the identification of the launching State that is liable⁶⁵.

⁵⁹ Article 4 (2) of the Liability Convention, 1972.

⁶⁰ Piotr Manikowski, *Examples of space damages in the light of international space law*, 6(1) POZNAŃ UNIV. OF ECON. REV. 60, 54-68 (2006).

⁶¹ Article 12 of the Liability Convention, 1972.

⁶² Caley Albert, *Liability in International Law and the Ramifications on Commercial Space Launches and Space Tourism* 36(2) LOY. L.A. INT'L & COMP. L. REV. 250, 233-261 (2014).

⁶³ Article 5 (2) of the Liability Convention, 1972.

⁶⁴ Article 5 (3) of the Liability Convention, 1972.

⁶⁵ Article 10 (1) of the Liability Convention, 1972.

v. *Limitation of Claim*

In the event that a state expresses inability regarding information about the happening of the injury or has shown inability to make known the launching State which is accountable, there is autonomy to make a claim within one year since the date, the state was made aware about the aforementioned facts. Under no circumstances, this time-frame should transcend a year since the date on which the State could conduct due diligence.

Despite the aforesaid systematic methodology regarding nature of liability and claims regarding compensation, the Liability Convention, 1972 is also witness to contemporary challenges of the space industry wherein private companies have transcended the state parties in terms of participation directly in outer space activities. This has caused friction between the technologically intensive space industry and the provisions of the incumbent provisions of the Liability Convention, 1972. Hence, it is reasonable to understand that there is an urgent necessity to alter the provisions on account of their irrelevance⁶⁶ in the present circumstances. A number of instances can be cited with regards to this.

Firstly, the Convention does not define the nomenclatures such as fault, negligence and causation⁶⁷, which are critical to determine state liability. Thereby the provisions of the Convention are rendered meaningless if a private company registered to a certain state engages in an activity which causes orbital debris wherein the key determination shall be based on the parameters for state liability. The Convention emphasizes upon absolute state responsibility for injury caused in outer space, earth's surface and atmosphere. Even though the Convention identifies liability based on fault, a pertinent issue is there are no rules constituting the ambit of the term 'fault'. This is especially significant considering that many space debris are extremely difficult to trace, which makes the task of holding states liable⁶⁸ within the aforesaid binding instrument. The lack of discussion and coherence regarding attribution of liability to fault, on the

⁶⁶ Wian Erlank, *Property Rights in Space: Moving the Goal Posts so the Players don't Notice* 19(1) POTCHEFSTROOM ELECTRONIC L. J. 7, 1-31 (2016).

⁶⁷ Fawaz Haroun & Shalom Ajibade et al. *Toward the Sustainability of Outer Space: Addressing the Issue of Space Debris* 9(1) NEW SPACE THE J. SPACE ENTREPRENEURSHIP & INNOVATION, 65,63-71 (2021).

⁶⁸ Paul B. Larsen, *Solving the Space Debris Crisis* 83 (3) J. AIR L. & COM. 487, 475-519 (2018).

grounds of negligence and causation in the Convention raises a complimentary problem. For instance, the Convention does not make a reference of duty of care⁶⁹ standard which forms the bedrock for liability under law of torts. Thus, for instance, while the potential for tortuous liability is prominent, the foundation of such liability can be complicated in the absence of a coherent framework for the same.

It is pertinent to mention that the Liability Convention constitutes an attempt to make state parties liable for their actions or omissions based on fault for damage caused, however, challenges emanate at two levels.

Firstly, there are no explicit provisions regarding tracking space debris considering that such considerations were irrelevant at the time when the Convention came into force. Secondly, even if the space debris can be identified, the issue of determining the extent of negligence by the state party⁷⁰ is difficult to identify. For instance, in case of an orbital collision between two satellites of different states, if one of the satellites' parts also collides with a defective satellite component belonging to the other state, questions of state liability from a contributory negligence perspective will arise.

It is also significant to mention that greater quantum of space debris has a direct bearing upon space traffic management and space sustainability. Outer space being in a peculiar position to be regulated, the appropriate lack of regulations⁷¹ on space traffic management, complicate the question of state liabilities from an orbital debris perspective. This is so because at present none of the international instruments as discussed aforesaid clearly articulate the extent, typology and nature of liability which can be attributed to state liability while removing space debris. As companies and nations look to disintegrate space architecture such as orbital satellites and debris, the question of proprietary rights looms large. Since outer space is considered as the domain for use relating to benefit of mankind, questions regarding liability from this viewpoint are also imminent.

⁶⁹ Joel A. Dennerley, *State Liability for Space Object Collisions: The Proper Interpretation of 'Fault' for the Purposes of International Space Law* 29(1) EUR.J.INT'L L. 282, 281-301 (2018).

⁷⁰ Joshua Talis, *Remediating Space Debris Legal and Technical Barriers* 2 STRATEGIC STUD. Q. 90, 86-99 (2015).

⁷¹ Giacomo Curzi et al., *Large Constellations of Small Satellites: A Survey of Near Future Challenges and Missions* 7 (133) AEROSPACE 7, 1-20 (2020).

The Registration Convention, 1975

The said Convention is based on interest put forward by States in the OST, the Rescue Agreement, 1968 and the Liability Convention, 1972 to provide a robust system where jurisdictions can lend a helping hand to identify space-objects. It addressed issues relating to the extent of accountability which the member states must undertake in relation to their space objects. Information transparency and symmetry⁷² among stakeholders is one of the cornerstones of the convention.

At the moment, non-functional space objects⁷³ like orbital debris is witness to lack of consensus on whether they should be within the ambit of a space object, as per the definition of “space object” of Art. I of both the Liability Convention and the Registration Convention. The pertinent dilemma of attribution through registration shares a close nexus with the jurisdiction exercised over space objects. While outer space and celestial bodies are exempt from territorial sovereignty claims, according to Art. VIII of the OST states shall exercise jurisdiction and control over the space objects on their registry. The term “jurisdiction” implies that countries have autonomy to legally enforce sanctioning mechanisms over their space objects, but in the absence of a coherent definition for space debris, enforcement through this Convention becomes dicey. This problem can get compounded through procedural bottlenecks involved in making claims under the convention.

It has been widely documented that the Convention does not accurately specify the appropriate methodology for multiple⁷⁴ state party claimants especially when one of such states also happens to be one of the launching states. For instance, five state parties collaborating on an international space project might have contributed differently to space debris through their jurisdiction registered companies in outer space thereby injuring another third party. However, in the

⁷² Ram S. Jakhu & Bhupendra Jasani et al *Critical issues related to registration of space objects and transparency of space activities* 143 ACTA ASTRONAUTICA 407,406-420 (2018).

⁷³ Rada Popova & Volker Schaus, *The Legal Framework for Space Debris Remediation as a Tool for Sustainability in Outer Space* 5(55) AEROSPACE 2, 1-17 (2018).

⁷⁴ Alexander P. Reinert, *Updating the Liability Regime in Outer Space: Why Spacefaring Companies Should Be Internationally Liable For Their Space Objects* 62(1) Wm. & Mary L. Rev. 344, 325-355 (2020).

absence of a clear legislative sanction, affixing liability and the foundation for it will be difficult to determine.

Thus, a few conclusions about the challenges can be drawn. Firstly, the substantive law under the Convention relating to fault, negligence, causation, definition of launching state needs to be demarcated in alignment with evolving international space law standards. Secondly, the procedural framework needs to have robust backing to support the substantive framework considering that the Convention is one of the most frequently used instruments regarding state liability. Further, the role of private companies in space security and their evolving dynamics must be explored through the provisions as the trend is increasingly shifting towards commercialization and in this context state liability ought to be seen.

The Moon Agreement, 1979

Article 14 envisages that nation states which are parties to the said Agreement must oblige with international accountability for municipal activities on the Moon, regardless of being implemented by government entities or otherwise, and for ensuring that municipal manifestations of activity are conducted in compliance with the Agreement. States Parties must ensure that non-governmental participation within the jurisdictional limits of such state shall undertake ventures on the Moon only under the supervision and operational control of the jurisdiction concerned. It is accepted among jurisdictions that arrangements regarding responsibility for loss caused upon the surface of the Moon, in addition to OST and the Liability Convention are predicated upon more intensive activities on the Moon. Similar to present contemporary international space law instruments, the Moon Agreement 1979⁷⁵ had also been drafted keeping in mind the predominance of state parties and not the private sector. However, the provisions of the agreement can have interesting implications⁷⁶ from the space security viewpoint. For instance, it is debatable the extent of international space security liability the attempts at appropriation of

⁷⁵ René Lefeber, *Relaunching the Moon Agreement* 41(1) J. AIR & SPACE L. 41, 41-48 (2016).

⁷⁶ Laura Delgado-López, *Beyond the Moon Agreement: Norms of responsible behavior for private sector activities on the Moon and celestial bodies* 33(1) SPACE POL'Y., 1, 1-3 (2015).

space asteroids would generate if private actors were to engage in mining of such debris and the paradigm shift⁷⁷ in customary international law such a phenomenon can have. This anomaly is further exacerbated by the fact that contemporary literature suggests the agreement was not signed by many jurisdictions⁷⁸, thereby implying that consensus over the agreement and implications for space security can be detrimental.

United Nation Principles and Declarations

Aside from the UN Conventions, treaties and agreements, there is an abundance of principles adopted by the UNGA⁷⁹ which are critical components of space security. For instance, the *Declaration of Legal Principles*⁸⁰, mentions about activities pertaining to outer space including celestial bodies that are to be carried out in accordance with common interest of mankind, principles of sovereignty and international law. Further, nation states must undertake full responsibility towards any outer space activity executed by state and non-state entities. In the interest of space security and national sovereignty, the declaration pertinently mentions about consultations with nation states in case of damaging consequences from outer space activity threatening sovereignty of states and space security. From a liability perspective, every state from whom an outer space activity is launched or a jurisdiction which launches or procures launch of a space object, should be made accountable for injury to another state as a result of such activity.⁸¹

⁷⁷ Abigail Pershing, *Interpreting the Outer Space Treaty Non-Appropriation Principle: Customary International Law from 1967 to Today* 44(1) YALE J. INT'L. L., 169, 149-178 (2019).

⁷⁸ Alexander W. Salter, *Settling the Final Frontier: The ORBIS Lease and the Possibilities of Proprietary Communities in Space* 84(1) J. AIR L. & COM., 109, 85-114 (2019).

⁷⁹ UNGA stands for United Nations General Assembly.

⁸⁰ Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space, General Assembly resolution 1962 (XVIII) of 13 December 1963.

⁸¹ See Principle 8, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 1963.

Another prominent principle⁸² is the *Principles of Remote Sensing*⁸³, which tries to promote and protect natural resources, usage of land and environment by launch and processing electro-magnetic waves emitted by remotely sensed objects from space. Important benchmarks have been identified such as carrying out of such activities for common benefit of countries involved regardless of their technological, scientific, economic or social progress, remote sensing activities as per the international law.

To promote equitable participation among all stakeholders, Principle XII makes a reference to reasonable and non-discriminatory access to states whose remote sensing data from space objects have been analysed within their respective jurisdiction. Along with this, since remote sensing activities are helpful in averting natural disasters, the principles promote information symmetry between participating countries to reduce scope for violation of space security and state sovereignty criteria. Principle XIV expressly mentions about international liability in accordance with Article VI of the Moon Agreement⁸⁴ for remote sensing activities implemented by government, non-government entities or international organizations where states are parties.

The *Nuclear Power Sources Principles*⁸⁵ constitute the next important principles relating to space security especially given the rise of emerging nuclear power industry usages pertaining to space applications. It lay particular emphasis on the concept of 'launching state' to mean a country exercising jurisdiction over a space object comprising of nuclear power sources. Such a definition is crucial to determine international accountability of a state in case of a mishap. Further, 'general-concept-of-defence-in-depth' refers to safeguards in place to tackle system malfunctions which can have ramifications for space security if because of such malfunctions there is a violation of state sovereignty. Principle III

⁸² LOH Ing Hoe & Roslan UMAR et al *Evaluation of Remote Sensing Principles 1986: The Unsolved Problems* 7(7) INT'L J. ACAD. RES. BUS. SOC. SCI. 475, 475-490 (2017).

⁸³ the Principles Relating to Remote Sensing of the Earth from Outer Space, General Assembly resolution 41/65 of 3 December 1986.

⁸⁴ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, adopted by the General Assembly in its resolution 34/68, opened for signature on 18 December 1979, entered into force on 11 July 1984.

⁸⁵ Principles Relevant to the Use of Nuclear Power Sources in Outer Space, General Assembly Resolution 47/68 of 14 December 1992.

delineates the guidelines and parameters for safe use of nuclear power sources to reduce negative impacts of radioactive material in outer space⁸⁶.

To ensure a smooth implementation of the aforesaid guidelines, it is imperative for a launching state to conduct a safety audit covering aspects such as different mission phases, nuclear power sources, among other such standards. Articles VI and VII of the Moon Agreement, 1979 play a key role in determining state accountability for activities in outer space having nuclear sources, and the nature of compensation for damage created by virtue space parts. Further, the quantum of damages must also be analysed accordingly with provisions of the Liability Convention, 1972.

The International Telecommunication Union (ITU)

Exploration into space commenced when most prolific scientific research and exploration were undertaken from a military perspective.⁸⁷ Within the domain of the space sector, there must be information symmetry to facilitate the smooth conduct of outer space operations and therefore a seamless telecommunication medium constitutes the backbone of such operations. The outer space collaborations commence when states approve to the creation of acceptable benchmarks that promote uniformity. It is the classification of lesser complicated cooperation due to the methodologies that epitomize it are subtle tools of minimizing the probability of environmental damage, that coerces the states to consensually acknowledge the area of taking similar decisions with regard to minimal incentive to engage in stepping down from the same.⁸⁸

⁸⁶ Steven Aftergood, *Space Nuclear Power and the UN: A Growing Fiasco*, 8 (1) Space Policy, 10, 9-12 (1992), cited in Jericho W. Locke et al., *Analysis of International Treaties and Policies Related to Space Nuclear Power and Propulsion*, in the Proceedings of the International Astronautical Congress, IAC (2019).

⁸⁷ M. Matheswaran, *Emerging Contours of Space Security: Options for India* 11(1) INDIAN FOREIGN AFF. J., 31, 31-50 (2016).

⁸⁸ Allen Eric Rotter, *International Security And The Space Domain: Applying Traditional Theories Of International Relations to the Astropolitical Environment* (2020) (unpublished LL.M Dissertation, Department of Political Science, The Graduate School of Alabama) (on file with The Graduate School of Alabama).

The ITU is a facilitator in the aforesaid, having been established under the International Telecommunication Convention.⁸⁹ The objective of the organization is to promote international cooperation for standardized telecommunication services. In this regard, the ITU is instrumental in electromagnetic spectrum allocation and registration of radio frequency assignments to prevent unwarranted disruption among different jurisdictional radio stations. Furthermore, the regulatory functions extend to appropriate standard setting for frequency allocation and offering scientific advisory services pertaining to the aforesaid. While the ITU-T (“T” for Telecommunications Standardization) seeks the maximum media attention, its contemporary, ITU-R (“R” for Radio) also has a pertinent (though arcane) standard development role in international spectrum management.⁹⁰ The discussion in the below mentioned paragraphs shall be divided under two classifications, namely the ITU constitution and the standard setting achieved through resolutions and administrative regulations.

ITU Administrative Regulations

The Radio Regulations, 2020 (hereinafter, the 2020 Regulations) make explicit references of communications in terms of outer space which need to be looked into from the context of outer space and space security. The Preamble advocates that the regulations are founded on principles such as equitable access to orbits and frequencies for member states giving special regard to developing countries, lack of harmful interference in radio communications of other member countries, regulation and enforcement of new radio-communications technologies. The following discussion shall entail an analysis of provisions having a bearing on space security.

There is emphasis⁹¹ on equitable distribution of rights between terrestrial and space radio communication along with specifications of frequencies for different stations. Further, space stations are mandated⁹² to be equipped with instruments

⁸⁹ Constitution and Convention of the International Telecommunication Union (Geneva 1992).

⁹⁰ PATRICK SPAULDING RYAN, *THE FUTURE OF THE ITU AND ITS STANDARD-SETTING FUNCTIONS IN SPECTRUM MANAGEMENT* (Sherrie Bolin ed., Sheridan Books, 2005).

⁹¹ Article 21 of The International Telecommunication Regulations, 2012.

⁹² Article 22 of The International Telecommunication Regulations, 2012.

to execute stoppage of radio emissions as and when imperative and prohibits interference from non-geostationary-satellite systems. Space stations belonging to different member countries need not comply about longitudinal positions as long as there is no unnecessary interference with another existing satellite network.

There are elaborate provisions⁹³ to report violations of the Constitution⁹⁴ as the founding document, Convention or Radio Regulations to the member country which shall have jurisdiction over the matter. This ensures information symmetry and transparency and coordination among all stakeholders for a holistic outlook. Further, member states must extend utmost cooperation and assistance, and take into account technical parameters such as frequency alignment, traits of transmission and receiver antennas, time sharing, modification of channels within multichannel transmissions.

This cooperation is also reflected under Article 16 wherein there is a requirement to establish an international mechanism for monitoring which can comprise of organizations from member states, or such states themselves to share information in a timely and accurate manner. However, private monitoring arrangements entered into by governments, international organizations and private or public enterprises shall be exempted from the aforesaid. Article 18 provides for procedural requirements to obtain license in accordance with the 2020 Regulations along with confidentiality obligations under Article 17.

The discussion on the aforesaid are a testimony to a few things. Firstly, as space traffic is changing from being predominantly military to being mostly civilian, the nature of space traffic management is changing from having a predominantly national security purpose to predominantly addressing the civil issue of public safety.⁹⁵ Secondly, with the proliferation of different instruments and stakeholders such as the ITU, International Organization for Standardization, there is rising interest by nation states in the development of multilateral approaches. Simultaneously, there is no single international

⁹³ Article 15 of The International Telecommunication Regulations, 2012.

⁹⁴ Sarah M. Mountin, *The Legality and Implications of Intentional Interference with Commercial Communication Satellite Signals*, 90 INT'L L. STUD. 135, 101-197 (2014).

⁹⁵ Paul B. Larsen, *Space Traffic Management Standards* 18(3) J. AIR L. & COM., 362, 359-387 (2018).

organization that is fully obligated to remediate the obstacles and threats to space assets.⁹⁶

International Organization for Standardization (ISO)

The International Organization for Standardization (ISO) is a global standard formulating entity having wider implications for standard setting in diverse areas including space communications. The objective of this non-governmental international organization is to ensure development of market relevant international standards for innovation. In the space sector, some of the pertinent standards are relating to Information Technology, Security Techniques and Check Character Systems⁹⁷, space data and information exchange systems: security framework for space data mechanisms⁹⁸ and the space data and information transfer systems: space data link and security protocol.⁹⁹

The first standard delineates prescribed standards for internal communication and information systems and the security measures needed for the same. The second standard provides for a robust security framework for space data systems through discussions on conceptual framework for data and security for space systems, a holistic information system for space missions, and a risk assessment mechanism within space data systems capable of being conveyed. The third standard explores the procedural safeguards for data authentication and confidentiality.

VI. CONCLUSION

It is an inevitable conclusion that space security perspectives are undergoing a paradigm shift in terms of technological developments and their impact on interpretation of existing legal instruments, development of industry standards and determination of liabilities under the international space law regime. The scope for harmonization is narrow at the moment considering the significant lack of jurisprudence around the aforesaid emerging issues. It must be noted that the dimensions of state liability from an orbital debris perspective will keep

⁹⁶ Theresa Hitchens, *Space Security-Relevant International Organizations: UN, ITU and ISO* in HANDBOOK ON SPACE SECURITY 507 (Kai Uwe Schrogl et al. Eds., 2nd ed., Springer 2014).

⁹⁷ ISO/IEC 7064:2002.

⁹⁸ ISO 20214:2015.

⁹⁹ ISO 21324:2016.

evolving as the legal framework tries to bridge the gap between itself and industry developments through certainty in interpretation, accurate enforcement of the extant legal instruments and a responsive regulatory approach. Finding the appropriate harmony in this scenario is therefore contingent upon the relevant stakeholders such as states, corporations, regulators engaging in convergence and not divergence. Further, with the rising influx of more companies into the space sector, the aforesaid issues are bound to take new dimensions from a state liability perspective and hence the researcher advocates for the following suggestions keeping in mind the aforesaid developments.

Existing definitions of 'weapons' and 'peaceful purpose' under the OST must be amended to include cyber weaponry to aid in certainty in interpretation and affixing liability.

The mechanisms of determining 'fault' liability under the Liability Convention, 1972 must incorporate criteria to identify such liability like extent of involvement by private corporations and states, differentiating between good faith mistakes and deliberate acts, among others.

Each of the five main international instruments on outer space law must incorporate best practices taking into account existing trends in legal development around issues of state liability, commercialization and technological progress. This shall add a layer of certainty to the challenges in enforcement of the provisions.

Health Care Practices among the Tea Plantation Labourers: A Sociological Study in the Tea Gardens of North Bengal

Taniya Basu Majumder¹

Abstract

In this modern age Health is a matter of concern to all strata and health care is one of the important aspects of human life. Worldwide mission has been started by World Health Organization (WHO), along with various governments, private as well as non-government organization to develop health care service among the population. But, despite remarkable progress in the field of diagnostics and curative and preventive health still there are disparities in the people's health among the different strata's or communities across the country on the basis of socio-economic and socio-demographic construct such as ethnicity, age gender, religion and caste, social class. Different studies show that, the distribution of health resources – practitioners, dispensaries, hospitals, equipment, beds, nurses, ANMs, drugs, etc. – is highly uneven between rural- urban poor - affluent and developed- backward section of populations in India.

Earlier the health, or lack of health, was merely judged by the attributes of genetic or biological disorders. But it is the discipline Sociology which has first established the close link between the ethnic traditions, socioeconomic status and cultural beliefs of individuals and spread of diseases. Where medical research might gather statistics on a disease, a sociological perspective of an illness would provide insight on what external factors caused the demographics that contracted the disease to become ill. The sociology of health and illness studies the interaction between society and health. In particular, sociologists examine how social life impacts morbidity and mortality rates and how morbidity and mortality rates impact society. This discipline also looks at health and illness in relation to social institutions such as the family, work, school, and religion as well as epidemiological statistics on the distribution of illness, the causes of disease and illness, reasons for seeking particular types of care, and patient compliance and noncompliance.

¹ Assistant Professor (Sociology), Department of Law, University of North Bengal

Therefore, the present paper Health Care Practices of the Tea Plantation Workers in North Bengal attempt to intensively study the working, living and health conditions of the tea plantation workers along with the socio- economic political factors affecting the health situations of workers and the role of the tea garden management and other stake holders from a holistic perspective as a socially produced phenomenon.

Keywords: *Health Care Practices, Tea Plantation, North Bengal*

I. INTRODUCTION

Plantations in colonial conditions are viewed as "a particular type of 'capitalist' enterprise with the following basic features: an agro industrial enterprise raising one or several crops on a large scale under tropical or semi-tropical climatic conditions; an international market orientation; the launching and subsequent maintenance of plantations under the ownership and control of foreign capital with the backing of the colonial state; the employment of a large number of producers and labourers (not necessarily wage workers) doing hard manual work under conditions of a primitive labour process; the use of a migrant and/ or immigrant labour system; and the mobilization and control of direct producers through economic and extra-economic coercive methods with the direct and indirect support of the colonial state. The class structure thus created through the use of coercion, open or concealed was sharply divided between white or sahib owners, managers and supervisors on one hand and non-white labour on the other."²

In other words, plantation can be defined as "an economic unit producing agricultural commodities (field crops or horticultural products, but not livestock) for sale and employing a relatively large number of unskilled labourers whose activities are closely supervised. Plantations usually employ a year-round labour crew of some size, and they usually specialize in the production of only one or

² Ranajit Das Gupta, *Plantation Labour in Colonial India*, 19, Issue 3-4 THE JOURNAL OF PEASANT STUDIES 173, 173-198 (2008) (15.02.22, 8 PM.), <https://www.tandfonline.com/doi/pdf/10.1080/03066159208438492?needAccess=true>

two marketable products. They differ from other kinds of farms in which the factors of production primarily management and labour are combined"³

With the continuous process of social change as a universal phenomenon, some sorts of changes have also been occurred towards the role of the state in Indian plantations after independence. As an outcome due to the political pressure led to welfare inputs and improvement in communication led to organization of the working class transformed the classical plantation system which is characterized by low wages, poor working conditions, isolation etc. into modern plantation system. However, Plantations worldwide were an advent of capitalism where cash crops like coffee, tea, rubber, sugar, banana and others started flourishing extensively. While defining a plantation the social process i.e. the way in which people of certain social origins were transferred to a totally different production process should not be dismissed. So, the plantation system has to be comprehended not just in terms of the economic consideration but also through the social relations that have shaped the plantation structure.

II. HISTORY OF THE GROWTH OF TEA PLANTATIONS IN INDIA

Governor General Warren Hastings who considered tea 'an article of the greatest national importance' to the British took the preliminary efforts to inspire the tea cultivation in India in 1776. There were two claimants for the discovery of tea in India. One was Sir Joseph Banks who was instructed by Hastings to prepare a series of summaries on farming of new crops in India for the East India Company and another was C. A. Bruce who upheld that he was the first European to locate the tea site in Assam. However, most authorities disposed to give the honor to Bruce. With the termination of the trade agreement between the British and China as well as the growing demand for tea in Europe coupled with the suitable geo-climatic conditions in North-India finally led to the introduction of tea cultivation in India.

Though, the tea plantations were introduced in India by the Colonizers yet, soon this industry emerged into a major industry in the economies and led to the

³ Backford L. George, *The Economics of Agricultural Resource Use and Development in Plantation Economies*, 18 No- 4 SOCIAL AND ECONOMIC STUDIES 321, 321-347 (1969), (Feb. 14, 2022, 8pm), <https://www.jstor.org/stable/27856401>.

development of a modern life along with a new social structure. The successive governments of India introduced several changes in this industry after independence. The tea sector is considered a modern industry and the owners of the industry are either leading companies or prominent individuals who benefit directly or indirectly in an immense way in the country. However, the workers in the tea estates form a backward community and live in a pitiable state.

In the colonial period the tea industry became the primary export commodity and foreign exchange earner in India. It is an industry which requires labour throughout the year, and the nature of work needs the involvement of both the male and female labour force. Plucking of tea leaves is an important activity and is a specialized job done by the female workforce in India. The tea industry provides employment to about one million workers in India. Though the percentage of the tea workers is marginal in the total labour force in India, but their participation is substantial in the respective tea producing states within the country. For example, the tea workers constituted around 28 per cent and 65 per cent of the total labour force in West Bengal and Assam respectively in 1999.⁴

III. TEA PLANTATION AND THE TEA LABOURERS IN NORTH BENGAL

Historically since 1650's labour migration was an important factor for the expansion of the world capitalist economy. The various reasons behind this migration were characterized by abject poverty, seasonal unemployment, indebtedness and recurrent famines. Thus, a large number of people from these places became victims and came to work in plantations, mines, mills and so on. Advance payment and the promise of better conditions, forced the helpless populace to get into contracts or agreements. This led to the so-called 'indentured system', which was followed by other types of recruitment into plantations.

Pradipta Chowdhury (1992) in his study 'Labour Migration from the United Provinces, 1881-1911' identified that, the eastern parts of United Provinces

⁴ Directorate of Census Operationst, District Census Handbook, Village and Town Directory, Darjeeling District, West Bengal, Part XII-A, p. vii., (Feb. 14, 2022, 2PM), lsi.gov.in:8081/jspui/bitstream/123456789/5318/1/35664_1991_DAR.pdf.

from where the labourers were taken to the tea plantations of Bengal and Assam, were the labour-catchment areas (LCAs). The author attributes to the institutional factors like decline of handicrafts and commerce, lack of investment by colonial state and the exhaustion of extensive margin in agriculture as the causes of large-scale labour migration from these areas. Mahapatra's study draws out the push and pulls factors for large-scale immigration from the Chotanagpur region between 1880-1920 to the tea plantations of Assam, Bengal and to the Jharia coalfields of Manbhum. He questions "the coincidence of the short-term conjunction of famines' between 1896 and 1899 with high immigration. Roughly, 10, 00, 000 people had left Chotanagpur during this period".⁵

Das Gupta's (1986) study on the structure 'of the labour market in colonial India in Assam tea industry states that indentured recruitment started from 1859 and continued till 1926. The planters later preferred the 'Sardari' system where the labourers were not under contract and were less expensive. This was the type of recruitment that existed mostly in North Bengal. A Tea Districts Labour Supply Association (TDLISA) was formed by most of the leading tea companies in Calcutta in 1877 and from 1917 it was called Tea Districts Labour Association (TDLA). While, the sardar acted as the direct recruiter these larger bodies functioned as the principal recruiting organization. The chowkidar's strict vigilance and the "agreement among the employers not to entice each other's labourer or to employ a labourer coming from other garden effectively restrained the freedom of movement".⁶

The tea plantation workers who are distinctly different from peasants and other industrial wage labourers come in the category of 'wage labourers' in North Bengal. These tea plantations labourers are chiefly the migrant labourers. With the modern industrial lines of production, the tea plantation sector has its own

⁵ P. P. Mahapatra, *Coolies and Colliers: A Study of Agrarian context of Labour Migration from Chotanagpur, 1880-1920* 1 Issue-2 STUDIES IN HISTORY, 247, 247-303 (1985), (Feb. 16, 2022, 9:30PM), <https://journals.sagepub.com/doi/10.1177/025764308500100206>.

⁶ Ranjit Das Gupta, *From Peasant and Tribesmen to Plantation Workers: Colonial Capitalism, Reproduction of Labour Power and Proletarianisation in North-East India, 1850's to 194*, P. 21, No.4 ECONOMIC AND POLITICAL WEEKLY, 2, 2-10. (1986), (Feb. 14, 2022, at 10PM), <https://www.jstor.org/stable/4375248>.

socio-economic culture compared to peasant agriculture. Unlike the other traditional occupations both tea cultivation and tea processing require a specialized and skilled labour force which make the life of the tea plantation labourers somewhat challenging in tea estates. The tea plantation workers mainly reside within the estate area in rows of rooms, which are generally called 'labour lines'. In North Bengal the tea plantation workers are also largely resides in the labour lines of individual houses or huts in clusters, which are strategically located in different parts of the tea estate to facilitate quick labour deployment and to protect the boundary of the estates.

Since the plucked green leaves are to be processed immediately, hence maximum tea estates have their own tea factories. The labour force in the large-scale tea estates is therefore of two types: (a) workers in the field operation, and (b) workers in the factory operation. In the field operation plucking of tea leaves, (two leaves along with the bud) regarded as by the chief activity in the tea estates which is mainly done by the female workers. For fresh budding this cyclical activity needs a gap of seven days. The overall maintenance of the tea bushes by applying fertilizers, weeding, pruning, etc. are generally carry out by the male workers.

The workers in the factory operation form another segment of the total workforce. The management of the tea estates constitute by the staff and the executive managers. The executive manager and the assistant manager or assistant superintendent is recruited from the elite in the country. In the colonial period and after independence until the industries were nationalized or transformed into the local companies the British were employed as managers of estates in India.

HEALTH CONDITIONS OF THE PLANTATION WORKERS – A HISTORICAL REVIEW

A large number of Indian labourers were migrated across seas and transported particularly in the harsh life on plantations of the countries like Africa, S.E. Asia, the Pacific and West Indies just after the abolition of slavery system in 1834. The situations of these plantations were vulnerable combined with the problem of over-tasking. Incomplete, unsatisfactory as well as imperfect work regarded as offence which led to high rate of conviction. The constant failure to perform the allotted tasks, inability to satisfy more demands couple with the

incompetence to execute heavier work generate a sense of lack self-esteem and loss of self-confidence among the workers which in turns indulge the incidences of suicides among the plantation workers. But these occurrences of suicides, accidents, murders contributed only a minor part to the contemporary mortality rate; the main causes of high mortality in the plantations were attributed by the diseases like diarrhea and dysentery malaria and tropical ulcers. The situation of India is also identical to the overseas series of events such as the diseases, deaths and challenging working conditions were part of life of the workers in the evolution of plantations.

During the period of industrialization, a significant number of studies on the health conditions of the working class revealed that, issues such as low wages, poor working and living conditions were some of the key factors responsible for the poor health of the plantation workers. Frederick Engels's most popular book "Conditions of the Working Class in England in 1844" is one of the pioneering works in this field which explains that, the squalor-like living conditions, overcrowding, inadequate wages, inhuman working conditions, meager food or at times no food, caused ill health and even death among the working class.

V. Krishnamurty in his article Changing Features of Working and Living Conditions of Plantation Workers in the workshop Socio-Economic Conditions in Plantations in India Proceedings of a National Tripartite Workshop organized by The International Labour Office in Conoor, India in November 1989 provide a detailed description of the worldwide situation of the plantation labourers. This study highlights the 'relationship between housing and the health status of the workers' by comparing the several factors like number of rooms; size of rooms, number of dwellers living in the house, type of cooking facilities, and water-heating and space systems within the residence. The study concluded with some basic observation that, with damp dwellings and poor ventilation along with the use of firewood or other biomass as the main form of household fuel, and if its use is mainly in open fires in badly ventilated rooms, the emissions contained in the smoke can provide an environment beneficial to high incidence

of respiratory diseases such as bronchitis, respiratory infections, asthma and pneumonia.⁷

A. Healthcare Practices among the Tea Plantation Labourers in North Bengal: An Overview

In this modern age Health is a matter of concern to all strata and health care is one of the important aspects of human life. Worldwide mission has been started by World Health Organization (WHO), along with various governments, private as well as non-government organization to develop health care service among the population. But, despite remarkable progress in the field of diagnostics and curative and preventive health still there are disparities in the people's health among the different strata or communities across the country on the basis of socio-economic and socio-demographic construct such as ethnicity, age gender, religion and caste, social class. Different studies show that, the distribution of health resources – practitioners, dispensaries, hospitals, equipment, beds, nurses, ANMs, drugs, etc. – is highly uneven between rural- urban poor - affluent and developed- backward section of populations in India.

Earlier the health, or lack of health, was merely judged by the attributes of genetic or biological disorders. But it is the discipline Sociology which has first established the close link between the ethnic traditions, socioeconomic status and cultural beliefs of individuals and spread of diseases. Where medical research might gather statistics on a disease, a sociological perspective of an illness would provide insight on what external factors caused the demographics that contracted the disease to become ill. The sociology of health and illness studies the interaction between society and health. In particular, sociologists examine how social life impacts morbidity and mortality rates and how morbidity and mortality rates impact society. This discipline also looks at health and illness in relation to social institutions such as the family, work, school, and religion as well as epidemiological statistics on the distribution of illness, the causes of disease and illness, reasons for seeking particular types of care, and patient compliance and noncompliance.

⁷ Krishnamurty, V. Changing Features of Working and Living Conditions of Plantation Workers, The International Labour organization: 19-32, (1990). (Feb. 14, 2022, 8PM), https://www.ilo.org/public/libdoc/ilo/1990/90B09_167_engl.pdf.

However, keeping the Plantation Labour Act in mind the comparative studies conducted by different scholars between the tea plantations of South India and North East India (West Bengal and Assam) based on the parameters of remunerations, housing, health and other welfare amenities demonstrates that, in North East India there is a huge difference in the wage structure among the workers along with the inadequate health services where the workers are mostly dependent on the part-time doctors which is not in compliance with the rules of the Plantation Labour Act.

Health services are an important component of the welfare amenities which must provide to working class by the management. Several empirical studies during the late 19th century, established that, the chief understanding of disease causation was the relationship between lack of basic resources, poor environmental surroundings combined with toxic air and vapours, ill health and mortality. The communicable diseases like plague, typhoid, cholera and tuberculosis were regarded as the major causes of death and were referred to as the disease of the poor. By providing descriptive empirical insights into the poor conditions of the working class various sociological and epidemiological inquiries establish a strong linkage between poverty and ill health.

According to the Plantation Labour Act (PLA), "Section 10- In every plantation there shall be provided and maintained so as to be readily available such medical facilities for the workers (and their families) as may be prescribed by the State Government."⁸ But the health security of the plantation labourers has been neglected from the very beginning. In fact, their problems began from the time they began their journey. U. Phukan (1984) in his book *The Ex-Tea Garden Population in Assam* displays that their death rate was very high because of the poor arrangements. Disease is reported as a reason to have wiped out completely the first batch of labourers in Assam migrated from Jharkhand.⁹

R.L.Sarkar (1986) highlighted in his book "Tea Plantation Workers in the Eastern Himalayas - A Study on Wages, Employment and Living Standards" that, around 70 per cent to 80 per cent of employment in the hill areas is dependent upon the tea industry. It provides subsistence indirectly to many people in hill areas by supporting ancillary avenues of employment. However,

⁸ The Plantation Labour Act, 1951, No. LXIX, Acts of Parliament, 1951 (India).

⁹ PHUKAN, U, *THE EX-TEA GARDEN POPULATION IN ASSAM*. (B.R. Publishing 1984).

the management of the estate has not been protecting their own labour force by providing adequate wages and the basic amenities such as food security, housing facilities, education opportunities, and most importantly the health as well as medical facilities for their survival. The tea estate management usually ignores the labour problems and consequently the tea pluckers lack motivation and interest in their jobs.¹⁰

Amalendu Guha in his book *Planter Raj to Swaraj: Freedom Struggle and Electoral Politics in Assam* discussed about the lack of basic requirements of the plantation workers in Assam by pointing out their low wages, inadequate housing accommodations, unsatisfactory medical facilities and insufficient food coupled with the ill-treatment from the managerial owner class, which make the life of the plantation workers miserable. Although there exist a very few legal provisions for the protection of the rights of the workers but, mostly of them act in favour of the planters.¹¹

Gita Bharali in her seminar paper *The Tea Crisis, Health Insecurity and Plantation Labourers' Unrest*, show that most of the tea gardens in Assam lack the basic health facilities they are supposed to have. A hospital is a distant dream and very few have a crèche as such. In most cases an untrained worker looks after them in a run-down building. In more than one garden the crèche is in the place used as a cowshed. The children do not get proper meals. Most dispensaries are ill equipped without enough medicines and with untrained staff, have inadequate drinking water, toilet and basic facilities. A few gardens have trained nurses or even doctors.¹²

Several studies based on tea gardens of Assam shows that, the management is either less interested or become negligence towards various welfare provisions

¹⁰ R. L. SARKAR & M. P. LAMA, *TEA PLANTATION WORKERS IN THE EASTERN HIMALAYAS- A STUDY ON WAGES, EMPLOYMENT AND LIVING STANDARDS*, P 51-58 (Atma Ram and Sons 1986).

¹¹ Guha, Amalendu, *Planter Raj to Swaraj: Freedom Struggle and Electoral Politics in Assam, 1826-1947* INDIAN COUNCIL OF HISTORICAL RESEARCH 1977.

¹² Bharali, Gita. (2007), *The Tea Crisis, Health Insecurity and Plantation Labourers' Unrest*. A seminar paper presented at the seminar, *Society Social Change and Sustainable Development* Organized by Department of Sociology, N.B.U. April, 2007. (Feb. 15, 2022), <https://onlineministries.creighton.edu/CollaborativeMinistry/NESRC/Gita.html>.

of the tea plantation workers which make their life vulnerable. Lack of proper housing and sanitation, collapse of the company's health system prevalence the diseases like malaria, hookworm, gastro-enteritis, and even cholera.

But in North Bengal most of the studies that conducted on tea plantation sector are generally concentrate on the economic aspect, which create a paucity of data particularly on the health status of the plantation workers in Terai and Dooars Region of North Bengal. The limited studies which are available on the health status of the plantations workers in North Bengal are of isolated and fragmentary in nature. There is an urgent need for initiating the area specific, problem specific, action-oriented health study in consonance with the felt needs of the plantation workers. The study should be mission oriented, having practical applications and directed towards improving the quality of the prevailing health situation as well as the health care practices of the poor tea plantation labourers.

Therefore, the present paper Health Care Practices of the Tea Plantation Workers in North Bengal attempt to intensively study the working, living and health conditions of the tea plantation workers along with the socio- economic political factors affecting the health situations of workers and the role of the tea garden management and other stake holders from a holistic perspective as a socially produced phenomenon.

According to Xaxa (1985) in 1876, the number of tea gardens in North Bengal was only 13, which had increased 235 by 1901.¹³ An exhaustive survey conducted by Regional Labour Offices under jurisdiction of Joint Labour Commissioner, North Bengal Zone in 2012 reveal that there are 276 organised tea estates in North Bengal. These tea estates are spread over Darjeeling and Jalpaiguri Districts. Only one set tea estate i.e., Cooch Behar T.E. is located in Cooch-Behar District. According to this survey, the hill area which comprises of three sub divisions has 81 tea estates among which 46 tea estates in Darjeeling district, 29 in Kurseong sub-division and 06 in kalimpong district. The Terai Region comprises only one sub divisions namely Siliguri Sub Division with 45 Tea Estates. The Dooars Area which has 150 tea estates again divided into three

¹³ V. Xaxa, *Colonial capitalism and underdevelopment in North Bengal*, 20 No.39 ECONOMIC AND POLITICAL WEEKLY, 1659, 1659-1665. (1985), (Feb. 14, 2022, 10PM), <https://www.jstor.org/stable/4374874>.

different sub divisions these are Jalpaiguri districts with 33 Tea Estates, Malbazar Sub Division with 56, and Alipurduar district with 61 Tea Estates.¹⁴

The thriving tea industry in India suffered a serious financial setback in the late 1990s and early 2000s as international tea prices collapsed from Rs. 78 in 1998 to Rs. 55 in 2004. With shrinking exports and rising labour costs, 25 loss making tea plantations in North Bengal in 2002 were closed down without prior notice and blocking labour payment, provident fund and gratuity, leaving thousands of plantation workers and their families in a state of utmost penury and deprivation.¹⁵ The tea plantation labours not only become jobless but also lack all the basic necessities including food, drinking water and shelter, this deficiency of sufficient and proper food turned into malnutrition and increases the cases of starvation death. A working paper remarkably observed a peculiar pattern of some closed tea gardens; the tea garden reopens during peak season and again closed during the lean period. This frequent and repeatedly closure and reopen nature of tea gardens are more dangerous for the surviving labour.

According to The Hindu news-paper in West Bengal there are 225 tea estates among which an estimated 23 tea gardens are now closed.¹⁶ But according to the 65th Annual Report 2018-2019 provided by the Tea Board India reveal that in Dooars region particularly in Alipurduar and Jalpaiguri districts 11 tea gardens have been closed and many are abandoned or are seek.¹⁷

However, the immediate industrial sickness and the consequent shutdown in several tea gardens resulted into deprivations which affect the life of the socially and economically marginalized workers, their family members along with their

¹⁴ Synopsis on Survey of Tea Gardens Conducted by Regional Labour Offices under jurisdiction of Joint Labour Commissioner, North Bengal Zone. (2012) (Feb. 15, 2022, 8 PM), file:///C:/Users/THIS PC/Downloads/Synopsis-of-Tea-Garden-Survey-Final-Report.pdf.

¹⁵ *Starvation Deaths in Tea Plantations in India, Rights and Development*, 1 Issue-4 CENTRE FOR DEVELOPMENT AND HUMAN RIGHTS 26, 26-28 (2006), (Feb. 02, 2022, 8:40 PM), <https://www.sum.uio.no/english/research/projects/hurep/publications/other/2007-bulletin-jun.pdf>.

¹⁶ THE HINDU 29th June 2014, (Feb. 16, 2022), <https://www.thehindu.com/news/cities/kolkata//article60069140.ece>.

¹⁷ Tea Board India 65th ANNUAL REPORT 2018-19. (Feb. 16, 2022, 8:35 PM), www.teaboard.gov.in/pdf/65th_Annual_Report_2018_19_Eng_pdf874.pdf.

children. It has been estimated that more than 3,000 workers of abandoned tea gardens of North Bengal have succumbed to starvation deaths in between 2002 and 2006. Studies also show that 70% of the people of closed tea gardens are in the Chronic Energy Deficiency III stage.¹⁸ Several surveys and press coverage conducted on these closed gardens reveal the cases of starvation deaths, sufferings, malnutrition and human trafficking as a consequence of the partially or fully collapse of the welfare schemes and the public distribution system combined with the almost absent of basic amenities like safe drinking water, health care, primary education and electricity.

In 2005 a nutritional survey was conducted on tea workers of Dooars in West Bengal. The survey team collects data from six open, sick and closed tea gardens. Four out of six tea gardens identified as a starving group. All adult members can be labelled as a “starving community” or “at critical risk for mortality from starvation.” The overall result is all surveyed garden showing alarming BMI (Body Mass Index) rate. The study also found peoples are suffering from diarrhea and vomiting, which influences to starvation related death. Vulnerable closed tea garden area converts to a potential field for traffickers. In North Bengal, trafficking incidence is higher among close and sick tea gardens than other tea gardens which did not face closure and sickness.¹⁹

The several sections of the Plantation Labour Act 1951 entitled the workers to get the minimum basic amenities within the plantation. According to “Section 8 of PLA 1951 in every plantation effective arrangement shall be made by the employer to provide and maintain at convenient places in the plantation a sufficient supply of wholesome drinking water for all workers”. As per the “Section 15 of PLA 1951 it shall be the duty of every employer to provide and maintain necessary housing accommodation for every worker including their

¹⁸ Talwar Anuradha et. al., Study on Closed and Re-opened Tea Gardens in North Bengal. Paschim Banga Khet Majdoor Samity & International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco, Plantation and Allied Workers' Associations (IUF) 3-10 (2005). (Feb. 14, 9:45 PM), <https://www.scribd.com/document/111811084/PKMS-IUFstudy>.

¹⁹ S. Chakraborty, *Tea, tragedy and child trafficking in the Terai Dooars*, 48 No.39 ECONOMIC AND POLITICAL WEEKLY, 17,17-19 (2013), (Feb. 16, 2022, 8 PM), <https://www.jstor.org/stable/23528471>.

families”. According to Section 10 “in every plantation there shall be provided and maintained so as to be readily available such medical facilities for the workers (and their families) as may be prescribed by the State Government.”²⁰

However, the reality is something different several survey reports of the closed tea gardens reveal that, although in accordance with law the tea garden owners are assigned to provide the basic amenities such as the supply of safe drinking water, electricity, education, healthcare and primary medical facilities yet, they have been stopped to deliver these welfare schemes and the public distribution services in the closed tea gardens. The tea plantation workers not merely receive the cash component as their wages but also these workers are entitled to a number of other facilities subsidised food grains in the name of rations free quarters, electricity and free fuel for cooking, unpaid health care facilities at the Tea Plantation’s Hospital, Crèches and honorary Primary education for their children which form an important part of their wages. But with the disaster in the tea industry the electricity has been cut off which in turns affect the water supply as it is electricity dependent. In some cases, as the workers are not receiving drinking water, they along with their families have been forced to depend on river water that is contaminated with pesticides.

As an obvious outcome the workers and their families have been suffering from malnutrition, anemia and other nutrition related problems. Combined with the lack of medical treatment, the outcomes have been resulted into fatal in some cases. As most of the tea gardens don’t maintain proper death registers so the exact number of persons who died is not clear. Therefore, the fatal cases are the product of hunger, starvation, malnutrition as well as basic medical care crisis which is strongly linked with unemployment.

Different Studies even, show that, the garden health professionals if available give the same medicine for different type of diseases. This clearly reveals about the acute shortage of medicines of garden hospital or dispensary. Considering the fact that, the garden workers are exposed to several communicable, preventable and occupational diseases and the gardens are located far away from Government hospitals, absence of proper medical facilities including qualified doctors is a matter of major concern for workers and their family members. Furthermore, those seeking medical services outside have run from pillar to pole

²⁰ The Plantation Labour Act, 1951, No. LXIX, Acts of Parliament, 1951 (India).

to reimburse their bills. Surprisingly, the conditions of so-called 'good' gardens do not differ strikingly in this respect.

An exhaustive survey conducted by Regional Labour Offices under jurisdiction of Joint Labour Commissioner, North Bengal Zone in 2012 reveal that, of all the 273 tea estates in West Bengal has displayed acute mismanagement and miserable labour welfare situation. According to the survey report, out of 273 tea estates, only 166 have hospitals. Out of these 166, only 56 tea estates have full time residential doctors. Other 110 tea estates' hospitals depend on visiting doctors. Among doctors of 166 tea estates, only 74 doctors have degree of MBBS, others are non- MBBS. Out of 166 tea estates having hospitals, 116 do not have any nurse. 107 tea estates (hills -64, Terai- 20 and Dooars-23) do not have any hospital. Out of 273 tea estates, 85 do not have any dispensary. Ten tea estates have neither hospital nor dispensary. Out of 273 tea estates, primary health centers (PHCs) exist in only 160, 113 tea estates (hills-38. Terai-23 and Dooars-52) do not have any PHC. Out of 273 tea estates, 160 provide ambulance. Many of these ambulances are not up to the standard. This survey report reveals the vulnerable poor condition of the health and medical facilities of the tea plantation labourers in the tea estates.²¹

The cycle between hunger - disease - low levels of productivity, (measured both in terms of absence from work as well as duration) - low wages - indebtedness - reduced consumption levels - disease, is reflective of how the development process has, largely, bypassed the tea plantation workers. For a majority of the worker, illness has serious economic consequences on their fragile incomes.

The right to adequate food and nutrition is a basic human right, both under international and domestic law and it is the duty of the state to protect its citizens from hunger, malnutrition and starvation and provide basic health care. The occurrence of starvation deaths is an affront to human life and dignity. The re-opening and revival of the tea gardens is the only hope left for the thousands

²¹ Synopsis on Survey of Tea Gardens Conducted by Regional Labour Offices under jurisdiction of Joint Labour Commissioner, North Bengal Zone (2012) (Feb. 16, 2022, 8 PM), file:///C:/Users/THIS PC/Downloads/Synopsis-of-Tea-Garden-Survey-Final-Report.pdf.

plantation workers who have been left to starve until death and all measures to restore their basic rights must be urgently and effectively implemented.²²

Thus, on account of the poorly developed market, it is imperative for government to shoulder the responsibility of providing a package of health care services that would provide early cure to malaria, TB and respiratory illnesses, gastrointestinal problems, mother and child health care services, fevers, health and nutrition education. Such a package does not need high investments in equipment's and buildings but requires a well-trained and motivated health personnel provided with basic facilities. Only such a system would make the health care system of the tea gardens accessible, affordable and need based.

IV. CONCLUSION

Labour on the tea plantations is an important aspect as at specific points of production cycle they are engaged to supply a constant flow of pre-processed green leaf to the estate factory throughout the season. The ample profit of the tea industry accelerates on the rise in foreign exchange which in-turns demands the increasing productivity which depends more on the labourers' proficiency and productivity. So, to earn the maximum profit, the managerial boards of the tea plantations exercise strict control over the workers to appropriate as much as surplus labour in nominal wages and by exploiting in such a way the plantation labourers are transformed into human machines.

Therefore, to protect their rights and security some legal steps must be constitute relating to the welfare of the plantation workers which make them able to reflect the positive returns. According to the requirement adequate legislations relating to the welfare of the plantation workers have been established, but what is lacking is its proper implementation.

Several studies outline the fact that, the aspect of the rights regarding the health, welfare and security of the tea plantation labourers' has been bypassed by numerous reasons.

²² Starvation Deaths in Tea Plantations in India, Rights and Development, 1 Issue-4 CENTRE FOR DEVELOPMENT AND HUMAN RIGHTS P. 26, 26-28 (2006), (Feb. 16, 2022, 8:30 PM), <https://www.sum.uio.no/english/research/projects/hurep/publications/other/2007-bulletin-jun.pdf>

The primary causes behind this are the absence of co-operation between the Government and the management of the plantation regarding the implementation of any welfare measures and benefit schemes, it also has arisen due to harsh mentality and unkind behavior of the managers inherently bearing by the workers in the tea gardens and the constant negligence in the concern of the management to execute the basic livelihood amenities for the labourers in the plantation. The entire practice of tea processing initially from the plucking of green leaves from the tea bushes to transform the raw material to the finished product and finally pack it for sale exclusively done by the tea plantation workers. In spite of that, they are exploited and used by the management since the inception to till date.

Therefore, whatever be the grounds of deprivations there is an urgent need to restore, restructure as well as reorganize the provisions regarding the working environment, the welfare amenities along with the health hygiene and other benefits. Government's outlook and attitude towards the working class must be changed and upgraded and there is an immediate need to seek better lookout for the situation of the plantation labour before the incompetence of the labourers may turn into stagnation of the Tea Industry.

Online Stream and Recording of Court Proceedings: A Constitutional Right

Akshay Baburao Yadav¹ &
Shivanjali Mane²

“Yatho Dharma ThathoJya”- where there is justice, there is victory.

Abstract

The judiciary takes a prominent role in every democratic country. The meaning of democracy is vague without independence and propend judiciary. The judiciary endorses to maintain check and balance between the executive and legislative. Besides all this, now the situation like Covid 19 makes the system more aggravate. To avoid this, India has to take the alternative in this digital era. Our attitude towards the court system has been developed in such a way that, when the word judiciary comes to our mind, we start to create the image of courtrooms in our mind. Virtual judiciary is another form of deliration of justice without any physical existence of the court room. This paper lays down emphasis on the Constitutional Right to Access to Justice especially by means of draft Model rules of Live Streaming and Recording of Court Proceedings published by E-Committee, Supreme Court of India, Information and Communication Technology in Indian Judiciary on 28th May 2021. Further it analysis the international best practices to find out the challenges and remedies revolving around the online streaming and recording of court proceeding which promotes reinforcing of public faith, transparency in Judicial System. This paper neither favoring online court proceedings or nor critiquing the traditional court proceedings. But the paper tries to balance between global development, technological advancement and hit of pandemic during that. It also takes bird eye view on judicial decisions. Lastly paper ends with personal analysis and suggestions regarding the possible challenges and remedies.

Key-words: *Online streaming, Recording of Court Proceedings, E-courts system, video conferencing of court proceedings.*

¹ Teaching Associate, National Law School of India University, Bengaluru; Next Generation Leader, Consumer International.

² Student, K.L.E. Society's Law College Chikodi

I. INTRODUCTION

The world has witnessed the grapples of the COVID-19 pandemic and has presented with various challenges and an opportunity to adopt technology. The technology has brought the whole world closer on a single click by turning it into a global village alias cyberspace of digital world estimating 3.8 billion of smart phone users at global level wherein India estimates 760 million smart phone users as on 29th June 2021³ and in 2020, India has nearly 700 million internet users across the country⁴. This advent has also brought justice delivery system at the door step by means of so called ‘Online Dispute Resolution’⁵ and has given the meaning to saying The State has the obligatory duty to render and protect the rights of its citizens enhancing Access to Justice and it was being very difficult as the complete lockdown during the pandemic period has changed the patterns of lifestyle of all human beings. But the adoption of the technology is been ensuring the access to justice which would not come to a standstill in view of the health risks, travel restrictions and social distancing measures owing towards Covid-19. The courts have to have to find out new possibilities during the pandemic to render justice and court adopted both virtual and in-personal hearing. The Kerala High Court within whose jurisdiction the first COVID-19 patient in India is confirmed, has put restriction on the entry of public to court complex and became the first court in the country to start hearing of matters via video conferencing and started live streaming proceedings in India and disposed of 7521 cases through video conferencing. The highest number of e-filing was recorded in the district and session courts. The highest disposal rate was given by the local courts. 401 cases were registered via e-filing

³ Shanglian Sun, Statista Research Department, “Smartphone users in India” (Jul. 5, 2021, 3.30 PM) <https://www.statista.com/statistics/467163/forecast-of-smartphone-users-in-india/>.

⁴ Sandhya Keelery, Number of internet users in India 2015-2025 (Jul. 5, 2021, 4 PM), <https://www.statista.com/statistics/255146/number-of-internet-users-in-india/>.

⁵ UNCITRAL Technical Notes on Online Dispute Resolution, Official Records of the General Assembly, Seventy-first Session, Supplement No.17 (A/71/17), Para. 217. Defines ODR as is a “mechanism for resolving disputes through the use of electronic communications and other information and communication technology”. The process may be implemented differently by different administrators of the process, and may evolve over time.

and 400 cases disposed through video conferencing setting.⁶As described by the Australia courts as, 'E-courts have resulted in reduction of trial time and are likely to reduce the costs of trial'.⁷ The same is been statutorily recognized under various legislation in India such as Information Technology Act 2000, The Indian Evidence Act 1872, Consumer Protection Act 2019⁸. The judiciary has also recognized video conferencing is a valid mode and is permitted. Actual presence of the parties is not necessary for conversation and concluding of contract as it can be done by electronic media and technology.⁹

II. THE GLOBAL DEVELOPMENT OF ONLINE COURT SYSTEMS

The development of the Online Court system is an advent of the western countries. The reference of this system, can be found in 1997 in the writings of Professor Frederick I Lederer,

'The Courtroom is a place of adjudication, but it is also an information hub. Outside information is assembled, sorted and brought into the Courtroom for presentation. Once presented, various theories of interpretation are argued to the fact finder who then analyses the data according to prescribed rules (determined by the judge through research, analysis and interpretation) and determines a verdict and result. The Courtroom is thus the centre of a complex system of information exchange and management. Ultimately because lawyers and judges deal continuously with 'data', high technology Courtrooms exist and Virtual Courtrooms are possible.'¹⁰

⁶Mc Glothlin Courtroom (W & M Law school) (Jul. 4th, 2020, 8.15PM) <http://www.livelaw.in/news-updates/covid-and-courts-kerala-courts-dispose-10919-cases-via-video-conferencing-155097>.

⁷*Harris Scarfe and others v. Ernst and Young*, No. 3, (2005) SASC 407.

⁸ Sec. 35 & 38(6) Consumer Protection Act, 2019-empowered its three-tier mechanism to consider the complaint filed through electronic modes and has also authorized to hear examination of the parties through video conferencing.

⁹*State of Maharashtra v. D. Praful B. Desai* (2003) 4 SCC 601, *Grid Corporation of Orissa Ltd. v. AES Corporation* AIR 2002 SC 3435, *Shakti Bhog Food Ltd. v. Kola Shipping Ltd.* (2009) 2 SCC 134.

¹⁰ Frederick I Lederer, *The Courtroom as a Stop on the Information Superhighway*, REFORM, Spring 1997, 4,4

The Lederer's writings have given pace to digital incursion in all facets of human activity including shopping, governments using these in facilitating schemes, social welfare benefits etc. and has become the omnipresent feature of Courtroom. The US McGlothlin Court room set up at The Centre for Legal and Court technology is the world's most technologically advanced trial and appellate Courtroom.¹¹ This Courtroom allows the judges, counsel, witnesses, interpreters, court reporters, and jurors to appear the court from remote areas. The audio recording of all oral arguments by Supreme Court of United States began since 1955 and are maintained by National Archives and Records Administration. The US Supreme Court network pool will distribute the teleconference live audio feed to network subscribers. C-SPAN will distribute the audio live via the Capitol Hill hub to all news organizations accredited by the Congressional Radio and Television Gallery¹². The Singapore's Technology Court¹³, has a Local Area Network which allows use of imaging, multimedia and video conferencing further it also allows litigation support system for presentation, a Computer Based Recording Transcription System (CBRT), a sophisticated audio-visual system (AVS) which allows various types of audios and video information to be presented with ease and a videoconferencing to allow foreign witnesses to give evidence in any proceedings. The Supreme Court Info Kiosk System (SCIS) which has touch sensitive screen and allows a user to obtain information on hearing schedules, the location of counter services in the Supreme Court and to call up a multimedia floor directory of the Supreme Court complex.¹⁴ The various other countries such as Turkey's UYAP, Canada Videoconferencing technology¹⁵, Italy's Online Civil Trail has transformed the

¹¹William And Mary Law School "Centre for Legal Court and Technology (Jul. 6 2021, 8 PM) <https://www.legaltechcenter.net/about-us/mcglathlin-courtroom/>.

¹² Supreme court of the United States media advisory regarding October teleconference argument audio (Jul. 7, 2021, 9 PM) https://www.supremecourt.gov/publicinfo/press/pressreleases/ma_10-01-20.

¹³The Singapore's Technology Court (Jul. 7, 2021, 7 PM) <http://www.gov.sg/judiciary/supremect/computerisation/index.html>.

¹⁴Allison Stanfield, Cyber courts: using the Internet to assist court processes, (Jul. 4, 2021, 6.34 PM) <http://www.ra.ethz.ch/cdstore/www7/1878/com1878.htm>

¹⁵ Amy Salzyn, *A New lens: Reframing the conversation about the use of videoconferencing in civil trials in Ontario* 'Osgoode HALL LAW JOURNAL 2012 vol. 50(2) 431). See also Rule 1.08 of the Ontario Rules of Civil Procedure provides that a witness's oral evidence at trial may be received by videoconference if the parties

court system to be more transparent. The unpredictable pandemic lockdown has brought forth crisis affecting human lives and also crippled the functioning of Judiciary. In order to adjudicate discharge its constitutional mandate of providing access to justice at all times, the Courts has rolled out Virtual Court hearings. The best practices that are followed with respect to online streaming and recording of court proceedings in other countries are as follows,¹⁶

- **United States:** since 1955 audio recording and transcripts of oral arguments has been allowed.
- **Australia:** live or delayed broadcasting is allowed but the practices and norms differ across courts.
- **Brazil:** since 2002 live video and audio broadcasting of court proceeding, including the deliberations and voting process undertaken by the judges in court is allowed.
- **Canada:** proceedings are broadcast live on cable parliamentary affairs channel, accompanied by explanations of each case and the overall process and powers of the court.
- **South Africa:** since 2007 the SC of South Africa has allowed the media to broadcast court proceedings in criminal matters as an extension of the right to freedom of expression.
- **United Kingdom:** after 2005 proceedings are broadcast live with a one-minute delay on the court websites but coverage can be withdrawn in sensitive Appeals.

III. COMMENCEMENT OF THE IDEA OF LIVE STREAMING OF COURT PROCEEDINGS

All the Courts are functioning through video conferencing throughout the Covid-19 lockdown and even at the instant. Advocates, the parties, victims, corpses etc. all are participating within the court proceedings during the course of the hearing through video conferencing. Also, within the model video conferencing rules as prescribed by the e-Committee of the Supreme Court, it has been only if the overall public are visiting be allowed to appear at the

consent; and that in the absence of consent, evidence may be received by videoconference upon motion or on the court's own initiative.

¹⁶ Live Streaming of the Supreme Courts Proceedings (Jul. 5, 2021, 6PM) <https://www.drishtias.com>

hearing conducted through video conferencing. The Supreme Court in *Swapnil Tripathi v Supreme Court of India*¹⁷ has ruled in favor of opening up the apex court through live-streaming. It held that the live streaming proceedings may be a component of the correct to access justice under Article 21 of the Constitution. However, the judgment has remained unimplemented. The e-Court Mission Mode Project was conceptualized with a vision to transform the Indian Judiciary by ICT enablement of Courts. The Learned Attorney General of India Mr. K. K. Venugopal submitted his proposition¹⁸ for live streaming of court proceedings. Mr. Venugopal was retorting to the Writ Petition No. 66 of 2018 filed by Senior Advocate Indira Jaising, who was seeking a declaration for allowing live streaming of the case proceedings within the Hon'ble Supreme Court in cases which hold constitutional and national importance. She had also focused on framing of guidelines with relevancy live streaming. The Hon'ble Court held the Ratio Decidendi of the case within the purpose that 'live streaming is basically the use of technology to 'virtually' expand the courtroom area beyond the physical four walls of the courtrooms¹⁹.

Recently, the Standing Committee of the Parliament tabled its 103rd Report titled as “103rd Report on Functioning of Virtual Courts/Court Proceedings through Video Conferencing” before both the Houses of Parliament on 11–9-2020²⁰ through Vide Para 2.38 (at p. 10) of the Report, the said Public Accounts Committee (PAC) Report observed thus:

2.38 The Committee notes that world over, court proceedings are recorded in some form or the other. The Supreme Court has time and again emphasized the significance of live streaming of court proceedings in promoting openness and transparency which in turn reinforce public faith in judicial system. The Committee agrees with the observation made by the Supreme Court that live

¹⁷ *Swapnil Tripathi v. Supreme Court of India* (2018) SCC 628.

¹⁸ Writ Petition No. 66 of 2018.

¹⁹ THE HINDU: LIVE STREAMING OF COURT PROCEEDINGS (Jul. 4, 2021, 5 PM) <https://www.thehindu.com/news/national/live-streaming-of-court-proceedings>.

²⁰ 103rd Report prepared by the Rajya Sabha Secretariat New Delhi in September 2020. The Report was prepared by the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, comprising eminent members of the Bar like Shri Bhupender Yadav, Mr. Vivek K. Tankha, Mr. P. Wilson and thirty other members of Parliament.

streaming court proceedings, especially cases of constitutional and national importance having an impact on public at large or a section of the public will promote transparency and openness. The litigant need not come to the court to watch the proceedings and thus will reduce crowding inside the court. The judiciary may also consider broadcasting virtual hearings of certain specified categories of cases to further the principle of open justice and open court.”

Opening the vista of the Courtrooms transcending the four walls to accommodate an oversized number of viewers can epitomize transparency, good governance, and accountability. It absolutely was said that since no one can plead ignorance of law, there is a corresponding obligation on the State to spread awareness about the law and so the developments thereof including the evolution of the law which might happen within the method of adjudication of cases before this Court.

Whereas to imbue greater transparency, inclusivity and foster access to justice, it's expedient to line up infrastructure and also the framework to enable live-streaming and recording of Proceedings These Rules are framed by the state supreme court of Judicature within the exercise of powers under Article 225 or relevant statute where applicable, and Article 227 of the Constitution of India. These Rules will apply to the tribunal of Judicature and to the courts and tribunals over which its supervisory jurisdiction²¹.

The right to access justice, guaranteed under Article 21²² of the Constitution, encompasses the right to access live court proceedings. An India stand alone amongst leading constitutional democracies is not maintaining audio or video recording or even a transcript of court proceedings. The Indian Constitution upholds the social dignity of Indian citizens by establishing fundamental rights. The inherent rights guaranteed by the Indian Constitution that extol the esteem of someone's existence include 'Equality,' 'Freedom,' 'Cultural and academic rights,' 'Freedom of faith,' and 'Constitutional remedies.' But, to what extent do these rights complement each other in terms of managing the results and

²¹ Constitution Of India, Article 225

²² Constitution of India, Article 21

sustaining India's democratic machinery?²³The Hon'ble Supreme Court of India on 26.09.2018 through the Writ Petition (Civil) No. 1232 of 2017²⁴ with Writ Petition (Civil) No. 66 of 2018²⁵, Writ Petition (Civil) No. 861 of 2018²⁶ and Writ Petition (Civil) No. 892 of 2018²⁷ allowed the 'Live Streaming of Supreme Court case proceedings on issues being constitutional and of national importance having an effect on the overall public at large or an outsized number of people'. The Constitution of India through Article 19 (1) (a) confers right to freedom of speech and expression to a citizen. Right to understand and receive information, it's by now settled, might be a facet of Article 19 (1) (a) of the Indian Constitution.²⁸ The Article 21, on the other hand, confers Right to Privacy to a personal. There's a core relation in between the Article 19 and also the Article 21 which collectively holds the dignity of the 'Live Streaming of Supreme Court's proceedings'.²⁹

As rightly pointed out by Hon'ble Supreme Court in *Anita Kushwaha v. Pusha Sudan*³⁰ opined that Access to Justice as a constitutional value will be a mere illusion if justice is not speedy, if it is not reasonably accessible in terms of distance and if the litigants' access to the adjudicatory process is too expensive. It is the constitutional duty of the State to provide with such judicial infrastructure so that every person is able to receive an expeditious, inexpensive and fair trial. Similarly, Article 39-A of the Indian Constitution promotes a laudable objective of promoting legal Aid to the needy litigants and obliges the State to make access to justice affordable. In this endeavor Online Streaming

²³ The world's most technology advanced trial and appellant courtroom, live law hearing on live streaming committee (Jul. 4, 2021, 4.20 PM), <http://www.livelaw.in> (Jul. 4, 2021).

²⁴ Swapnil Tripathi v. Supreme Court of India, (2018) 10 SCC 639.

²⁵ Indira Jaising v. Secretary General, (WRIT PETITION © NO. 33 OF 2016).

²⁶ Mathews J Nedumpara v. Supreme Court of India (writ petition no. 191 of 2019).

²⁷ Centre for Accountability and Systemic Change v. Supreme Court of India (WP (CIVIL) diary NO.10793/2020, order date. 1-4-2020).

²⁸ Chief Election Commissioner. v. M.R. Vijayabhaskar, (2021) SCC Online SCC 364, Supreme Court upheld the right of journalists and media to live report the court proceedings and observations, including even those that may not even be encrypted as part of the final order or judgment of the Court.

²⁹ State of U.P. v. Raj Narain (1975) 4 SCC 428 held that freedom of speech and expression is directly correlated with the right to information and the right to know about the happenings in the society especially those occupying positions of power.

³⁰ Anita Kushwaha v. Pusha Sudan (2016) 8 SCC 509.

and Recording of Court Proceedings is one such facet adopted by Government of India, which provides all the citizen including litigants to access the court proceedings.

IV. ONLINE STREAMING: SUPREME COURTS

The E-Committee of the Supreme Court has published the Draft Rules on Live-Streaming and Recording of Court Proceedings. The rules have been framed with the motive to "imbue greater transparency, inclusivity and foster access to justice"³¹. These rules will be applicable to all courts. The SC conducted court proceedings via video conferencing for the first time on March 27. The SC used the 'Vidyo' application for the online court proceedings. The apex court is also looking to live-stream court proceedings.³²The access to stream live court proceedings was given to only a limited number of individuals who were at the Supreme Court premises. The development comes after the SC allowed lawyers to argue their cases through video conferences, file cases online 24×7 and also watch proceedings on smart TVs in the press rooms of the court complex. Court hearings are to be telecasted with a 10-minute delay³³. Many Indian High Courts have experimented with live telecast of hearings recently. The draft rules state that the contents of recordings will be vetted and posted on the courts' website or made available on digital platforms usually within 3 days of the conclusion of the hearings. The live-stream of court proceedings can't be reproduced, transmitted, uploaded, posted, modified, published, or re-published in any form without the court's written authorization. Any acts in violation to the rules will be punishable under the Indian Copyright Act, Information Technology Act, and other provisions of law, including the law of contempt.

A. Hardware – Control & Placement

Cameras are going to be installed within the courtroom covering a minimum of five angles; one towards the Bench, the second and third towards the advocates

³¹Live-Streaming and Recording of Court Proceedings (Jul. 6, 2021, 9.14AM) www.Schorship.law.upenn.edu.

³² *Ibid.*

³³ Lord Justice Bridge, Civil Court's Structure Review, Final Report, Judiciary (Jul. 5, 2021, 9AM) <http://perma.cc> .

engaged within the 4 concerned matter, the fourth towards the accused (where applicable) and therefore the fifth towards the deponent/witness, pro-re-nata. Within the event that the Court has employed an electronic evidence presentation system, a further feed shall be captured there from. A remote-control device shall be provided to the presiding judge on the Bench to pause or stop the Live-streaming at any time. Advocates, witnesses, accused, or the other person permitted by the Bench, shall use appropriate microphones while addressing the Court. In up to now as an overseas Location is anxious, appropriate hardware are going to be deployed to the extent practicable, bearing in mind the provisions made within the aforementioned sub-rules. Where Proceedings are conducted through web links, including videoconferencing services, appropriate software and hardware are employed, if necessary, to come up with an integrated feed for Live-streaming.

B. Human Resource Requisitioning and Positioning

A dedicated room (DCR) shall be founded for each court complex. The DCR shall, inter alia, comprise a political candidate of the Court, technical and video recording experts. The DCR will monitor and track Proceedings as they're live streamed, recorded, and transcribed. The DCR shall make sure that nothing uncivil or inappropriate is streamed within the property right. The coverage of Proceedings is going to be coordinated by the technical experts under the direct supervision of the Registrar (IT) or her/his nominee. The Registrar (IT) and/or their nominee shall be subject to the directions of the IT Committee for the general implementation of Live-streaming and Recording of Proceedings.

Technical expert(s) should be appointed/deputed at each of the Court Premises to facilitate the Live-streaming of Proceedings, in addition to the Court Master and court employees connected to the Bench. The technical expert(s) will work under the supervision of the DCR's overall oversight.

C. Live-streaming and Recording of Proceedings

The Cases relating to matrimonial disputes, sexual offences, gender violence, child abuse, recording of evidence and those which may provoke enmity among communities have been excluded from ambit of live-streaming. Courts will be at liberty to decide on exclusion of any other categories of cases from live-streaming or increase in delay between the actual hearing and the telecast.

Subject to the exclusions contained within these Rules, all Proceedings are Live-streamed by the Court. The following are visiting be excluded from Live-streaming:

- Matrimonial matters, including transfer petitions arising there under.
- Cases concerning sexual offences, including proceedings instituted under Section 376, Indian code, 1860 (IPC).
- Cases concerning gender-based violence against women.
- Matters registered under or involving the Protection of youngsters from Sexual Offences Act, 2012 (POCSO) and under the Juvenile Justice (Care and Protection of Children) Act, 2015.
- In-camera proceedings as defined under Section 327 of the Code of Criminal. Procedure, 1973 (CrPC) or Section 153 B of the Code of Civil Procedure, 1908 (CPC).
- Matters where the Bench is of the view, for reasons to be recorded in writing that publication would be antithetical to the administration of justice.
- Cases, which within the opinion of the Bench may provoke enmity amongst communities likely to guide to a breach of law and order.
- Recording of evidence, including cross-examination.
- Privileged communications between the parties and their advocates; cases where a claim of privilege is accepted by the Court; and non-public discussions between advocates.
- The opposite matter during which a specific direction is issued by the Bench or the magistrate.
- These exclusions are backed and recognized by the Supreme Court through its finding in *Supt. and Remembrance of Legal Affairs v. Satyen Bhowmick*³⁴ and *Naresh Shridhar Mirajkar v. State of Maharashtra*³⁵, which hold that some Cases may occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera restricting the public trials;

D. Method of Procedural Recording

³⁴ *Supt. and Remembrance of Legal Affairs v. Satyen Bhowmick* (1967) AIR SC 1: (1966) 3 SCR 744.

³⁵ *Naresh Shridhar Mirajkar v. State of Maharashtra* (1975) 4 SCC 428.

- Cameras shall not audio-video record the media persons and so the visitors present during the Proceedings. The following will ordinarily not be Live-streamed or saved within the Archival Data or transcribed:
- Discussions between/amongst the judges on the Bench.
- Instructions given by a judge to the manager staff during the Proceedings.
- Any communication/message/document given by the Court Master/Reader to the Bench.
- Documents given to the judge during the Proceedings.
- Notes taken down by the judge during the Proceedings.
- Notes made by an advocate either on paper or in electronic form, for assistance, while making submissions before the Bench.
- Communication between the advocate and client, inter-se the advocates and communications which isn't a submission exchanged between the advocate and therefore the Court.³⁶

E. Access and Storage

The Recordings are archived. Recordings is also uploaded, wholly or partly, on the Courts' website or made available on other digital platforms, as directed by the Court. Access to copies of the Recordings not uploaded is going to be sanctioned by the Designated Officer, who will act as per law. An application for copies of Recordings shall be made within the form prescribed in Schedule III. The Archived Data should ordinarily be retained by the Court for a minimum of six months, subject to special directions issued by the concerned Bench in an exceedingly particular case. The jurist may issue practice directions regarding the cases and also the period that archived data are preserved.

F. Transmission of Hearings and Recordings

i. General Precaution

Personal information like date of birth of parties, home address, card number, checking account information, and therefore the personal information of related parties, like close relatives, witnesses and other participants, are deleted or muted during Live-streaming. Inter alia, anyone of the masking techniques, as

³⁶Court Proceedings and Live Streaming During Covid 19 Outbreak: Phenomenon (Jul. 5, 2021, 11 AM) <http://www.barandbench.com>.

provided in Rule 6.8, could also be adopted. However, such Proceedings are going to be preserved within the Archival Data.

G. Relay of Proceedings

There shall be a delay of ten minutes in streaming, which can be changed as per the direction of the Court. Subject to limitations contained in these Rules, the Live-stream shall commence as soon because the Bench assembles and instructs the Court staff to start the Proceedings and shall end when the Bench signals its conclusion for the day. The Live-streaming shall be dispensed from the Designated Venue as decided by the Bench.

H. Relay of Recordings

The content of the Recording is vetted and shall be posted, usually within three days of the conclusion of the proceedings. The identical shall be posted on the Courts' website or made available on such digital platforms, as directed by the Court.

I. Disclaimers, Prohibitions and Restrictions

Disclaimers

The daily cause list published on the web site of the Court shall contain requisite information and disclaimer regarding Live-streaming. The Archival Data shall not constitute the official record of the Court Proceedings unless otherwise directed by the Bench.

The Rules also prohibits and restricts on usage of the Recording or Live –stream that:

- i. No person/entity (including print and electronic media and social media platforms) apart from an authorized person/entity shall record, share and/or disseminate Live-streamed Proceedings or Archival Data. This provision shall also apply to all or any messaging applications. Any person/entity acting contrary to the current provision is going to be prosecuted as per law. The Court shall have the exclusive copyright within the Recordings and Archival Data. Any unauthorized usage of the Live-stream are going to be punishable as an offence under the Indian Copyright

- Act, 1957, Information Technology Act,2000, and other provisions of law, including the law of Contempt.
- ii. Any party/ litigant-in-person accessing the Live-stream are bound by these Rules.
 - iii. The Live-stream shall not, without the prior written authorization of the Court, be reproduced, transmitted, uploaded, posted, modified, published, or re-published in any form.
 - iv. The employment of authorized recordings in their original form is also permitted by the Court, inter-alia to disseminate news and for training, academic and educational purposes. Authorized recordings handed over for the aforesaid purposes shall not be further edited or processed. Such Recordings won't be used for commercial, promotional purposes or advertising in any form.
 - v. No person shall use a Recording Device for recording or for transcribing the proceedings, aside from those authorized by the Court.

Communication Device or a Recording Device shall not be used to disturb Proceedings in an exceedingly manner that will cause concern to a witness or other participants within the proceedings or allow an individual who isn't a participant to receive information about the proceeding or the hearing to which the person is not otherwise entitled. During Proceedings, all personnel shall follow the instructions of the Presiding Judge, adheres to courtroom etiquettes and discipline, and shall not engage within the following actions- audio and/or video, taking screenshots or using mobile communication tools to relay the Proceedings. Any person found of Communication Device or a Recording Device during the proceedings will lead to prosecution as per law. Additionally; the Bench may direct seizure of the Communication Device or Recording Device.

J. Transcription and Access

Only when the Court orders it, transcripts of recordings will be provided. The transcripts may be translated into other languages that are on the schedule. Differently able people will be able to access recordings that have been posted.

K. Dedicated room(s) for live-streaming

In order to decongest the court rooms, dedicated room(s) for viewing the live stream is also made available within the Court Premises. Access shall run to law researchers, staff, litigants, academicians, and media personnel authorized to enter the Court Premises upon receipt of necessary permissions/approvals. Appropriate arrangements shall be made to enable viewing of Live-streams from multiple Benches within this/these room(s). Special arrangements are made for differently-able persons.

L. Power to Relax

The state supreme court may, if satisfied that the operation of any Rule is causing undue hardship, by order, dispense with or relax the necessities of that Rule to such extent and subject to such conditions as is also stipulated to accommodate the case in a just and equitable manner.

M. Reference to Words and Expressions

The meaning of words and terms used but not specified in these Rules shall be determined by the legislation in force at the time, including the Information Technology Act 2000, the CPC, the CrPC, the Indian Evidence Act, 1872, and the General Clauses Act, 1897.

N. Provisions for Remaining Assets

The Court will consider matters for which there is no specific provision in these Rules in accordance with the concept of serving the interest of justice.

V. LIVE STREAMING AND RECORDING OF COURT PROCEEDINGS – WHAT THE JUDICIARY HAS TO SAY

*Swapnil Tripathi v. Supreme Court of India*³⁷, in an RTI response, the Madras tribunal has stated that it's not taken steps to implement the Supreme Court's directions regarding the live-stream of court proceedings. The Court said that the virtual hearings are being conducted through Microsoft Teams platform. It's further stated within the reply that as per the video conferencing rules, except in proceedings which are ordered to be held in-camera, the Court shall endeavor to

³⁷ *Swapnil Tripathi v. Supreme Court of India* AIR (2018) SC 55.

produce public viewing subject to avail ability of the bandwidth. This response has come on the RTI application filed by Saurav Das, an independent journalist who sought a response on what actions are taken to measure stream the Court proceedings pursuant to the Supreme Court's directions within the case of Swapnil Tripathi v. Supreme Court of India, whereby the Supreme Court had decided to live-stream Court proceedings within the larger public interest.

*Nippur Thapliyal and Ors v. State of Madhya Pradesh & ors.*³⁸ during this case the Madhya Pradesh High Court informed the tribunal Judicial that web link to look at court proceedings held via video conference are going to be made available online soon. This writ was filed on behalf of the journalist, Registrar General of the judicature bringing on the record minutes of E-Committee meeting of tribunal, stated that the E Committee has resolved to supply live web links of the hearings happening through virtual mode and video conferencing to any or all the journalists and people aspiring to access them. The state supreme court's response came on plea moved by four journalists seeking better access to the High Court proceedings. The court administration said that it's approved virtual streaming of court proceedings through a link to be made available on the Madhya Pradesh tribunal website.

*In Areeb Uddin Ahmed v. Allahabad High Court, Public Interest Litigation*³⁹and *Nupur Thapliyal v. High Court of Madhya Pradesh.*,⁴⁰the journalists of online legal media platforms like Bar and Bench and Live Law had approached High Courts for being permitted to access court proceedings on real time basis claiming the right of journalists and media to live report the court proceedings and observations.

A. Challenges Faced by the Public

Globally, India was ranked 89th out of 149 countries/regions by average internet connection speed. Over 60 per cent mobile users in India are facing network

³⁸Nippur Thapliyal and Ors. v. State of Madhya Pradesh and Ors. AIR (1995) SC 56.

³⁹Areeb Uddin Ahmed v. Allahabad High Court, Public Interest Litigation (PIL No. 865 of 2021).

⁴⁰Nupur Thapliyal v. High Court of Madhya Pradesh (W.P. No. 9669 of 2021) (Principal Seat at Jabalpur).

problems while accessing internet across locations. All these lead to chaos while performing online proceedings as well as when the general public attends them. There has been an ongoing problem in rural areas of mobile network connectivity. The villages are remote, backward because of lack of facilities and poor connectivity. The reason for this is:

1. Connecting when "roaming" can be a struggle. If your flight has just landed, several hundred devices power on and try to connect to an overloaded network. On a train, users find it difficult to hold a conversation even when passing through areas with moderate cellular coverage. It's the same on inter-state highways.
2. Lack internet tower in rural areas. Telecom towers, with their antennae, are the ubiquitous symbol of mobile telephony in India, yet there are too few of them with just 425,000 for the entire country.
3. Mobile data is patchy in India. 3G isn't everywhere, but even where you get a strong 3G signal, you might find no data activity. This is a problem for a country with 240 million mobile internet subscribers - that's 92% of its total internet subscriber base.
4. The pleader and the other stake holder lack with the skills required to access the court proceeding.
5. These are the reasons which make it difficult for general public in attending online proceedings.

B. Challenges Faced by the Court

1. The issue of access: There a number of litigants and advocates who lack internet connectivity and requisite infrastructure and means to participate in virtual hearings and therefore the process. This has serious implications. The plain one being that an outsized chunk of our citizenry is liable to being excluded from the method of justice delivery thanks to factors beyond their control. Moreover; such issues are likely to hit lower courts the worst. And this may have ramifications of its own since district or subordinate courts are the primary port of require an unlimited majority. Most virtual court proceedings in India currently happen using third party software/platforms which pose a security hazard and are at risk of hacking and misuse. Exclusive software for India's judicature to use and to handle virtual court hearings must be developed.

2. The degree of comfort: A highly underrated but equally consequential factor is whether or not everyone, whether or not access to reliable internet connectivity is universal, is comfortable and well versed with the new tools and mediums of justice delivery. It's interesting that the Secretary, Department of Justice stated that big, well-to-do law firms and advocates in urban areas would face no issues as compared to those participants in rural areas given the digital divide.
3. The concept of open courts: It might threaten the constitutionality of Court proceedings and undermine the importance of Rule of law which forms part of the essential structure of the Constitution.
4. The lack of technical manpower in Courts, cyber security and susceptible to abuses including issues of privacy are the main concerns of effective implementation.

C. Possible Remedies

The problems could be solved by setting up strong network towers in both rural and urban areas. There by a good amount of people access online proceedings. Telecom companies like Jio, Airtel, etc. should collectively take an initiative. Company like Jio has taken the initiative of providing fiber route wires in rural areas for fast network connection and is feasible for public at less cost. At the same time Airtel is on mission of establishing tower for providing internet in all rural areas. Setting up internet service center or internet café in all important points of every rural and urban area can help people in accessing the internet this also help the law graduates and law students who cannot physically access the court can access virtually.

The Ministry of Communications should mean the implementation of the National Broadband Mission, with the aim of providing reliable, and consistent connectivity infrastructure to any or all districts and lower courts across India. The judiciary considers solutions like mobile video conferencing facilities to permit for meaningful participation from those living in remote geographies. Training programs are concerned in each of the 25 High Courts. Twenty-five master trainers extended training to 461 trainers within the districts, who successively have now been tasked with training others within the lower courts and within the remaining districts. Another suggestion is that the Bar Council of India should introduce a computer course module within the syllabus of

three/five-year law programs so on skill students in a number of these aspects as an element of their college education and training. The matter associated with the thought of open court will be resolved by recording the proceedings and making it easily accessible. Along with the public and the lawyers to whom we called representatives of the Bar should also be trained in regards the author recommends to Bar Council of India to introduce computer course as one of the subjects in law courses to get trained in handling computers and get adopted to technological world. To tackle with the concerns relating to data privacy and data security the Ministry of Electronics and Information Technology develop a new platform for judicial system in India

IX. CONCLUSION

The live streaming of proceedings within the Court is the large interest in order that there is often transparency within the justice which is given by the Court. The Court has also issued some guidelines to balance the interest between the administration of Justice and therefore the decorum of the Court. The Court has also allowed the interns to attend the Court proceedings so they'll learn every procedure of the Court. Before we predict of cameras in courts, more fundamental reforms must be affected. These include greater reliance on written briefs and also the significance accorded to them, page limits for briefs (and, perhaps, also for judgments), points in time for oral arguments (and for judges to issue judgments), and a greater emphasis on preparation prior to. The judiciary must also employ a press officer to liaise with the media, and issue simultaneously one- or two-page summaries of its judgments to facilitate greater public understanding. The celebrated saying of Justice Louis Brandeis, "sunlight is the best disinfectant", Justice Chandrachud observed that live streaming makes Judges conscious in their conduct; fair in their approach towards the counsels and those listening to them, which transparency is bound to bode well for the institution in the longer run. It also makes each and every participant in the court extremely cautious and cognizant of whatever he is arguing before the court of law.

**Recognising the Social and Cultural Rights of the Climate Refugees:
A Case Study of the Sundarban Delta (West Bengal, India)**

Ms. Mrinalini Banerjee¹

Dr. S. Shanthakumar²

Abstract

Climate change is now a global challenge and climate refugees are one of the prime stakeholders to who face the brunt of it. Apart from being legally unrecognized, the climate refugees are also socially and culturally affected from their untimely displacement. While analysing the international human rights conventions/ treaties, the authors have established how these conventions/treaties can be interpreted for protecting the social and cultural rights of the climate refugees. This article also focuses on exploring ways to safeguard the human rights of people affected during such times of crisis. The article further elaborates on this issue by narrating a case study of the climate refugees residing in the Sundarban Delta (West Bengal, India).

Keywords: *Climate change refugees, Sundarban Delta, Climate Change, Natural disaster, social rights, Cultural rights*

I. INTRODUCTION

Climate refugees are in the midst of a global debate as it is a challenge for the international community to accommodate and integrate them in civil society in absence of their legal recognition by the government(s) of host countries. It is speculated that a billion people would be displaced due to issues related to climate change.³ In this article, the authors have highlighted the social and cultural right of the climate refugees by providing a case study of the Sundarban

¹ Research Scholar, Gujarat National Law University, Gujarat

² Vice Chancellor, Gujarat National Law University, Gujarat.

³ Rachel Baird, Katy Migiro, Dominic Nutt, Anjali Kwatra, Sarah Wilson, Judith Melby, Andrew Pendleton, Malcolm Rodgers and John Davison, Human Tide: The Real Migration Crisis, Christian Aid (May, 2007), www.christianaid.org.uk/Images/human_tide3__tcm15-23335.pdf.

Delta (West Bengal, India). The Sundarban Delta is a cyclone prone region and also faces problems due to rise of sea-level. The islands in the delta (for example, Lohachara, Bedford etc.) are sinking at a fast pace, consequentially and continually displacing a large number of climate refugees. In this article, the authors have examined the social and cultural problems faced by the climate refugees and also provided solutions to overcome these issues. The authors have also illustrated on how the local communities are troubled due to huge influx of migrants from neighboring countries. In fact, the real challenge is that the islands where the climate refugees are taking shelter, also do not have a secured future. For example, the Lohachara island which was home to ten thousand people is now submerged; there are also speculations that the Ghoramara island which is now the home for many climate refugees would also be completely submerged in the upcoming years.

During the empirical research, the authors found out that the government does not take concrete measures to save the habitants of the Sundarban Delta (West Bengal, India), apart from providing aid through the national and state level programs existing to mitigate poverty. The authors opine that there should be climate-specific strategies which address Sundarban Delta's unique topography and geological position. Moreover, there should be various psychological workshops dedicated to the climate refugees facing trauma due to social and cultural isolation.

II. SCOPE OF THE ARTICLE

The authors of this essay have focused solely on climate refugees. Because there is no legal definition of climate refugees, the authors have come up with an operational definition based on their study.

'Climate refugees are persons who need to evacuate their home country to another country due to a well-founded fear of persecution as a result of an environmental disaster, and their home country is unable to protect them from such disasters.'

The authors have limited their case study only to Sundarban Delta (West Bengal, India).

III. METHODOLOGY

The purpose of this essay is to investigate and highlight the social and cultural issues that climate refugees encounter. The authors investigated this by conducting a case study of climate refugees living in the Indian territory's Sundarban Delta. The research was carried out by the authors using socio-legal approaches and quantitative research. The research was carried out in two stages by the writers. In the first phase, the authors have conducted an extensive literature review from the available primary and secondary sources. In the second phase the authors have gathered information by the help of an open-ended questionnaire and semi-structured interviews. The rationale behind choosing Sundarban Delta, India, as a place of research is because of its topography and geological position. The scope of this research is limited to relevant few blocks of Sundarban Delta, namely: Gosaba Block, Sandeshkhali, Canning, Chota Mollah, as these blocks are primarily occupied by the Climate refugees migrated from Bangladesh to India due to repetitive natural calamity and adverse effect of climate change.⁴ The questionnaire was filled by 54 respondents settled in the afore-mentioned region. The respondents were selected randomly. Also, the authors have conducted 4 in-depth interviews where the questions were semi-structured. The 4 interviewees are subject experts and closely associated with the theme of the article. Lastly, the authors have critically analysed the data and also tried to provide viable solutions to overcome this issue.

IV. LEGAL FRAMEWORK PROTECTING THE SOCIAL AND CULTURAL RIGHTS OF THE CLIMATE REFUGEES

The International Human Rights Law and its principles, does safeguard the human rights of the people affected during crisis. However, this law is insufficient and inadequate to protect the human rights of all kinds of crisis, for eg: protection of the human rights (social and cultural rights) of the climate refugees. Despite this legal gap, in order to protect the rights of the climate refugees we need to take recourse to Human rights law as the authors opine that there are various conventions under the Human rights laws which if well-interpreted can be made applicable for the climate refugees. The topic of climate

⁴ Mrinalini Banerjee, S. Shanthakumar, *Analysing the legal rights of the climate refugees during Covid-19 pandemic in India: Challenges to International Law*, AJEL, 11-12, (2022).

refugees is not specifically governed by refugee frameworks; hence the climate refugees confront with the same recurrent problem of their legal identity. Additionally, there persist unanswered issues about what constitutes ‘climate-induced’ or ‘Displacement’, as a consequence of ambiguous and inadequate protection standards. Climate Refugees currently do not fall either under the ambit to the 1951 Refugee Convention nor under the 1967 Protocol relating to the Status of the Refugees.⁵

Article 1 of the 1951 Convention, followed up by the 1967 Protocol Relating to the Status of Refugees, does define the term ‘Refugee’ but it does not include climate as a reason of *well-founded fear of persecution*. However, the authors opine that climate refugees would fall under the purview of this definition if the climate refugees are constituted under the condition of being *member of a particular social group*, and face persecution owing to which they flee from their country of nationality and are unable to avail protection from their home State or are unable to return to their country of nationality owing to such fear. Some scholars say, “The only time environmentally-induced displaces may be regarded as ‘refugees’ is when the state uses environment as an instrument of political oppression. This requirement exists because at the heart of the notion of persecution lies state failure to provide protection”.⁶

Apart from the Refugee Convention, The United Nations Human Rights Council enacted a resolution in October 2021 that recognised the basic right to a safe, clean, healthy, and sustainable environment, as well as the human rights implications of the climate crisis. Also, the Council appointed a UN Special Rapporteur on the promotion and protection of human rights in the context of climate change.⁷ This showcases that deliberations on the rights of climate refugees have already started and the authors opine that, the day is not far when

⁵ SHUVRO PROSUN SARKER, *REFUGEE LAW IN INDIA: THE ROAD FROM AMBIGUITY TO PROTECTION*, (Palgrave Macmillan, 2017).

⁶ Elizabeth Keyes, *Environmental Refugees? Rethinking What’s in a Name*, 44, N.C. J. INT’L L 461, 472, (2019).

⁷ *No Shelter from the storm the urgent need to recognise and protect climate refugees*, ENVIRONMENTAL JUSTICE FOUNDATION, (2021), https://ejfoundation.org/resources/downloads/EJF_Climate-Refugee-Report_2021_final.pdf.

there would be a hard law protecting the rights of the climate refugees and binding on all States.

The authors during their doctrinal research identified the trend of mixed migration – which essentially refers to the fact that migration streams encompass both those seeking relief and those seeking betterment, while also recognising that for some, the inspiration may be both – may mean that legal provisions governing migrant worker rights, such as the 1990 Convention on Migrant Workers, can only provide limited support to those displaced across borders who participate in remunerated employment.⁸ Additionally, Customary International Law is a source of International Law that exists outside of any treaty system and gives legal legitimacy for some well-established norms of International Law. It may also control treaty gaps and the behavior of nations that are not signatories to a treaty. It might thereby impose a legal responsibility to provide social services to those displaced as a result of climate change, even if no such requirement exists under a treaty.⁹ The authors have further interpreted a few conventions or declarations falling under the ambit of Human Rights Law. The authors are of the view that if specific sections of the Universal Declaration of Human Rights (UDHR), if made obligatory, it would entail a duty to provide social assistance to people displaced by climate change. According to Article 22¹⁰, everyone has the right to exercise the economic, social, and cultural rights that are necessary for their dignity and the free development of their personalities. Furthermore, right to labor is guaranteed under Article 23¹¹ and right to education is guaranteed under Article 26¹² and these articles are enough for the time being to protect the basic rights of the climate refugees. However, as the Declaration is non-binding, hence the author opine that its articles may be binding only if they are incorporated as a part of the Customary International Law as these provisions serve as the non-treaty foundation for Customary Human Rights Law. Additionally, any customary

⁸ *Id.* at 19.

⁹ Nathan Stopper, *Adrift From Home and Neglected By International Law: Searching for Obligations to Provide Climate Refugees with Social Services*, CJTL, <https://climate.law.columbia.edu/sites/default/files/content/docs/Stopper-2011-05-Social-Services-for-Climate-Refugees.pdf>.

¹⁰ Universal Declaration of Human Rights (United Nations), 1948, Art. 22.

¹¹ Universal Declaration of Human Rights (United Nations), 1948, Art. 23.

¹² Universal Declaration of Human Rights (United Nations), 1948, Art. 26.

responsibility to offer social assistance to climate refugees is likely to come from Customary Human Rights Law or later from agreements based on them.¹³

Aside from the UDHR, certain sections of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) can also be used to provide protection to climate refugees in general. These include, but are not limited to, Article 6 of the ICESCR, which addresses the right to work and earn a living, so ensuring the right to life. In addition, Article 12 of the ICESCR requires states to recognise the people's right to the best possible bodily and mental health standards. The Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) would also apply.¹⁴

Specifically, with respect to current pandemic crisis response and healthcare facilities for the climate refugees, the relatively nascent International Health Regulations, 2005 can be put to test. The implementing states, in such unprecedented conditions as a pandemic, should endeavour to undertake their obligations not only with respect to the citizens and residents, but also towards climate refugees.¹⁵

The UN International Organization for Migration, in 2005, issued the MiGOF (Migration Governance Framework). The Framework aimed to determine essential elements which could facilitate responsible and safe migration during times of crises. Climate change, being crises, might fall under the purview of the MiGOF.¹⁶

Although provisions of various laws, regulations, conventions and non-binding measures such as the Sustainable Development Goals can help to protect the climate refugees as a stop gap measure. However, the absence of a legal recognition for this group of people is a lacuna which should be alleviated by

¹³ Stopper, *supra* note 8.

¹⁴ Priya Pillai, *COVID-19 Symposium: COVID-19 And Migrants—Gaps In The International Legal Architecture?*, OJ (2020), <http://opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-and-migrants-gaps-in-the-international-legal-architecture> .

¹⁵ *Id.*

¹⁶ Rhea Abraham, *Migration Governance In A Pandemic: What Can We Learn From India's Treatment of Migrants in the Gulf?*, EPW, (2020), <https://www.epw.in/engage/article/migration-governance-pandemic-india-gulf>.

the implementation of a dedicated law highlighting on the rules and procedures.

V. RESULT AND FINDINGS

In this part the authors have provided a detailed case study of the Sundarban Delta (West Bengal, India) highlighting on its geographical location followed by the social and cultural problems faced by the climate refugees residing in that area.

A. Topography of the Sundarban Delta

Sundarban, the earth's biggest delta, spans 10,200 square kilometers of Mangrove Forest spread over India and Bangladesh. It is also home to the earth's largest mangrove forest. In 1989, the Sundarban was designated as a UNESCO World Heritage Site owing to its unique ecosystem. Moreover, Sundarban also has a 5400-square-kilometer non-forest, populated territory in India that runs along the north and north-western edge of the mangrove forest.¹⁷ Besides the Ganga and the Brahmaputra, a cumulative catchment area of 1.6 million sq. km contributes to the delta, which is fed by several small to medium sized peripheral streams that originate in the nearby uplands. The Bengal Depositional System includes both the sub aerial and subaqueous portions of the delta. The Ganga–Padma–Lower Meghna River splits the Ganga–Brahmaputra delta in half diagonally.¹⁸ Around the months of January to June, the Bay of Bengal's oceanic current flows in a circular pattern. As a consequence, marine water seeps further into the woodlands, raising salt levels. Whereas, the oceanic current rotates in an anticlockwise pattern from July to December.

B. Demography of the Sundarban Delta

¹⁷SUNDARBAN ECOLOGY, SSDC, Department of Sundarban Affairs, Govt. of W.B., <http://ssdcindia.org.in/sundarbancontent.php?id=3+&+title=SUNDARBAN+ECOLOG+Y>.

¹⁸Bushra Nishat, *Landscape Narrative of the Sundarban : Towards Collaborative Management by Bangladesh and India*, *Environmental Science*, IWA, (2019), <https://documents1.worldbank.org/curated/ru/539771546853079693/pdf/Sundarban-Joint-Landscape-Narrative.pdf>.

The Sundarban is home to one of the world's most diverse ecosystems. The delta is noted for its outstanding biodiversity and has potentially the world's biggest surviving expanse of mangroves. The Sundarban forest spreads over almost 10,200 square kilometers across Indian and Bangladesh. Out of which 40% of the delta belongs to India, (based out of the State of West Bengal) and the rest of the delta lies in the Bangladesh territory.¹⁹

In 1872, the entire population of the Sundarban Delta was 296045 people, but by 2011 it had risen to over 4.44 million people as stated in Figure No.1.²⁰ However, the scheduled census for India in 2021 due to the Covid-19 pandemic was rescheduled to 2022.²¹ Between 1872 and 2011, the population rose by about 15 times. Prior to independence, the population was quite low. However, between 1901 and 1951, the population nearly doubled. Due to different political events, the population rose about fourfold between 1951 and 2001. The Sundarban has attracted a large number of people from Bangladesh. In other words, it is observable that the rate and pattern of population growth in the region have not been uniform. According to census statistics from 2001 and 2011, the maximum positive and negative temporal fluctuation may be seen in Sagar and Sandeshkhali-II, respectively. Canning –II and Sandeshkhali –I, on the other hand, show the smallest positive and negative variances. In compared to 2001, the coefficient of variation demonstrates that the growth rate in 2011 is more unpredictable and less steady.²²

In a given time period, positive variation indicates that the block level pace of increase is lower as compared to the overall regional rate of growth, while

¹⁹Sundarban Demography, SSDC, Department of Sundarban Affairs, Govt. of W.B., <http://ssdcindia.org.in/sundarbancontent.php?id=1+&+title=SUNDARBAN+DEMOGRAPHY>.

²⁰*About Sundarbans*, WWF, https://www.wwfindia.org/about_wwf/critical_regions/sundarbans3/about_sundarbans/.

²¹Office of Registrar General and Census Commissioner, India, Ministry of Home Affairs, Government of India, <https://censusindia.gov.in/census.website/>.

²² Bablu Samanta, *Population Growth in Sundarban Region – A Spatio-Temporal Analysis*, 6 (2018), <https://saspjournals.com/wp-content/uploads/2018/04/SJAHSS-64-877-883-c.pdf>.

negative variation indicates that the block level growth rate is more than the regional growth rate.²³

“The highest male population recorded in 2001 in Patharpratima and in 2011 in Basanti. On the other had the highest female population was recorded in 2001 in Patharpratima and 2011 in Basanti. The lowest male population was recorded in Sandeshkhali-II in both 2001 and 2011. The lowest female population was recorded in Sandeshkhali-II in both 2001 and 2011.”²⁴

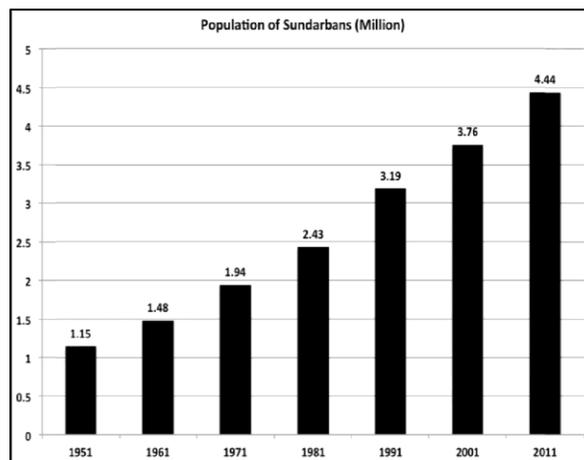


Figure No. 1: Highlights the Population growth in the Sundarban Delta, India over the years. (Ghosh, Aditya & Schmidt, Susanne & Fickert, Thomas & Nüsser, Marcus. (2015). The Indian Sundarban Mangrove Forests: History, Utilization, Conservation Strategies and Local)

VI. ANALYSING THE NEED FOR CLIMATE REFUGEES TO MIGRATE TO WEST BENGAL, INDIA FROM BANGLADESH AND THEIR AFTERMATH

Migration is never the first option for any person, it is generally the last resort specially when the reason for displacement is climate change. Climate refugees do have any legal protection neither in International Law and in the Domestic law of India still they need to migrate cross-border specially when the home State does not or cannot provide satisfactory aid to the hostile people. As per the

²³ *Id.*

²⁴ Samanta, *supra* note 21.

author's research the main reason for the climate refugees to opt for migrating to another country is hoping for survival and a better life. One of the adverse effects of climate change is the rise of the sea-level and the islands of the Sundarban Delta are one of the victims of the same. This has led a massive number of cross-border migration. Coming to the global scenario if there is a further increase of sea-level by a meter then 145 million people would have to face the brunt of it.²⁵

- i. The authors have explored the possible situations in which climate refugees migrate to Sundarban Delta, India. One when the entire island is submerged and another when a part of the island is submerged.
- ii. Eg: Islands like New Moore Island, South Talpatti Island, a disputed island between India and Bangladesh, Lohachara, Kabasgadi and Bedford are completely submerged.²⁶ Ghoramara island is partly submerged and researchers state that it would be sinking completely very soon.²⁷
 - The main reason for the climate refugees to migrate are the loss of islands as they are shrinking or drowning because of the following reasons: -
 - Islands have low altitude shores
 - High amount of silt in the rivers
 - Rise in the sea-level
 - Repetitive Cyclones

The Sundarban Delta has fallen into trap to the adverse effect of climate change. Specially because of its topography and geological positioning. Also, the islands are low-lying hence with the rise of sea-level they are easily sinking. However,

²⁵ Anthoff, D, R. J. Nicholls, Richard S.J. Tol and A Vafeidis, *Global and Regional Exposure to Large Rises in Sea-Level: A Sensitivity Analysis*, Working Paper No 90. Tyndall Centre for Climate Change Research, Norwich, London (2006), https://www.researchgate.net/publication/313156282_Global_and_regional_exposure_to_large_rises_in_sea-level_a_sensitivity_analysis.

²⁶ Island Claimed by India and Bangladesh Sinks Below Waves, THE GUARDIAN, (March 24 2010), <https://www.theguardian.com/world/cif-green/2010/mar/24/india-bangladesh-sea-levels#:~:text=New%20Moore%20island%20in%20the,and%20sea%20patrols%2C%20he%20said>.

²⁷ Nikita D, *No home for Ghoramara island's climate refugees*, TWOCIRCLES.NET, (Dec. 3, 2021), <https://twocircles.net/2021dec03/444291.html>.

the climate refugees who are migrating to India are not safe too in the Sundarban Delta of the Indian territory. For eg: The Lohachara island which was once a habitant of 10,000 people is now submerged, the Ghoramara island is partly submerged hence the residents of that island are now moving to Sagar island.²⁸ Moreover, Sundarban delta of the Indian territory consists of 8.5 million hectares of agricultural land but if the sea-level rises by 2 meter then 486 thousand hectares of fertile agricultural land would be inundated.²⁹ Recently, the Sundarban Delta has faced a number of devastating cyclones, like: Amphan, Fani, Yass etc. During such times the rivers are over- following leading to 5 – 6 ft. of water on the streets. Additionally, hardly any delisting of the river hence during heavy rain the water is flooding the residential area leading to saline water is entering into the fertile paddy land and making the soil infertile for irrigation. When the authors interviewed the respondents most of them mentioned that the mud bunds are a major reason for rivers overflowing as it cannot withstand the cyclone and the water pressure. They are of the opinion that if concrete bunds, of a greater height is built then it can resist the flow of water to some extent. During the field investigation the authors witnessed that the infrastructure in the Sundarban Delta is poor and majority of the population are living in mud or kuchcha houses hence whenever any natural calamity hits the area it destructs their houses leaving them devastated. Additionally, repetitive re-construction of houses and resettling is not possible especially when their economic conditions are not strong and there is almost nil subsidy for rehabilitation and resettlement from the Government. The schemes from the Government are available only for the Indian citizens and not for the climate refugees as stated in Table No. 2.

A. Nature of Migration of the Climate Refugees

The migration of the climate refugees can be either temporary and permanent in nature. While analysing this part the authors realised that it would be somewhat similar to the migration of the Internally Displaced Persons (IDPs), hence the authors have aimed to analyse the nature of migration only from the perspective of the climate refugees. The authors have laid down a few differences between

²⁸ Architesh Panda, *Climate Refugees Implications for India*, 14 EPW 20, (2010).

²⁹ *Id.*

temporary migration and permanent migration due to climate change and also highlighted the difficulties faced by the host state as stated in Table No.1.

Table No. 1: Highlights the distinction between the two types of migration occurring due to climate change and the problems arising due to such kind of cross-border migration.

Title	Temporary climate refugees	Permanent climate refugees
Definition	The temporary climate refugees are those who do migrate to another States but remains there only till the disaster and its effect remains in their State of Origin. Once the adverse climatic effect reconciles in their State of Origin, the temporary climate refugees move back to their State of Origin.	The permanent climate refugees are those who do migrate to another States but remains back in the host State forever. The speculated reasons by the authors for their remaining back are as follows: They do not have a place to return as their land is completely destroyed due to the negative effect of climate change. They seem to be comfortable in the host State hence they do not wish to face the struggle of migrating back to their State of Origin. They fear that there can be a similar environmental catastrophe in the future hence they would again have to migrate. Moreover, there are chances that they may not be able to migrate depending on the severity of the calamity.
Problems	Many a times the host countries on humanitarian grounds or having a good relationship with	As explained in Part III and IV, the climate refugees are not legally recognised hence they are

	<p>the neighbouring country allows the temporary climate refugees to migrate but end up with many civil issues with the local residents. Additionally, there is a huge financial burden on the host State to provide the required relief to the climate refugees.</p>	<p>not allowed to entered the territory of the host country and seek for refugee status. Moreover, if the climate refugees somehow enter the territory of the host country and over stay or migrate to other parts of the country then they would be termed as illegal migrants. Subsequently, the climate refugees would be violating the immigration law of that host countries.</p>
<p>Problems which are similar for the host country irrespective of the nature of migration</p>	<p>Unavailability of resources – As the climate cross-border migration occurs all of a sudden hence it is quite challenging for the host country to maintain the demand and supply ratio. Economic stress Cultural and social misbalances Security issues</p>	<p>The details of the same has been elaborated in Part VI of the article.</p>
<p>Example – Sundarban, India Case Study</p>	<p>In the Sundarban Delta of the Indian territory, the authors interviewed 54 respondents and all of them were permanent climate refugees, migrated due to the rise of the sea-level and recurrence of natural calamity for e.g.: Fani, Amphan etc. The authors wish to make a point that there is a check met situation for the climate refugees as neither can they go back to their home country as there is lack of resources to sustain the effect climate change specially when the sea-level is rising nor would the host country accept them wholly as mentioned in part III and IV of the articles. Furthermore, the author’s during their in-depth interviews and doctrinal research found out that there is a better</p>	

transition for the climate refugees to migrate when there is a need of vote bank for the local government.³⁰ During such times the host country would accept the incoming of the climate refugees to fulfill their political agendas.³¹

B. Characteristics of Migration of the Climate Refugees

The main characteristics of the migration of the climate refugees are that it is forceful, non-voluntary and compulsory. E.g., When the islands are submerging due to the rise of sea level. The climate refugees do not have a choice but to migrate if they wish to survive. Hence during such circumstances, the people would automatically relocate to the nearest and safest location. The authors also want to highlight that the chance of climate refugees moving back to their State of origin is doubtful as their return depends on whether their place of origin is still advisable to stay.

C. Difficulties Faced by the Climate Refugees from Pre to Post-Migration

While analysing the responses from the fifty-four (54) respondents and the four (04) interviewees, the authors were able to empathize with the problems that the climate refugees face throughout the entire process of transition. Hence, to illustrate their problems, the authors have divided the migration of the climate refugees into three phases. In these three phases the authors have elaborated on the problems, difficulties and insecurities faced by the climate refugees while moving to Sundarban Delta, India.³²

Phase 1: Before leaving the State of Origin

³⁰ Abhijit Dasgupta, *The Politics of Agitation And Confession: Displaced Bengalis in West Bengal*, Refugees and Human Rights: Social and Political Dynamics of Refugee Problem in Eastern and North-eastern India (2002).

³¹ Abhijit Dasgupta, *Displacement and Exile: The State-Refugee Relations in India* OS (2022), <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199461172.001.0001/acprof-9780199461172>.

³² S. A. Pourhashemi, B. Khoshmaneshzadeh, M. Soltanieh and D. Hermidasbavand, *Analyzing the individual and social rights condition of climate refugees from the international environmental law perspective*, 9 IJEST, 57-67 (2012).

Phase 2: During the transition phase from the State of Origin to the State of destination

Phase 3: After seeking the State of destination

Phase 1: Before leaving the State of Origin:

Wherever there is an environmental catastrophe or regular occurrence of natural calamities, the locals of that region face its brunt, consequently compelling them to become climate refugees. During any such crisis, the climate refugees need to prioritize the survival of themselves and their family members; instead, they are left with the worries of an uncertain future. In reality, the very first problem the climate refugees face is in identifying the country they can migrate to, especially when there is lack of express domestic policies, of political will, and of compliance. Next comes the uncertainty of what action will be taken by the host country. From the interaction and subsequent responses from the respondents, the authors have listed a few queries that prevail over them: for example, whether the host country would accept/ reject their arrival?; if accepted, what would be the time duration for their acceptance?; further, whether there would be any particular civil conditions applicable to them? which would be the designated place to stay for the climate refugees? whether they would be provided with the basic necessities of a dignified life?, etc.

Phase 2: During the transition phase from the State of origin to the State of destination:

During this transitional phase, the climate refugees face various other problems apart from the difficulties mentioned in phase 1. The authors have analysed the problems faced by the climate refugees as per their empirical research. Some of the problems that the climate refugees need to withstand are: the harsh weather, limited availability of food and water, and health complications among the children and the older people while travelling to the State of destination. Apart from these problems, a significant risk lies in crossing the border because they are generally considered as illegally migrant due to inadequacy of law as previously explained in part IV of this article. Even if, the climate refugees somehow successfully cross the border, they face hindrance in arranging for their boarding and local currency.

Phase 3: After reaching the State of destination:

Even after reaching the State of destination, the struggle of the climate refugees still continues. The authors have classified the problems faced by the climate refugees in two parts i.e., personal problems and socio-cultural problems as stated in Table no.2.

Table No. 2 The authors have analyzed the problems faced by the climate refugees in 2 parts:

Personal Problems	Social and Cultural Problems
Identity crisis and insecurity within oneself.	Social Insecurity Dependency on one's own culture Difficulty in accepting other's culture
Due to the lack of local identity proof, there is a high chance of corruption in receiving it.	Social Rank/ Status Isolating on the basis of caste Discrimination on the basis of gotra
The search for a job or to find a new occupation is quite challenging in a new country.	Religion can be different and there are chances of becoming minority in the new country. Customs } Festivals } Moreover, the customs and festivals would automatically be different, and the climate refugees may feel isolated and ignored.
Unaware of where to find a safe and secure stay. Lack of information on how to own property.	Communication is a major issues as the language and dialect generally differs.
Lack of knowledge of the schemes and policies prevalent in host country.	The climate refugees are not socially accepted that quickly; hence they feel lonely and face a significant problem finding brides or grooms for their children.

Inadequate health facilities	Other family issues
------------------------------	---------------------

The Possible Reasons for the Host Country to be Apprehensive to Accept the Climate Refugees

The authors feel that unnecessarily one cannot blame the host country for their hesitance and resistance to accept climate refugees into their territory. A few reasons that the authors contemplated are as follows:

- i. Whenever there is an environmental catastrophe due to climate change the movement of the people is in huge numbers and the host state may not be prepared for the same, as mentioned in details in part V(g).
- ii. There are high possibilities that the climate refugees can bring various diseases along with them and the authors opine that there is a possibility of spreading of the same amongst the other local people.³³
- iii. Due to huge influx of the climate refugees, there can be shortage of resources as the host country was not prepared for the same.
- iv. The authors witnessed that most of the climate refugees migrate

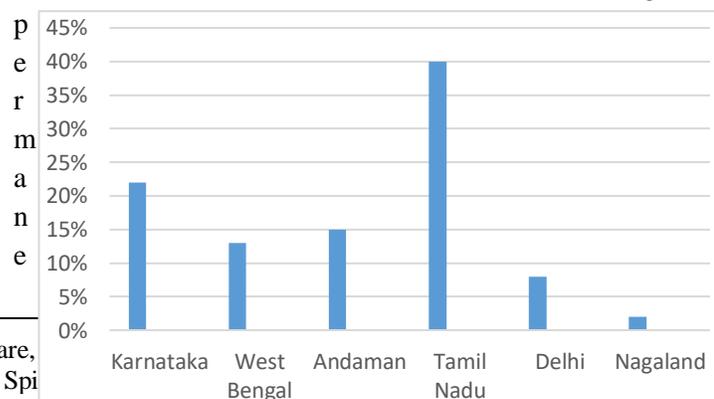


Figure No. 2: Depicts the rate of percentage in which people have migrated out of Sundarban in search of Job.

³³ Chiara Altare, Burton, Paul Spi analysis of UNH <https://www.jogh> retrospective-ana Andreas Halgreen

3, Ann pective 19064, ps-a-

Elset and Christian Wejse, Review of infectious diseases in refugees and asylum seekers—current status and going forward, 38 PHR (2017), <https://doi.org/10.1186/s40985-017-0065>, <https://publichealthreviews.biomedcentral.com/articles/10.1186/s40985-017-0065-4#citeas>.

ntly to the Sundarban Delta, India and as there is shortage of job opportunities hence the locals inclusive of the climate refugees migrate to various parts of India (as stated in Figure No. 2) creating a disparity in the price for domestic service for e.g.; domestic household jobs, jobs as family drivers. Consequentially leadin to a civil tension which ³⁴has high possibility to get converted into a civil conflict.

- v. As these climate refugees are desperate to get a job for thetheir sustenance hence the authors feel that there is a high chance for exploitation of the workers at the workplace, mainly at the unrecognised sectors.
- vi. The host countries are also concerned with the safety and security of its citizens due to the sudden influx of unknown people in one's territory.³⁵ Moreover, it also increases the risk for *domestic terrorism*.³⁶
- vii. Lastly, all ruling governments are worried and concerned about their come back to power. Hence, accepting the climate refugees who are generally in huge numbers can upset the citizens moreover, there needs to be major re allocation of resources. Therefore, the authors opine that if the citizens are upset with the present government, then their coming back to power could be really difficult ultimately leading to the host country not accepting the climate refugees in their country.

VII. Recommendations and Solutions

The authors have listed below a few proposals to provide a feasible suggestion to end the long time complaint of the climate refugees.

- Proposal 1: Amending the present Refugee Convention or the Protocol to the Refugee Convention.

³⁴ 1 BHAB SEKHAR MONDOL, ABIMUKH SUNDARBAN, (1 ed. 2020).

³⁵ Nizar Messari and Johannes van der Klaauw, *Counter-terrorism Measures & Refugee Protection in North Africa*, 29 RSQ 4, 83-103 (2010), <https://doi.org/10.1093/rsq/hdq034>.

³⁶ Graig R. Klein, *Refugees, Perceived Threat & Domestic Terrorism*, *Studies*, CT, (2021), DOI: 10.1080/1057610X.2021.1995940, <https://www.tandfonline.com/doi/full/10.1080/1057610X.2021.1995940>.

- Proposal 2: Coming up with a new legal framework dedicated for the environment and climate refugees / immigrants.
- Proposal 3: Bilateral / Multilateral agreement amongst the States
- For E.g.: The vulnerable states should join hands through any bilateral or multilateral treaties to save themselves whenever there is an environmental catastrophe.

All this way, this will enable us to secure the future of the environmental victims.

- Proposal 4: There can be a financial allocation of fund by the international community which the authors has named it as *Climate Change Induced migration Fund*.³⁷
- For Eg: The International Community can allocate a special fund, Climate Change Induced Migration Fund, for the climate refugees. The supervising committee can monitor it, and whenever required, the operational team can set up a temporary camp for the climate refugees with their permission. In this process, the high cost of relocation and other needs or requirements, as mentioned earlier in the article, could be managed well without burdening other States. Eventually, the climate refugees can be moved back to their State of origin in due course. If their State of Origin does not exist, the climate refugees can be shifted to the countries capable of welcoming them without hampering the needs of their citizens.
- Proposal 5: The vulnerable States, who are under high alert of an environmental catastrophe can either buy or lease land from the neighboring country and save their people of any kind of uncertainty.

The authors opine that on implementing any of the proposals, the basic needs of the climate refugees will be well-taken care of. Such positive change will ensure that the climate refugees are taken care of, and they do not need to be victims of more suffering. Moreover, in this fashion, the climate refugees do not need to be illegal migrants, and it would also reduce the apprehension about the climate refugees amongst the host countries.

³⁷ © The authors reserve the right to this new term. This new term is created by the authors.

VIII. SOLUTIONS TO THE PROBLEM

The authors believe that to execute the proposals (mentioned in Part VI.), a well-planned standard of operating procedure (SOP) is required. A challenge which can be faced while executing the SOP, is to identify the genuine climate refugees amongst the many who claim to be one of the many. To find a solution to this challenge, the authors divided the climate refugees into three categories on the effect of environmental catastrophe on the State of origin, as mentioned in Table No. 3. The authors have also laid down some conditions which can be applied generally for all the climate refugees irrespective of which category they fall into as mentioned in Table No.3.

The general information to be collected are as follows:

- a) To disclose the place from where the climate refugees are coming.
- b) Identity proof/ residence proof of the place mentioned at point no. a.
- c) Matching the Identity card as mentioned in point no. b with the number of the family members as claimed by the climate refugees in the borders.
- d) Details of the property if any in the State of the Origin and also whereabouts of the property.
- e) Identifying the nature of the environmental calamity and verifying it.
- f) Understanding the frequency of the calamity and how severe it was.
- g) Figuring out the possibility of relieving of the place.
 - If yes, calculating the financial expense in relieving the place.
 - Finding out how much would it take to be restored

Table No. 3: Evaluating to what extent has the environmental catastrophe has affected the State:

Category A	Category B	Category C
Country completely submerged	Country partially submerged	Country likely to be submerged and under threat

<p>In this category everyone is a victim. Hence, further scrutiny is not required.</p>	<p>Main difficulty arises in this category because of the following reasons: There is a chance for the victims to migrate to some other place of their own country. Therefore, the actual reason for the climate refugees to migrate to some other neighboring country needs to be analysed. There can be cases where people can take opportunity of this situation and claim to be one of the victims of the environmental catastrophe and migrate to the neighboring countries for better living and livelihood. Hence the operational team needs to be vigilant and identify the genuine cases amongst the many.</p>	<p>Precautionary principle should be applied. The residents of such a place can be identified from the criteria mentioned-above</p>
<p>The ideal manner in which such a crisis can be handled is if the State herself can negotiate for its rights at an international forum.</p>		<p>The country should come up with strategies to manage the pollution and control the adverse effect of climate change.</p>
<p>In such category there would be a greater number of people who would want to flee. Hence,</p>		<p>Developed nations can come forth to help the States falling under this category so that they can sustain.</p>

it is advisable that if the State purchase a land for its citizens.		
---	--	--

IX. CONCLUSION

The deplorable plight of climate refugees has made global organisations take notice of their stateless existence and poor living conditions. The authors strongly opine that if there is a legal implementation of conventions and laws on the protection of climate refugees from the affiliated councils of United Nations, then this issue can be sorted to an extent. However, unless such laws and conventions are binding on the countries, there is not much hope that the countries will suo moto recognise the social and cultural rights of climate refugees. Hence, this is where the authors feel that the ‘Common but differentiated responsibility’ principle should be made applicable. The developed states should own up to their responsibility to help the struggling states, both financially and technologically. The authors do acknowledge the various inadequacies in the Refugee Convention; despite that, at least on humanitarian grounds and also on account of having ratified various conventions of international human rights law, a State should provide some basic rights (health rights, right to life and personal liberty) to the climate refugees.

Artificial Intelligence: Copyright and Authorship/Ownership Dilemma?

*Gyandeep Chaudhary*¹

Abstract

Along with new creative opportunities, various new legal challenges have been created with the introduction of sophisticated Artificial Intelligence (AI). Computer programs like Google's Deep Dream create unique and intricate artworks, which is hard to distinguish from human creations.

The law is not unaware of artificial intelligence problems; our legal framework is not developed to resolve AI's rapid development issues. The problem is that our legal system has no answers to apparently uncomplicated questions such as "Who is the creator of a machine-produced painting using AI?"

The law does not ignore artificial intelligence problems; our legal framework has not been developed to resolve concerns relating to rapid AI development.

Modern copyright laws have been drafted in such a fashion as to take originality into account as a manifestation of the author's identity, while originality is one of the necessary conditions for copyright subsistence. So, what if we get the personality out of the equation? Do machines create works without copyright? Do we have to amend the copyright law in order to incorporate AI under its ambit? This article will explore these and other questions and potential solutions to the existing problem at hand; who is the author in the case of AI-generated works?

Keywords: *Artificial Intelligence, Copyright, Copyright Law*

I. INTRODUCTION

"Sometime early in this century, the intelligence of machines will exceed that of humans. Within a quarter of a century, machines will exhibit the full range of human intellect, emotions, and skills, ranging from musical and other creative

¹ Ph.D. Research Scholar, Indian Law Institute, New Delhi

aptitudes to physical movement. They will claim to have feelings and, unlike today's virtual personalities, will be very convincing when they tell us so." – Ray Kurzweil.²

Regardless of whether it is the Indian Copyright Act, 1957 or the Patents Act 1970, most Indian legislations trace their foundations in the British colonial administration.³ Then, technology was not as mature as it is today. Machines have always been used to assist people with their jobs. However, with the growing usage of Artificial Intelligence (AI) in our everyday lives, reality has shifted radically. As applications such as Prisma and Google Deep Dreams operate on robust neural networks to generate beautiful designs or low-key AI's composed of chat-bots like Siri and Alexa, technological creativity is always around us and AI plays an important role.

The notion of human beings granted copyright, or other intellectual property right centres around the traditional approach, and all the current laws accordingly drafted. However, with the evolution of our world, non-human beings are producing original works, and this makes the notion of 'authorship' and 'copyright ownership' more complicated. When we see the famous 'Monkey Selfie'⁴ case in which the monkey unintentionally clicked on a selfie from a camera of a photographer and PETA went to the court on behalf of the monkey for awarding him selfie copyright, issues like these become apparent. While there was an out-of-court settlement of the current issue, what the court may have ruled on the matter remains unresolved.⁵

Artificial Intelligence, which was fiction in the 1950s, is more science and less fiction these days. AI can already compose music, write lyrics, write scripts for movies, and can paint too. Recently, Nature Morte Gallery in Delhi hosted

² Olga Fesenko, *Intellectual Property Rights in Artificial Intelligence*, UNIVERSITY OF TARTU, SCHOOL OF LAW DEPARTMENT, (2017), https://oigus.ut.ee/sites/default/files/oi/o._fesenko_d._kovaevi_it_law_lab_intellectual_property_rights_in_artificial_intelligence.pdf.

³ *History of Indian Patent System* CONTROLLER GENERAL OF PATENTS, DESIGNS AND TRADEMARKS, INTELLECTUAL PROPERTY INDIA (December 19,2019), <http://www.ipindia.nic.in/history-of-indian-patent-system.htm/>.

⁴ *Naruto v. Slater*, No. 16-15469 (9th Cir. 2018) (*hereinafter* Naruto).

⁵ Dani Deahl, *How AI generated music is changing the way hits are made*, THE VERGE (August 31, 2018), <https://www.theverge.com/2018/8/31/17777008/artificial-intelligence-taryn-southern-amper-music/>.

India's first artwork exhibition created by Artificial Intelligence⁶. As the artworks created by AI are becoming ubiquitous, the question arises, who holds the authorship of the work, creator of the machine, the human, or the machine itself?

II. ARTIFICIAL INTELLIGENCE AND COPYRIGHT

AI was famously described as “the science of making computers do things that require intelligence when done by humans” by Ray Kurzweil⁷. Although it has widely been acknowledged that machines can be capable of performing mathematical and science activities, creativity has long been thought to be a uniquely human ability. However, 30 years after Kurzweil's concept, computers produce all sorts of original works, including visual, literary and musical works.

Henceforth, artificial intelligence systems over the past one decade have gained a rapid momentum within this extremely tech-savvy world. With highly technical and sophisticated technologies being used for developing ingenious, intelligent as well as intellectual AI systems. Therefore, that day is not far away when these smart bots will start producing useful and spectacular inventions without really taking the help of human intelligence.

This ability of AI in producing and generating information, content, inventions, technology, etc., has raised a big question concerning the challenges and problems that it can give rise to concerning Intellectual Property Rights. Therefore, IPR law of most countries will not be sufficient enough to deal with content that is generated through AI since it places the traditional notions linked with patents and copyrights under doubt of whether or not such inventions or copyrights generated through the machine which can be treated equivalent to those created by a human.

Therefore, this paper aims at analysing both national as well as international IPR laws to determine the validity of IPR content created through artificial intelligence and that whether such material can be treated as the content which is created by humans (considering these AI software's and bots are ultimately created or developed by humans).

⁶ Radhikha Iyenger, *Inside India's first AI Art Show*, MINT (August 17, 2018), <https://www.livemint.com/AI/GUhjytNccrVRTrMCYknjaI/Inside-Indias-first-AI-art-show.html>.

⁷ RAY KURZWEIL, *THE AGE OF INTELLIGENT MACHINES* (MIT Press 1990).

The whole concept of artificial intelligence and IPR has led to significant assumptions in the minds of legal practitioners and IPR professionals all around the world, while one popular opinion concerning AI and its entry in the world, IPR is to be seen as a positive shift that can help in accelerating the growth and development of humans by generating such significant innovations, which are far beyond the intellect of human beings, Thus, allowing all the human to experience the most advanced, efficient as proficient innovations in a minimal period. However, the second popular opinion about AI is different and is quite contrary in terms of the impact of AI upon humanity. As per this opinion, AI or artificial intelligence shall not be allowed to surpass human intellect by letting it enters into the field of IP, since this way AI will soon take over the world and will reprogram itself in a manner that it can put the existence of humans under significant threat thus, leading to an end of homo sapiens on earth, with the only surviving entities being machines, robots, and bots.

As per a draft report submitted by the European Parliament to the Commission on Civil Law Rules on Robotics⁸, it mentioned how artificial intelligence would soon take over the world by leaving no stratum untouched. The report⁹ also suggested providing for sufficient criteria through which the copyrighted works of AI shall be classified under the standards of ‘own intellectual creation.’ Furthermore, the report also questioned whether such copyrighted work, which is generated by a machine, will be valid copyright, or will it be stuck off as invalid copyright since a human being did not initially create it. Not only this but, under the scope of patent law, the entire international community has gotten into the debate of whether such high degree inventions undertaken by AI’s be treated as patents or not.

A very recent judgment given by the San Francisco court outright denied the validity of a copyright to a picture taken as a selfie by a monkey called Macaque monkey.¹⁰ Therefore, taking this judgment as an example, the international legal community is now considering the validity of AI granted copyright and inventions. Not only this, but there are also some legal practitioners, courts as

⁸ European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics [2015/2103(INL)].

⁹ *Id.*

¹⁰ Naruto, *supra* note 3.

well as other IPR professionals who have started rejecting claims for patents and copyrights generated through IPR.

Various international copyright houses strictly mentioned¹¹ how they would not accept any such work which is created through machines or generated using any AI. Similarly, concerning AI-generated patents, there are several issues and potential challenges that may arise in terms of the valid owner of such inventions. Therefore, mainly because there is no human intervention in such AI-generated patents, it is even more difficult to register the real owner, which is not a human but a machine. However, if these rights are given both to the machine and the human who created such a machine, the next central question that will come into existence is the use of such rights? Thus, whether or not both the entities shall get the right to use the innovation or only the human can solely be determined through an in-depth discussion upon the said subject matter within the international community.

Another significant aspect that the international community needs to deal with is the fact that if in case an AI produces or generated an invention that already belongs to someone else, then in that case, who will be liable with damages¹². Therefore, it is quite clear that we cannot ask the machine to pay costs, and so considering such an innovation is not created by a human, so he or she can also not be charged with costs.¹³

Copyright protection has historically been applicable in situations where technology has been used as a medium to assist an individual in doing a job (for example, utilising a camera to take a photograph). In these cases, the individual was recognised by being the artistic mind who defined or created the scenario resulting in the initial script. Recent developments in machine learning and the rise of computer resources have ensured that AI can now build works that are, no doubt, independent of human imagination. This raises the question of whether these AI-created works can be protected by copyright?

¹¹ Monika Shailesh, *Artificial Intelligence: Facets & Its Tussle With IPR*, MONDAQ (Oct. 10, 2020), <https://www.mondaq.com/india/new-technology/740638/artificial-intelligence-facets-its-tussle-with-ipr>.

¹² Gyandeep Chaudhary, *Artificial Intelligence: The Liability Paradox*, SUMMER ILI LAW REVIEW 144 (2020) (*hereinafter* Gyandeep).

¹³ *Id.*

Henceforth, even though these questions at first may seem to be quite confusing still with the growing pace of AI inventions, it has become the need of the hour for us to draw specific legal solutions to these complex questions. Furthermore, therefore, the researcher has further provided for an in-depth analysis of the Indian legal framework concerning IPR and how it is to be interpreted as to construe answers to these complex questions highlighted by the international community concerning the use of AI for generating relevant IPR content.

III. POLICY REGIME- GLOBAL AND DOMESTIC POSITION

Copyright is part and parcel of intellectual property rights. The author of original work has a legal right, which allows him/her to use and distribute the work exclusively. The reason and rationale for this was the notion that the author is a source of the possessive individualism economic theory of Locke¹⁴. In general, two important features are necessary for granting copyright. The work should, firstly, be tangible and secondly original.

Generally, the copyright is being granted to literary and artistic works. Since development of literary works is AI's new areas of applicability, the study of copyright is essential vis-à-vis to AIs. Therefore, for in order to further determine the validity of IP generated through AI, this proposed research will provide for a detailed analysis of the national and international legal framework, along with the analysis of various landmark precedents, for understanding the future scope of intellectual property generated through Artificial entities machines, software and robots. To better understand this proposition, few landmark cases could be analysed such as *Burrow Gilles Lithographic Co. v. Sarony*¹⁵, *Bleistein v. Donaldson Lithographing*¹⁶ and *Alfred Bell & Co. v. Catalda Fine Arts*¹⁷.

Burrow Gilles Lithographic Co. v. Sarony

The emphasis of this case was on whether an image/photograph could obtain copyright protection.¹⁸ It was an interesting case because it addressed the

¹⁴ Diane Leenheer Zimmerman, *It's an Original! (?): In Pursuit of Copyright's Elusive Essence* 28(2) COLM J L & ARTS 187,194, (2005).

¹⁵ *Burrow Gilles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

¹⁶ *Bleistein v. Donaldson Lithographing*, 188 U.S. 239 (1903).

¹⁷ *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951).

¹⁸ *Burrow Gilles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

separation of mechanical and artistic work. Court addressed whether or not a product which is machine-generated should be given copyright protection. By maintaining that solely mechanical labour is not artistic per se, the court has limited the extent of its protection.¹⁹ Consequently, copyrights for their works cannot be granted if the AI systems are subject to a rigid approach such as this.

Bleistein v. Donaldson Lithographing Co.

Here also the issue of law discussed in the previous case followed. Court specifically discriminated against the work of a human and anything abstract or artificial. Speaking for the majority, Justice Holmes established the human personality's singularity and held out the same as a requirement for copyright.²⁰ In using this phrase, the court made its position clear "something irreducible, which is one man's alone," implying that anything that is not a result of human imagination was not eligible for any protection.²¹

Alfred Bell & Co. v. Catalda Fine Arts, Inc.

This ruling saw a softer approach towards copyright being adopted by the courts. The court lowered the criteria of originality and decided that, in order for the work to be original, it must not be copied from any other similar artistic work.²² It also held that an author could claim unintended or incidental variations as his own. This decision was also a relief to people who asserted copyrights of the work created by AIs, although some programming and algorithms did not replicate it.

To a certain degree, these three decisions resolve the uncertainty surrounding the protection granted to AI systems. The prospective right holders still have an impact due to lack of a definitive position.

IV. ANALYSIS OF INTERNATIONAL SCENARIO CONCERNING ACCEPTABILITY OF AI IN IPR

Uncertainty over the applicability and stance of AI is not new founded as the one of reports by CONTU ("The National Commission on New Technological Uses of Copyright Works") in year 1974 indicated that it is theoretical and not

¹⁹ *Id.*

²⁰ *Bleistein v. Donaldson Lithographing*, 188 U.S. 239 (1903).

²¹ *Id.*

²² *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951).

practical to develop the AI with the capacity to create an independent work.²³ In its evaluation of the impact of fast progress on interactive Intellectual Property computing, OTA²⁴ (“Office of Technology Assessment”) re-examined the issue again in the year 1986 where the OTA deviated with CONTU and recommended that AIs should be legitimate co-authors of works protected by copyright.²⁵ Thirty years later, the debate about AI is paramount, whereas on one side, computers cannot be as creative as humans, and on the other side, they disagree with the excuse of creativity.²⁶

Even if countries are permitting copyrights in an AI’s work, the question as to who obtains copyright is cryptical and hard to understand as the current legal regime requires a right holder’s legal personality.²⁷ However, there is an ambiguity therein, which alludes to what occurs when the AI system is bought, whether the developer of AI or the purchaser has copyright. Some countries like England and New Zealand, which grants copyright to program makers for works created by AI, by legal fiction in creator’s favour. Legal support is provided by expanding the copyright definition to include works created by computer (which lack the author of a human being, i.e., AIs).²⁸ However, the above question has still not been answered.

The nature of criminal liability of AIs is also a problem with the current system²⁹. Nobody considered the wonders they would achieve while creating the AI, and never expected that the same would rise when AIs grow into an autonomous entity in the future. A pertinent question will then arise concerning

²³ *Final Report of the National Commission on New Technological Uses of Copyrighted Works* NATIONAL COMMISSION ON TECHNOLOGICAL USES OF COPYRIGHTED WORKS, Washington D.C, (1978).

²⁴ An office of United States Congress from year 1972-1995.

²⁵ *Intellectual Property Rights in an Age of Electronics and Information*, U.S. OFFICE OF TECHNOLOGICAL ASSESSMENT (1986).

²⁶ DAVID GELERNTER, *THE MUSE IN THE MACHINE: COMPUTERS AND CREATIVE THOUGHT* (Fourth Estate, 1994).

²⁷ James Boyle, *Endowed by their Creator? The Future of Constitutional Personhood*, *The Brookings Institution Future of The Constitution Series*, 70 NCLREV 1231 (1992).

²⁸ Copyright, Designs and Patents Act, §§ 178, 1988 (UK); Copyright Act, § 2, 1994 (New Zealand).

²⁹ Gyandeeep, *supra* note 11.

an AI's possible criminal liability.³⁰ If the present position continues, the designer has responsibility, even though he lacks *mens rea* or *actus reus*. There are, therefore, certain loopholes in the current position of AIs under IP law.

V. DAMAGES IN CASE OF PLAGIARISED INNOVATION

Another significant aspect that the international community really needs to deal with is that if an AI produces or generated an invention that already belongs to someone else, then in that case, who will be charged with damages. Therefore, it is quite clear that a machine cannot be made to pay damages, so considering such an innovation is not created by a human, so they cannot be charged with damages.

Henceforth, even though these questions at first may seem to be quite confusing still with the growing pace of AI inventions, it has become the need of the hour for us to draw specific legal solutions to these complex questions. Thus, the researcher has further provided an in-depth analysis of the Indian legal framework concerning IPR and how it can be interpreted to construe answers to these complex questions raised by the international community concerning the use of AI for generating relevant IPR content.

VI. ANALYSIS OF INDIAN LEGAL SCENARIO CONCERNING AI-GENERATED IPR

India is slowly but gradually pushing forward in the AI market, with big companies including Apple and Salesforce acquiring Indian AI-powered companies. Not only this, but the increase in AI start-up in India has been massive, with increasing amounts of funds being invested into research and development of the same. One of the most notable facts is that how an AI space, Sentient, received an investment amount of 143 Million USD in its initial years³¹. Therefore, there is no doubt that with such a massive increase in AI within the country, the scope of such AI innovations touching upon the stream of IPR is not surprising. So, this raises the need for understanding the IPR legal framework of India, to determine whether or not such IPR innovations through AI are valid or invalid under the Indian legal framework:

³⁰ Gabriel Hallevy, "AI v. IP- Criminal Liability for Intellectual Property IP Offenses of Artificial Intelligence AI Entities", SSRN (18 November 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2691923.

³¹ Gyandeeep, *supra* note 11.

A. AI-Generated Copyright under Indian Law

Copyright is a law which safeguards the human mind and intellect's original creations. Indian copyright grants protection to creations, which is not a mere concept, so if creation is the author's expression and not merely a thought, such work can be protected.

Section 14³² defines "Copyright" which states that copyright is the exclusive rights of the author to do or to delegate any act concerning his work such as reproduction, publication, adaptation and translation of work. Also, Section 17³³ of the Act stipulates that the author shall be the first copyright owner however if the contracted work is performed by an employed individual for consideration, that in this case, the employer is the owner of the created work.

Section 2(d) of Copyright Act 1957 provides an elaborate definition of "Author" and in the case *Rupendra Kashyap v. Jiwan Publishing House Pvt. Ltd.*,³⁴ it was held that

*...in the context of question papers for an examination, that the author of the examination paper is a person who has compiled the questions; the person who does this compiling, is a natural person, a human being, and not an artificial person; Central Board of Secondary Education is not a natural person and it would be entitled to claim copyright in the examination papers only if it establishes and proves that it has engaged persons specifically for purposes of preparation of compilation, known as question papers, with a contract that copyright therein will vest in Central Board of Secondary Education.*³⁵

Likewise, the courts have maintained in light of various other decisions that a legal person cannot be granted authorship any work involving copyright.³⁶ Copyright Office's Practice and Procedure Manual (2018)³⁷, also

³² The Copyright Act, No.14 of 1957 INDIA CODE (1957), § 14.

³³ The Copyright Act, No.14 of 1957 INDIA CODE (1957), § 17.

³⁴ *Rupendra Kashyap v. Jiwan Publishing House Pvt. Ltd.*, 1994 (28) DRJ 286.

³⁵ *Navigators Logistics Ltd. v Kashif Qureshi*, 254 (2018) DLT 307.

³⁶ *Tech Plus Media Private Ltd. v Jyoti Janda*, (2014) 60 PTC 121 see also, *Camlin Pvt. Ltd. v National Pencil Industries*, AIR 1986 Delhi 444.

explicitly states that only the information of a natural person to be provided as the author of the work during the copyright application.

The rationale of the author as a natural person was based on the findings made by courts, which decide the copyright of work in various jurisdictions, which be summarised as follows,

- 1) The first owner of the copyright is always the author.³⁸
- 2) To protect a compilation, authorship elements in the selection, coordination, and arrangement of materials are required.³⁹
- 3) Authorship elements are needed to select, coordinate, and arrange the materials to protect a compilation
- 4) Compilation created by dedicating money, skill, labour, and time is a scholarly work in which copyright vests with the author.⁴⁰
- 5) Copyrightability work is to be tested on the basis of author's skills and judgement being applied in the original work.⁴¹

B. Possible Issues if Artificial Intelligence Granted Protection under Copyright Act

Compilation of existing content –

As we discuss about AI-created work, we need to consider that AI-created work would be focused on the content or factor, or the amount of knowledge that the algorithm enables it to delve into. To produce a result, AI relies on its programming and algorithm. The AI may explore and analyse already available information, and so the creation of it is based on publicly available information or already copyrighted material. AI cannot produce original material because its work consists of a modification or an updated version of the existing data. Consequently, acknowledging AI as an independent entity and the separate protection of work can lead to infringement of the copyright of holders.

Originality -

³⁷Practice And Procedure Manual 2018, COPYRIGHT OFFICE GOVERNMENT OF INDIA https://copyright.gov.in/Documents/Public_Notice_inviting_reviews_and_comments_of_stakeholders_on_draft_guidelines/Literary_Work.pdf.

³⁸ The Copyright Act, No.14 of 1957 INDIA CODE (1957), § 17.

³⁹ Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991).

⁴⁰ Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber, 61 (1995) DLT 6.

⁴¹ Eastern Book Company v. D. B. Modak, (2008) 1 SCC 1.

While examining copyright under the Indian Copyright Act, we look into section 13⁴² of the Act, which defines “works in which copyright subsists.” This provision explicitly specifies that the creation must be original if it is to apply for literary, artistic, dramatic, and musical work. However, given that the word “original work” is not defined anywhere in the Act, courts typically review the following parameters when determining originality⁴³:

- 1) Whether the expression and idea are inherently linked. (**“Doctrine of Merger”**)
- 2) Whether the author applied expertise and effort. (**“Sweat of the Brow Doctrine”**)
- 3) Whether the least possible level of imagination is present in work. (**“Modicum of Creativity Doctrine”**)
- 4) Whether the resultant work is a product of only work and skill, the author’s judgment and skills are involved. (**“Skill and Judgment Test”**)

In order to assert copyright ownership or authorship by AI, the work developed must be original and suitable for the testing of originality, whether it is the work of literature, dramatics, music or art. However, it remains debatable whether AI can create original work. The Copyright Act of 1957 recognises compilations of literary work, and the work so created by AI can qualify as a compilation because the AI relies on existing knowledge and visibility of the programming and, therefore, may qualify to be copyright protected. Alternate claims, however, state that such work is merely a compilation without expertise, judgement and skill.

Contemplating the court’s decision in *Eastern Book Company v. D.B. Modak*⁴⁴ where it was observed by the court that,

To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely

⁴² The Copyright Act, No.14 of 1957 INDIA CODE (1957), § 13.

⁴³ Lucy Rana, *Artificial Intelligence And Copyright – The Authorship*, MONDAQ (December 18, 2019), <https://www.mondaq.com/india/copyright/876800/artificial-intelligence-and-copyright-the-authorship>.

⁴⁴ *Eastern Book Company v D.B. Modak* (2008) 1 SCC 1.

labour and capital. The derivative work produced by the author must have some distinguishable features and flavour.

So, demonstrating “skill and judgement” is an essential prerequisite for any derivative work or compilation.

Infringement

When an AI is acknowledged as the owner and author of the resulting creation, an essential question arises, who is liable for any violation or infringement by AI? Section 51⁴⁵ states:

51. When copyright infringed. — *Copyright in a work shall be deemed to be infringed—*

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) when any person—

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

*(iv) imports 2*** into India, any infringing copies of the work*

⁴⁵ The Copyright Act, No.14 of 1957 INDIA CODE (1957), § 51.

Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

On analysing it could be said that “person” is capable to infringe upon the copyright. Since AI’s status as a legal entity is still not classified, any violation by AI becomes a serious problem. For AI, liability for any infringement caused by AI becomes much more difficult. As the AI does not have its own legal status, the problem of AI and copyright might therefore decline if a proper network and sequence are not formed for the creation of liabilities for AI’s actions.

C. Obstacles Associated with AI as Copyright Holder

To examine the complexities accurately associated with the recognition of AI as an author, we have to check if AI can, under Indian Copyright law, be recognised as author. Let us look at a few situations to examine existing provisions of copyright law *vis-a-vis* AI:

- 1) Under section 17⁴⁶, transferring copyright is also provided for under the employer-employee relationship, where the creative work did by the employees under the contract for consideration, the employer would be deemed to be the holder of the copyright. Now, in the situation of AI systems, since AI is not looked upon as separate entities, the employer-employee relationship would be hard to established in order to grant the ownership to the employer. The creator (programmer/owner/user) or any others cannot, therefore, be executed or authorised by the AI to become the owner of that work.
- 2) Under section 57⁴⁷, the special rights or also known as moral rights of the author can be challenged. These special rights comprise of the “right to paternity” (“the right to work and to be acknowledged”), “right to integrity” (“right of withholding or seeking compensations from all acts which could damage the dignity or reputation of the author”). Therefore, on recognising AI as the author of such work, such rights become superfluous, since AI cannot verify whether the dignity or reputation of the original work has been affected by any act. The right specified as the

⁴⁶ The Copyright Act, No.14 of 1957 INDIA CODE (1957), § 17.

⁴⁷ The Copyright Act, No.14 of 1957 INDIA CODE (1957), § 57.

moral right have more human feeling and emotions attached to creation, and ever since emotional quotient is absent in AI systems, it would be inappropriate to enforce such right.

- 3) The author is permitted to claim royalty⁴⁸ under the existing copyright laws in India which cannot be waived off. Hence, when the author of work is an AI system, then several questions would arise such as, who determines AI royalty, how this royalty is paid to AI, and in a specific scenario where if AI can determine the royalty, then should that amount be determined based on reasonability.
- 4) For any AI work, it will be difficult to impose the accountability of AI over any development. For example, in a possible scenario, what if the creation of AI is derogatory, slanderous in nature or contrary to the public morale, then except for taking down the relevant work from the public domain, no other plausible could be taken against the AI.

Therefore, on analysing existing Indian legal framework for IPR, it can be said that just like other countries, India too does not have any specific law or legal provision that could effectively deal with the IP that may be generated by Indian companies using AI-powered machines, bots or technologies.

VII. WOULD COPYRIGHT SUBSIST IN AI-CREATED WORKS?

The next question to be explored is whether copyright should remain in the works created by AI. Answering this question involves a discussion of copyright theories.

A. Utilitarian Theory

The Utilitarian theory is said to form the backbone of the protection of intellectual property.⁴⁹ To “foster the creation of artistic or useful works that

⁴⁸ The Copyright Act, No.14 of 1957 INDIA CODE (1957), § 31D.

⁴⁹ Amir H Khoury, *Intellectual Property Rights for “Hubots”*: On the Legal Implications of Human-Like Robots as Innovators and Creators 35(3) CARDOZO ARTS AND ENTERTAINMENT LAW JOURNAL 635, 652, (2017).

benefit society,”⁵⁰ these theories conceptualise the copyright as a utilitarian device. The promotion of artistic or useful works involves the incentive for innovation that is inherent in utilitarian theory. Without such a stimulus for innovation, the utilitarian theory suggests that authors may not invest the time, energy, and money needed for these works. They are readily and cheaply copied by freeloaders, thus eliminating the authors’ capacity to reap their works’ benefits.⁵¹

An application of utilitarian theory to works produced by AI is fundamentally based on the fact that ‘AI systems do not need to be encouraged to produce work from artworks.’⁵² AI systems are not vulnerable to short-term memory loss, overloading of information, deprivation of sleep, or distractions that humans are sensitive to and require encouragement to overcome.⁵³ Consequently, when considering AI as an object of copyright protection, the utilitarian theory’s motivational argument is redundant.

On the other hand, even where an AI system is involved, people are always indispensable to creating works. First, a human being, usually a team, builds AI systems. Secondly, human action is necessary for the creation of works by the existing AI system. A user (a human being) will either submit input data or, at a minimum, activate the AI system needed to start work generation.

In a similar vein, in *Telstra Corporation Ltd. v. Phone Directories Company Pty Ltd*⁵⁴ case, the applicant contended “human authorial contributions in the entire

⁵⁰ Roberto Garza Barbosa, *The Philosophical Approaches to Intellectual Property and Legal Transplants. The Mexican Supreme Court and NAFTA Article 1705* (Summer 2009) 31(3) HOUSTON JOURNAL OF INTERNATIONAL LAW 515, 517, (2009).

⁵¹ Jeanne C Fromer, *An Information Theory of Copyright Law* (2014) 64 EMORY LAW JOURNAL 71, 74-75, (2014) *see also*, Alina Ng, *The Author’s Rights in Literary and Artistic Works*, 9 J. MARSHALL REV. INTELL. PROP. L. 453, 453 (2009); Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 676 (2000) (statement of Wendy Gordon).

⁵² Shlomit Yanisky-Ravid, *Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era – The Human-Like Authors are Already Here – A New Model*, (4) MICHIGAN STATE LAW REVIEW 659, 668, (2017).

⁵³ Shlomit Yanisky-Ravid, Luis Antonio Velez-Hernandez, *Copyrightability of Artworks Produced by Creative Robots, Driven by Artificial Intelligence Systems and the Originality Requirement: The Formality-Objective Model*, 19 MINN. J.L. SCI. & TECH. 1, (2018).

⁵⁴ *Telstra Corporation Ltd v Phone Directories Company Pty Ltd*, (2010) 194 FCR 142.

continuum of production should be considered, not just the human involvement at the final point of materialization.”⁵⁵ This line of reasoning can be applied to AI works. While a human’s intervention cannot be pinpointed in the final point of materialization of a work created by AI, human intervention is easily identifiable earlier in the production continuum. For example, humans are behind the code that trains AI to make decisions and use the AI system. While no one holds the “proverbial pen” to do the actual writing,⁵⁶ there are humans that can be identified as contributing to the works of AI in earlier stages of the production continuum and could be held ‘responsible for the arrangements further up the chain.’⁵⁷

Therefore, it could be argued that human beings, who in a certain way, contribute to the production of AI-generated works, need to be allowed to promote such a contribution. If human beings are in no way compensated for such an endeavor, if they do not obtain any benefits from creating AI systems or triggering them to create works, they will not make their indispensable contributions, and the world community will end up with less (if any) creations created by AI.

At the same time, it is questionable whether copyright protection is, in all cases, indispensable to promote the production of works for works generated by AI. Firstly, concerning human participation in AI development, developers of AI-based software have already been incentivised by copyright legislation. It is questionable whether an additional level of protection awarded for software developers would lead to additional incentives and increased outputs.⁵⁸ Therefore, according to utilitarian theory, vesting rights for AI-generated works in software developers may be unjustified. There is no evidence that the second layer of copyright protection will contribute to the development of more AI systems and, as a result, more works. However, as shown in a subsequent

⁵⁵ Jani McCutcheon, *The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law*, 36 MELBOURNE UNIVERSITY LAW REVIEW 917, 942, (2013).

⁵⁶ Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, STANFORD TECHNOLOGY LAW REVIEW 5, 21, (2012).

⁵⁷ Ana Ramalho, *Will Robots Rule The (Artistic) World? A Proposed Model for The Legal Status Of Creations By Artificial Intelligence Systems*, 21(1) JOURNAL OF INTERNET LAW 12, 13, (2017).

⁵⁸ Hristov, n 34.

section, the natural rights theory could justify additional copyright protection for AI works.⁵⁹

One more concern is whether people who cause AI systems to build works, i.e., users of AI systems, must always be encouraged to do so. The answer will probably depend on the degree and form of effort that has been made. If the person simply switches to the AI scheme or makes a sheer effort or not of an intellectual nature, it might not be necessary to merit copyright protection. Also, minor operations, such as the AI system's activation, are indispensable for the AI system's start-up, but it would be disproportionate and unnecessary for users to be given exclusive rights over the produced works. On the other hand, if users are engaged in a sufficiently significant intellectual effort that contributes to the development of a work, that commitment could be worth promoting and, thus, copyright protection may serve as a mechanism to promote such efforts on the part of users.

This reasoning is based on the utilitarian approach to copyright: only when no exclusive control leads to a lack of incentives for making an effort and creating works, leading to fewer artistic goods that enter society, the exclusive right to work should be given.⁶⁰ Except where required to encourage innovation but not in such an excess to preclude fair access by the public to works, exclusive rights must also be given.⁶¹ The utilitarian theory could explain the protection of works created by AI only if there is a sufficiently substantial human contribution to those works' production. In other words, there is no point in encouraging users to contribute little when they need minimal effort and are likely to be made in any event. According to utilitarian philosophy, only efforts that humans can probably do without enough compensation are worth rewarding.

B. Natural Rights Theory

Natural rights theory provides another rationale for justifying copyright in works created by AI.⁶² Simply stated, the natural rights theory refers to the notion of

⁵⁹ See below Natural Rights Theory.

⁶⁰ Miranda Forsyth, *The Digital Agenda Anti-Circumvention Provisions: A Threat to Fair Use in Cyberspace*, 12 AUSTRALIAN INTELLECTUAL PROPERTY JOURNAL 82, 84, (2001).

⁶¹ *Id.*

⁶² Owen Morgan, *Graffiti – Ownership and Other Rights*, 12 MEDIA AND ARTS LAW REVIEW 167, 179, (2007).

basic rights that cannot be denied. Philosopher, John Locke, recognises property as a fundamental natural right because “people are entitled to own both what they produce employing their own efforts and whatever they have laboured on.”⁶³ This theory’s contextual development is essential to consider, as it evolved when intellectual property laws were not implemented and, therefore, only refers to a tangible property if strictly applied. Despite the intangibility of intellectual property, successive scholars have consistently applied natural rights theory to intellectual property. Subsequently, intellectual property rights, such as copyright, have been considered by some as equal to property rights in all types of assets.⁶⁴ Therefore, an author is entitled to copyright protection as a natural right because it protects the “fruits of his labour.”⁶⁵

Will the principle of natural rights justify granting copyright over AI-created works? The situation is more complicated than it may seem at first glance, as in the case of incentive theory. First, natural rights principles do not justify granting the AI system copyright because only human beings, not machines, have natural rights. We should also question whether, as ‘fruits of their labour,’ people who contribute to works produced by ai may assert property rights over those works.

A metaphor can help to clarify the situation’s ambiguity. When a tree has lemons grown, the farmer, while not growing the lemon, earns property rights in the lemon due to his labor. The tree carried out the process of growing a lemon directly, but no one can refuse the farmer the “fruits of his labor.”⁶⁶ Similarly, one might argue that the AI performs explicitly producing the work in material form (‘lemon’) rather than the human one. However, since the human-produced the AI system in the first place and/or activated it to produce works (compared to planting and watering the lemon tree), the human should have a natural right to the work created by AI.

⁶³ JANICE GRAY ET AL, PROPERTY LAW IN NEW SOUTH WALES (LexisNexis Butterworths, 4th ed, 2018) 14.

⁶⁴ Adam Mossoff, *Why Intellectual Property Rights? A Lockean Justification*, LAW & LIBERTY (May 4, 2015) <https://www.lawliberty.org/liberty-forum/why-intellectual-property-rights-a-lockean-justification/>.

⁶⁵ Joseph Savirimuthu, *John Locke, Natural Rights and Intellectual Property: The Legacy of an Idea*, 8(11) JIPLP 892, 892, (2013).

⁶⁶ *Id.*

However, is the labor performed by human beings always involved sufficient and not too remote from the final output for them to claim ownership of the works created by AI? In some instances, humans developing the AI may consider what kind of performance the AI system would generate. For example, in the *Meandering River*⁶⁷ case, individuals who programmed an AI system to capture satellite images and bring them together in a real-time implementation may have had a general view of the type of work that AI would create as an output. In such a case, where coders had a general view of output, it would be fair to attribute copyright in the artwork created by AI to persons who developed the AI system in the first place.

Likewise, the courts in certain jurisdictions have recognised that the graphical user interface (GUI) is separately protected from the underlying software.⁶⁸ The main reason for granting such protection is that software developers can view how the GUI looks when writing code. Therefore, it is fair to grant them exclusive rights over the GUI and prevent others from creating identical or very similar GUIs by merely writing another source code. Similarly, in the case of computer games, software developers not only own rights to the underlying software but also to the result of the software, i.e., the audiovisual expression of the game; they may be protected as audiovisual works or other types of work (musical, graphical, etc.).⁶⁹ In these cases, software developers acquire rights to both the GUIs and the audiovisual expression of video games since they have envisaged them as the final output that the software will produce; therefore, they count as ‘fruits of their labour.’ A similar rationale would apply to AI works as long as AI developers have a specific vision of the works that AI will produce.

The AI system can be designed to accept various input data in other scenarios, so that system developers cannot even imagine what kind of outputs this can lead to. Building on the example of *Portrait of Edmund Belamy*⁷⁰, a group of

⁶⁷ *Work – Meandering River*, ONFORMATIVE, <https://onformative.com/work/meandering-river>.

⁶⁸ See EU case law: *Bezpečnostní Softwarová Asociace - Svaz Softwarové Ochrany v Ministerstvo Kultury* (C-393/09) [2011] E.C.D.R. 3 (22 December 2010).

⁶⁹ ANDY RAMOS ET AL, *THE LEGAL STATUS OF VIDEO GAMES: COMPARATIVE ANALYSIS IN NATIONAL APPROACHES* (WIPO Report, 2013).

⁷⁰ Amanda Turnbull, *The price of AI art: Has the bubble burst?*, *THE CONVERSATION* (Jan. 7, 2020), <https://theconversation.com/the-price-of-ai-art-has-the-bubble-burst-128698>, (*hereinafter* Amanda).

researchers fed their data set consisting of over 15,000 portraits dating from the 14th to 20th centuries into an AI program code, which they downloaded online to shape the rough idea of the painting to be produced by the AI. Therefore, it is likely possible that the person who created the AI program code, which the French researchers downloaded online, might not have envisaged what kind of data could be the input nor the output it would have produced.⁷¹

In such a case, when output is very remote from the work of AI developers, and they do not have a vision of the kind of work that AI is going to produce, it becomes unwise to give them exclusive control over such works. In comparison, MS Word developers cannot claim ownership of all texts written when using this application, even if they were very innovative and thoughtful when writing the software. Similarly, while developers of AI have certainly done considerable intellectual work to create an AI system, in *Portrait of Edmund Belamy's*⁷² case, it is unlikely that developers have planned this type of output. It can therefore be argued that the results are too distant from the work of developers and cannot claim copyright over them.

As far as the AI user is concerned, the question is whether the 'labor' they contribute is sufficient to give them ownership of 'fruits.' In some cases, users may have a creative intellectual contribution to the type of input data that will be fed into the AI system. If the contribution is sufficiently significant and not merely mechanical, it may be sufficient to justify the outcome's ownership. Following the same example of *Portrait of Edmund Belamy*,⁷³ it was the idea of the user, the French artist, to feed the AI algorithm with a specific data set. Such a creative idea and effort to implement it is likely sufficient to give rise to copyright protection over the output that the AI system subsequently generated.

On the other hand, if the user contributes little or no intellectual effort to the generation of the work, it is questionable whether that contribution would be sufficient to allow the user to own the final result generated by AI. For example, feeding a single word to the AI system, which then generates a poem, is likely

⁷¹ *Is Artificial Intelligence Set to Become Art's Next Medium?* CHRISTIE'S (Dec. 12, 2018), <https://www.christies.com/features/A-collaboration-between-two-artists-one-human-one-a-machine-93321.aspx>.

⁷² Amanda, *supra* note 71.

⁷³ *Id.*

insufficient to protect the user's copyright who contributed that single word.⁷⁴ Also, returning to the lemon example, if the neighbor waters the lemon plant several times, this effort is insufficient to claim ownership of the lemon fruit; the lemon tree owner still owns the lemon tree. This is in line with the arguments put forward in the utilitarian theory that it is worthwhile to encourage users to grant copyright protection only if their contributions are sufficiently significant.

As a result, according to the theory of natural rights, the answer as to whether copyright protection should be granted to AI-created works depends on the nature and significance of the work performed by human beings. If the labour force is not too distant from the final output and demonstrates sufficient intellectual effort, it can be reasonable, under the theory of natural rights, to allow those human beings with property rights over the final product produced by AI.

In particular, it appears from the foregoing that, in the case of particular works created by AI, granting exclusive rights over works may be justified, e.g., where the individual contribution is significant and where the contribution is not too distant from the final output. However, in other cases, where such criteria are not met, works may not deserve copyright protection at all. For example, if the works created were not envisaged by the developers and did not require any significant input from the user (i.e., were created virtually independently by the AI system), there seems to be no reason to grant exclusive rights to any of the people involved in the process. If their contribution was insignificant, there is no incentive to provide protection. If the AI system's output is too remote from human individuals' input, the theory of natural rights would not require the granting of property rights over that output. This type of work would then fall into the public domain and could be used.⁷⁵

VIII. COPYRIGHT- AUTHORSHIP/OWNERSHIP CONUNDRUM: A POSSIBLE SOLUTION

⁷⁴ Es Devlin, *Poem Portraits*, ARTS EXPERIMENTS, https://artsexperiments.withgoogle.com/poemportraits?_ga=2.33161846.992826029.1556786810799000725.1554196893.

⁷⁵ Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, 57 IDEAS: THE JOURNAL OF THE FRANKLIN PIERCE CENTER FOR INTELLECTUAL PROPERTY 431, 431, (2017).

For over 200 years, a significantly debated subject has been the authorship of creative works. Until this time, it was not so difficult to grant authorship, since most modern inventions like cameras and computers that helped create copyright work were merely instruments, and people have been the real brains behind the production. However, due to the exponential growth of AI and modern machine learning strategies, an AI system without human intervention is producing more and more work.

For a work to be copyrightable, it has to conform with the “modicum of creativity,” a requirement formed in *Modak*⁷⁶ case; where the court, asserted that there should be a minimum degree of creativeness. Another critical element is the presence of human talent since imagination is perceived to be a human activity. In the Ninth Circuit Decision, where a monkey took its selfie⁷⁷, the court stated that the monkey could not be granted copyright for the photographs it took, the reason given was, “any claim can be refused for registration by the US Copyright office if it determines that a human being did not create the work.” Court added that “it will exclude works produced by machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.” Hence, the decision elicited the question as to who owns the copyright of art created by an AI.

Although humans program the algorithms, it is from the AI-powered by that algorithm the decision making, the imaginative work originates. Considering the recent expressions made by AI, it is infallible that there is a work of creativity in them. For example, an AI at Google created unheard sounds by merging sounds of two different instruments and opening up a whole new toolbox for musicians to explore⁷⁸; this is just one model in a series of creations that AIs have made. In 2016, a novelette authored by a Japanese computer machine entered into the second round of a national literary competition⁷⁹.

⁷⁶ Eastern Book Company v. D. B. Modak (2008) 1 SCC 1.

⁷⁷ Naruto, *supra* note 3.

⁷⁸ Cade Metz, *Google's AI Invents Sounds Humans Have Never Heard Before*, WIRED (May 15, 2017), <https://www.wired.com/2017/05/google-uses-ai-create-1000s-new-musical-instruments/>.

⁷⁹ Natalie Shoemaker, *Japanese AI Writes a Novel, Nearly Wins Literary Award*, BIG THINK (Mar. 24, 2016), <https://bigthink.com/natalie-shoemaker/a-japanese-ai-wrote-a-novel-almost-wins-literary-award>.

Section 2(d) of The Copyright Act, 1957, defines ‘author’, the main issue is in the definition “the person who causes the work to be created.” To decide who “causes” work to be done, the proximity of a natural or lawful person to the “expression or the work” in question to be looked as closer a person is, the more he adds to it, and the more likely he or she is to call himself a person “who causes the work to be created.” Therefore, under the present arrangement of the Copyright Act, it cannot be feasible for the creation of works in which the “original author” is not an individual or a legal entity as a matter of fact as mentioned above.

Thus, their creation will be problematic under Indian copyright laws concerning works created by AI. In the beginning, the AI system would eventually involve human intervention, but the way of deciding who the maker/owner is when AI is under the spotlight while doing a job is still in a hazy place. At present, the European Commission is working on a directive⁸⁰ that aims at defining ‘legal personality’ with primary concern for AI. Copyright laws can either revoke copyright rights for works where there is little or no human intervention, or they can grant authorship to the software designer.⁸¹ This could proceed to another dilemma in regard to the application designer or the application user. It is like wondering who is the owner of the copyright, pen, or writer.

Things will likely become even more unforeseeable because artists use AI’s more often now than ever, and the AI system show signs of change when they replicate imagination, making it harder to see when a human or machine creates a work of art. We have not yet begun the debate as to what happens when personhood is extended to AI; it is a whole different matter. Copyright refusal culminated in the publishing of works produced by AI in the public domain, and the laws must be readjusted or newly created immediately to appropriate work produced independently by AI, as granting proprietary control to works would serve as a significant motivation for AI creators.

While glancing through the question of authorship, another question arises that are we even looking at the right question, and if not, then what is the right question? It is the researcher’s view that determining the copyrightability of the

⁸⁰ *Supra* note 7.

⁸¹ Andres Guadamuz, The Monkey Selfie: Copyright Lessons for Originality In Photographs And Internet Jurisdiction, 5(1) INTERNET POLICY REVIEW (2016).

works produced by AI is the wrong place to start with to contemplate that can an AI can be considered an author of a work? We must concentrate on writing rather than on writers and ask whether an AI can produce a work fit enough to be granted copyright instead of asking whether it can be an author. Therefore, a reinterpretation of the terms “employer” and “employee” could be made for “Work Made for Hire Doctrine” to classify AI as an employee instead of redefining the term “authorship” to include non-humans.

A. Work Made for Hire Doctrine

Since AI creators and corporations have no active role in the production of work by the AI, copyright protection cannot be granted to them under existing copyright laws. Nevertheless, the “Work Made for Hire” doctrine could provide a solution in order to achieve it. This doctrine states that, if an employee hired by the employer makes a work, then the employer would be deemed to be the author even though the employee created the work.⁸² Therefore, this doctrine could be applied to the existing AI industry.

This doctrine act as an exception to the general principles of copyright, wherein the ownership of copyright vests with the original creator of the work, thereby providing an ideal pretext to regulate the works of AI systems. Secondly, the Indian Copyright Act, 1957, provides for the employer to be the author⁸³ as it not only provides incentive and commercial control over the work, but it also ascertains liability for the actions of creators, *i.e.*, employees.

Section 17 provides that the original owner of the copyright would always be the author. However, there are certain exceptions to this provision, and section 17(a)⁸⁴, 17(b)⁸⁵ elaborates about certain situations wherein the first owner of the copyright is being assigned to the employer under whose employment the employees have created that work. Section 17(c)⁸⁶ is a residuary provision that

⁸² *US Copyright Office, Circular 9: Works Made for Hire (Sept. 2012)*, (Apr. 20, 2020), <https://www.copyright.gov/circs/circ09.pdf>.

⁸³ *The Copyright Act, No.14 of 1957 INDIA CODE (1957)*, § 17.

⁸⁴ *The Copyright Act, No.14 of 1957 INDIA CODE (1957)*, § 17(a).

⁸⁵ *The Copyright Act, No.14 of 1957 INDIA CODE (1957)*, § 17(b).

⁸⁶ *The Copyright Act, No.14 of 1957 INDIA CODE (1957)*, § 17.

incorporates all other types of works that are not explicitly covered under clause (a)⁸⁷ or (b)⁸⁸.

Someone else is hired to work by the employer to decide the job's time to be completed and the methods of getting the work to an end, and how the work is performed, so the contract is a "contract of service". On the contrary, one person hires a particular person to do certain work but leaves the other party to determine how the work is to be accomplished and what action is taken to accomplish the desired result, the contract is "contract for service". In *Beloff v. Pressdram*⁸⁹, the court said that whether work was done during employment is a question of whether the employee created the work as a component of the employer's business or whether the employee, in his individual capacity, did it. In the first instance, it is a "contract of service", and for the second, it is a "contract for service."⁹⁰ Therefore, in situations when the AI system is working autonomously, the work done by it may be treated as a contract for service.

When applying the WMFH model on AI systems, several issues remain unanswered. "Are the works copyrightable to begin with"? In addition, can the employer possess copyright via WMFH doctrine if they are not copyrighted? What if an AI device goes beyond its "employment" competence?⁹¹ An AI developed work must be viewed differently from work performed by an employee when evaluating the work made for hire doctrine. There is no human author behind an AI, while employees construct work according to their prior agreement with the employer in a conventional employer-employee relationship, and employees create such involving the employer's active participation.⁹² The

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Beloff v. Pressdram* (1973)1All E.R.241 (Ch. D.)

⁹⁰ Sanjeev Malhotra, *Right of ownership under Indian copyright law*, LEGAL SERVICES INDIA (FEB. 13, 2020), http://www.legalserviceindia.com/articles/copy_owner.htm

⁹¹ Kartikeya Prasad, *Looking For The Authors Behind Works Created Autonomously By AI Machines*, MONDAQ (Mar. 21, 2019), <https://www.mondaq.com/india/copyright/792184/looking-for-the-authors-behind-works-created-autonomously-by-ai-machines>.

⁹² E Jordan, *Employment Relations Research Series 123 Employment Regulation Part A: Employer Perceptions and the Impact of Employment Regulation Executive Summary*, <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/f/11-1308-flexible-effective-fair-labour> (Mar. 30, 2020).

justification for granting employers copyright is to explain the high cost of training qualified employees and building intellectual property rights work.

Unless there is new legislation or amendments to existing regulations, it is impossible to implement this doctrine in the current copyright regime. Work created independently by an AI is not subject to the “WMFH” because the correlation between the developer and the AI system is not an agency relationship in the employer employee’s essence. Section 2(d)(vi)⁹³ states that “the author is someone who did computer-generated works.” If the courts wish to view it liberally or an amendment to the existing Act is done extending the concept and definition of an author, in that case, creators of the AI systems may be given ownership of the copyright in the works created by the AI machines autonomously.

IX. CONCLUSION

Presently there is a vast void between the existing copyright regime and the emerging AI technologies, and very much like in the era of the internet’s emergence where the laws were playing catch-up, presently it is almost the same scenario with the AI. This approach could potentially lead to adverse outcomes, as the pace of development and AI implementation is very rapid. Therefore, lack of action in this domain could leave various creative industries vulnerable when it comes to creating copyright-protected works by the AI system and could also jeopardize the protection of such created works of AI by not offering them sufficient incentive to continue the development of these platforms.

As mentioned above, any future legislation must balance developers’ interests and protect authors who do not prefer to use machine assistance to create their works. Since the development of these new legislative schemes seems to be moving at a snail’s pace, however, the future of law in this regard looks uncertain, but the endeavors of the EU will undoubtedly lead the way in the future.

Advances in computation will mean that we cannot distinguish between human and machine, generated works soon. Therefore, it is our prerogative to decide what kind of protection we should provide to work created by AI with minimal or no human interference. The most reasonable arrangement is by all accounts to

⁹³ The Copyright Act, No.14 of 1957 INDIA CODE (1957), § 2(d).

concede copyright to the individual who made the AI produced work conceivable, with the Work Made for Hire doctrine looking the most effective. The advantages of such an approach would ensure that AI systems developers would continue to invest in the development of technology, confident that their investment would yield a return to them.

Damming the Rivers Of North Bengal: A Socio-Legal Approach towards Sustainable Use of the River Biodiversity

*Soumya Pratik Dutta¹ &
Dr. Madhumita Dhar Sarkar²*

Abstract

North Bengal due to various perennial rivers is an ideal for hydro-power project plants. Dam building in India dates all the way back to the pre-Harappan era. India now has over 5100 major dams, according to the latest estimates from the Central Water Commission. Due to various developmental purposes the rivers of North Bengal in particular lost their natural flow. RoR hydropower plants are 'socially and environmentally benign,' and a useful mechanism to meet water demand. Reforming technocratic water and energy organizations is a very difficult task. To solve these concerns in the near term a stronger organizational framework for environmental and social governance is required and the guidelines need to be framed. Additionally, there is no legislative or administrative structure in place to ensure that evaluation, planning, judgement, economic evaluation, or environmental impact evaluations for the assessment the impact of dams on rivers. Proper planning and implementation are the need of the hour.

Keywords: *Dams, perennial rivers, Hydro-power, ecology, action plans*

I. INTRODUCTION

River dams are probably the most visible aspect of contemporary river administration. When the World Commission on Dams conducted a study of the world, it discovered more than 45,000 major dams. While the majority of beavers or certain people have dammed rivers for as far as either species has lived, the extent and size of dam construction in the 21st century were unparalleled. Additionally, manmade operations throughout the river length disrupt the river's dynamic balance and hasten bank erosion. Anthropogenic

¹ Ph.D. Research Scholar, Deshbandhu Chittaranjan School of Legal Studies, Assam University, Silchar.

² Professor in Law, Deshbandhu Chittaranjan School of Legal Studies, Assam University, Silchar.

activities like deforestation, gravel mining, dam and bridge building, artificial channelization, bank restoration program, and land-use changes impact the shape and natural dynamics of river biodiversity. Dam development has moved mostly from industrialized to developing nations, with countries like China and India undertaking large-scale dam development projects, involving inter-basin exchanges. While developing nations' water and energy needs are genuine and must be met, the danger to environments is severe, and rare species & places are in peril. Migratory fish, river dolphins, and water birds are especially susceptible, as are individuals who rely on these environments for their livelihood, such as fisheries. Those most impacted by dams seldom gain immediately and often remain without reliable electricity or safe drinking water. Meanwhile, a significant portion of the water stored in dams is squandered, particularly via poor agricultural irrigation facilities. The first dam is thought to have been erected across the Nile about 2900 BC to provide water at Memphis, King Menes' city. Dam building in India dates all the way back to the pre-Harappan era. The first dam on the Indian subcontinent is thought to have been constructed of stone rubble by Zoroastrians in Baluchistan.³ In Kutch, dams constructed of stone rubble known as Gabarbands may be observed, as well as brick bunds in Karachi have been discovered. These dams are reported to be very hard to date. However, archaeologists dated the dating to the pre-Harappan era based on pottery discovered in that location.⁴

The northern part of West Bengal, which is popularly known as North Bengal, is the land of various perennial rivers and as the rivers are flowing in sloppy and hilly areas these rivers is current bearing too. So they are ideal for hydro-power project plants. In this context, we can state categorically that dams are the greatest single hindrance to guaranteeing uninterrupted freshwater flows in rivers. The majority of India's large, medium, and small rivers have been dammed at various points, altering water flows downstream by certain reservoirs, notably during the non-monsoon periods, as well as the nature of monsoon floods. India has less than 350 reservoirs when it gained independence in 1947. Today, India has approximately 5100 major dams, according to the latest estimates from the Central Water Commission. Now the problem with the construction of dams and bridges on the river is that it causes hindrance in

³ The Dying Wisdom, p.21.

⁴ *Ibid.* 22.

guaranteeing uninterrupted freshwater flowing in rivers. India had fewer than 350 dams when it gained independence in 1947. India now has over 5100 major dams, according to the latest estimates from the Central Water Commission. Due to various developmental purposes the rivers of North Bengal in particular lost their natural flow, some rivers like Teesta started to change its natural direction. Even the soil, river bed and bank erosion has now become a regular phenomenon.⁵ It is very unfortunate to mention here that the existence of some major rivers of North Bengal namely, Mahananda, Balason, Karala etc. are now at stake.

II. RUN-OF-THE-RIVER (ROR) HYDRO

The Bureau of Indian Standards IS: 4410 defines a run-of-river generating plant as "a generation source that produces electricity from run-of-river flows and has sufficient postage to meet every day or week demand fluctuations." The river's usual path is not appreciably disturbed At such locations where the run-of-river generating plant is situated. Notably in this context IS: 4410 states the following about a reservoir dam: 'This reservoir confiscates water throughout periods of plentiful availability for usage throughout periods of shortage. It absolutely not at all affect the individual activities, the policy sector has promoted the impression that all RoR hydropower plants are 'socially and environmentally benign,' and hence create win-win scenarios. These intervals may be lengthy seasonal, yearly, or longer in duration. The bulk of huge hydroelectric dams that are referred to as 'run-of-river' are being developed in the Himalayan region, the diverting river flows via extensive tunnels before they are returned to the river downstream of a power plant. These projects are marketed as 'environmentally benign' due to the fact that they entail less submergence and less water management than traditional storage dams. This vision conveniently ignores the effect of various design aspects. For example, between the dams and also the power plant, large sections of the riverbank will be diverted, with up to 85–90 percent of the stream flow rerouted through the tunnel in the wintertime (lean season). The 18.5-kilometer-long head racing tunnel connecting the dam to the powerhouse in Sikkim's 510-MW 'Teesta V project' skips a 23-kilometer stretch

⁵ "Wetland Conservation and Management Rules 2010", South Asia Network on Dams, Rivers and People, vol. 8, issue 11-12

of river. Not only would this have a detrimental effect on the riverine ecosystem, but a cascading of developments will result in a devastating effect to the majority of the river running via tunnels. These projects require substantial digging in geological formations in vulnerable area, with severely underestimated environmental and socioeconomic consequences. For example, Houses built over lengthy tunnel alignments have developed fractures, water supplies have dried up, and severe landslides have occurred frequently. Additionally, digging creates a large number of muck & stone debris, whose disposal is a significant difficulty. The unregulated dump of these vast volumes of excavation muck in high Himalayan slopes with limited accessible flat ground has also resulted in disposal in rivers which ultimately affecting the entire river biodiversity. This is a truth that has been confirmed by India's Comptroller and Auditor General (CAG) in a 2009 report on Sikkim.⁶

Certain sectors are waging a deceptive campaign, claiming that RoR schemes being constructed in places including Arunachal Pradesh do not even entail the building of reservoirs! It is necessary to emphasize here that the projects usually include big dams, just like defined by the Ministry of Water Resources of India, the International Council on Large Dams (ICOLD), and also the World Council on Dams. Whatever the nature of the project, dams divide rivers by cutting biological ties downstream or upstream, among the river as well as its floodplain resulting in degradation of river biodiversity. Although there is cooperation between Environment Impact Assessment Committee (EIAC) and Ministry of Environment and Forest (MoEF) but there is also constant debate is going on regarding the disclosure of 'ecological flows' (e-Flows)⁷ while reviewing projects. It would be incorrect to see this as a panacea for making all projects 'benign'.⁸ E-flows have the ability to environmental protection strategy in otherwise environmentally and socially acceptable initiatives, although they are

⁶ Apr. 02, 2020,

http://www.cag.gov.in/html/cag_reports/sikkim/rep_2009/civil_chap1.pdf.

⁷ Environmental flows describe the quantity, timing, and quality of water flows required to sustain freshwater and estuarine ecosystems and the human livelihoods and well-being that depend on these ecosystems. (Mar. 03, 2020), https://en.wikipedia.org/wiki/Environmental_flow#:~:text=Environmental%20flows%20describe%20the%20quantity,and%20spiritual%20needs%20assumes%20significance.

⁸ Mar. 04, 2020, iucn.org.

the contentious notion that requires more extensive discussion in the specific setting. As a result, generally labeling RoR initiatives as socially and ecologically beneficial' is patently false. Regardless of the mode of operation or the kind of storage, the single and aggregate consequences of hydropower plants in every river basin must be thoroughly analyzed and understood prior to giving approvals.

III. IMPACT OF DAMS ON THE RIVER BIODIVERSITY OF NORTH BENGAL

North Bengal boasts the most magnificent river system in the whole nation. It is well-drained by a variety of rivers and tributaries of varying sizes. Apart from its river, the terrain is densely forested with ponds and bogs. The majority of rivers start in the Northern Himalayas and are fed by snow. As a result, they do not dry out throughout the winter. During rainy periods, they are absorbed and nearly always result in flooding. Siltation has an effect on the riverbeds. The Teesta in North Bengal's biggest and most significant river. As is the case with many of Northern India's other big rivers, the Teesta originates on the other edge of the Himalayas and breaks through the mountainous boundaries. Along with its tributaries such as the Rangpo, the Rilli, and the Rangit, the Teesta enters Jalpaiguri from Darjeeling and travels southeasterly till it reaches Bangladesh's Rangpur region. This river often alters its path, resulting in flooding. Between 1787 and 1968, this river caused devastating floods. Its flow is really swift. As a result of its devastation, it is dubbed the 'River of Sorrow in North Bengal'. The Torsa River (also spelled Torsha and referred to as Kambu Maqu, Machu, and Amo Chhu) originates in Tibet's Chumbi Valley, where it is called as Machu. It enters Bhutan as the Amo Chu. It is 358 km (222 miles) long in total, with 113 km (70 miles) in China and 145 km (90 miles) in Bhutan, before running into India's northern state of West Bengal. Torsa joins with Kaljani and it then flows into Bangladesh by the name of Kaljani and meets with the Jamuna there. Amo chu Hydro Power Plant, developed by NTPC Ltd, is one of the biggest hydroelectric projects in the country.

Besides the Teesta and Torsa, the Balason, the Mahananda, the Jaldhaka, the Torsa, the Kaljani, the Raidak, the Kulik, the Atrai, the Tangan, and the Kalindri are the other major rivers that pass across the research area. These rivers arise in the Darjeeling Himalayan area or in the Bhutan hills next to it.

The majority of these rivers eventually flowed into Bangladesh and subsequently into the Bay of Bengal. The Teesta River divides the country into 2 sections: the Terai in the west and the Dooars in the east. Terai is a Persian term that means a moist and humid environment. The term applies to the linear patch of land, 15 to 20 miles in diameter that runs the length of the Himalayan foothills from west to east. It relates to the region immediately under the Darjeeling Mountains as well as the boundary foothills between Bhutan and India. The Terai area is a highly uneven strip, sparsely covered and pierced by an infinite number of tributaries from the hills, which combine and split on the flat, until they emerge from a forest zone and penetrate the plain, pursuing convoluted routes that gleam such silver thread. Similarly, the term 'Dooars' relates to the mountain's doors. From north to south, a rough part resembles a massive stairway descending a series of steps from the towering Himalaya to the southern North Bengal plains. Rainfall has been plentiful across the Himalayan foothill districts of Darjeeling, Jalpaiguri, and southern neighbour Coochbehar.⁹ When the monsoons arrive, the ground is flooded with periodic streamlets that ultimately flow towards river systems, leading them to overflow and sometimes flood. During the pre-monsoon and post-monsoon seasons, some of the cyclonic storms and bouts of depression from the Bay of Bengal often reach the plains, breaking the climatic monotony. India now has over 5100 major dams, according to the latest estimates from the Central Water Commission.¹⁰ Dam development has increased rapidly in previous years. As previously noted, rivers provide minimal value in terms of design, judgement, building, operation, and other dam-related operations. The cumulative effect of several dams is not equal to the total of the impacts of individual dams; in fact, it may exceed the amount in the event of numerous impacts. However, no reliable cumulative effect assessment for any basin has been conducted. Cumulative impact evaluation is also important in terms of determining a basin's carrying capacity and guaranteeing that cumulative effects do not exceed that capacity. The first situation in which a study of basin maximum load was undertaken was in the case of the Teesta basin. This occurred as a result of a stipulation contained in

⁹ Dr. B. Banerjee, *Morphological Regions of West Bengal*, GEOG. REVIEW OF INDIA, Vol. 26

¹⁰ "Wetland Conservation and Management Rules 2010", South Asia Network on Dams, Rivers and People, vol. 8, Issue 11-12.

the Teesta V project's 1995 environmental approval letter. The report left much to be desired, but even its recommendations have not been implemented, and the MoEF itself has violated them.

The passions for dam construction in India started with Pandit Nehru's description of massive reservoirs have been called the 'temples of contemporary India.' He subsequently regretted that our country was afflicted by the 'sickness of gigantism.' Regrettably, contemporary planners have mostly forgotten this. Nehru argued for a plethora of smaller projects during the Central Board of Irrigation and Power's 29th annual meeting (held on November 17, 1958), nonetheless, his followers remained focused on colossal undertakings. This collection comprises the Teesta Barrage Project TBP in the Jalpaiguri district, as well as the National Hydroelectric Corporation's NHPC's level III and IV hydropower projects in West Bengal's Darjeeling district. Snow-capped summits of the Himalayas People from all around the world go to the sheer cliffs, rapid rivers, and green hillsides. The trek towards northern Sikkim will wow visitors with the splendor of the Teesta's dancing and roaring as it winds through verdant slopes. However, if the 8 projected Teesta hydroelectric dams, six from Sikkim & 2 from West Bengal, are completed, the dancing river would vanish. Further downstream, in the Jalpaiguri area, a formidable barrage already exists at Gajoldoba. Siltation which has been a significant issue in all of the hydro projects constructed to date also affects the river biodiversity. The reservoir was emptied through evaporation through dams & seepage of water via channels supply of water to the control area's marginal land that had been guaranteed throughout the project's planning phases. By dumping more water at the monsoon's peak, dams constructed to reduce floods have worsened floods. As per the Central Water Commission's CWC Guidelines for such Sustainable Development & Management of Water Resources, the minimum flow of a Rivers should have a minimum flow of 10 days in their natural state.¹¹ While the majority of beavers and some humans have dammed rivers for as long as either species has existed, the extent and size of dam construction in the twenty-first century were unparalleled. Notably, West Bengal is blessed with 7.5% of the country's water resources. The primary source of water in West Bengal is rainfall, which averages roughly 1762mm per year. 76 percent of this total is

¹¹ Report of the working group report on minimum flows set up by the WQAA, Vol. 1, Ministry of Water Resources, Govt of India

obtained during the monsoon season, while the remainder is received during the non-monsoon season. 21% of precipitation infiltrates the soils and regenerates the groundwater, whereas 49% returns to the environment through evapotranspiration. The net yearly water resource provided by rainfall in West Bengal is 51.02 billion cubic meters (WBPCB, 2009). North Bengal has around 60% of the available water resources, whereas South Bengal has 40%. Groundwater resources including natural discharge, are 34.20 billion cubic meters, with 31% in north Bengal and 69% in south Bengal. The state gets 598.56 billion cubic meters of transboundary water from its neighbors. The Ganga transports 525 billion cubic meters of water from its vast watershed, which covers 26% of India's land area. North Bengal receives 60% of the government's water resources, which remained 'underutilized' until the Jalpaiguri region built a barrage over the Teesta. The Teesta barrage project intends to unite a number of rivers in north Bengal. Not just in North Bengal, but also in West Bengal, the Teesta Barrage Project TBP is a significant irrigation project in eastern India, upon completion, the project is expected to irrigate 922 000 hectares in six districts of north Bengal and generate 67 50 megawatts of hydropower. Through a network of barrages & canals along the river, the three-tiered plan will utilize Teesta River flows for "irrigated farming hydropower generation navigation, and flood control." While work on the project started in 1976, only a few segments have been finished, notably the building of the Teesta Barrage at Galzaldoba in West Bengal's Jalpaiguri district and barrages on the Mahananda and Dauk rivers.¹² Along with the grandiose TBP, NHPC Limited is creating two "low dams" in West Bengal's Darjeeling district, namely Teesta Low Dam III (132 megawatts) and Teesta Low Dam IV (132 MW of power) (160 megawatts).¹³ While the proponents of the project and the government create a bright image, there are several unanswered uncertainties concerning the project and its possible repercussions.¹⁴ How will these initiatives improve the local population's level of living? Is the tectonically precarious terrain capable of supporting such large buildings and the reservoir

¹² *Tehelka*. 2011. "Barrage Locked in Land Dilemma". Sept. 9. (Mar. 08, 2020), http://www.telegraphindia.com/1110909/jsp/siliguri/story_14483682.jsp.

¹³ (Mar. 08, 2020), NHPC Limited, <http://www.nhpcindia.com/index.htm>.

¹⁴ Irrigation and Waterways Department (1996), A Note on the Teesta Barrage Project (Unpublished).

they generate? What impact will this have on the region's abundant biodiversity? Is it possible to ensure the lives of all downstream and upstream areas' populations? These, as well as several others legitimate concerns about the project's social validity, environmental balance, and financial viability remain unresolved. According to some experts, huge dams and dams can contribute to earthquakes¹⁵. The conflicts surrounding the Koina dam, the Tehri dam, and, more recently, the Teesta dams near Mangan, Sikkim are just a few instances. In light of the recent spate of earthquakes, the existence of a vast number of recharged dams would be devastating in the event of such an occurrence. Connecting a toxic river to a non-toxic river will have a terrible effect on all of our rivers and, subsequently, on all humans and wildlife including biodiversity. In this light, we might cite Mr. W.A. Inglis' opinion from 1909 about the Teesta Barriage Project in North Bengal "We build dams to collect water and divert water from streams to irrigate land without respect for nature's apparent design. We safeguard riverbanks from environmental erosion and dredge gravel and mud from areas where nature intended them to stay. Naturally, there are boundaries inside which we must constrain our effort, and achievement is contingent upon a proper appreciation of these boundaries and a sound sense of balance."¹⁶

IV. CONCLUSION

In fact, India has no rule requiring perennial rivers to have year-round freshwater flow when a dam, divert, or hydroelectric project is developed. The bulk of India's big, medium, and minor rivers have been impounded at different locations, modifying downstream water flows, particularly during non-monsoon periods, and influencing the character of monsoon flooding. As previously stated, the services offered by rivers have little significance in the design, judgment, development, operation, and other activities associated with dam construction. While approving run-of-river hydropower stations, the MoEF has begun to require that rivers always maintain a certain minimum flow. For example, the NHPC's 510 MW Teesta V hydropower plant on Sikkim's Teesta River was required to preserve a constant discharge of one cubic meter per

¹⁵ (Mar. 04, 2020), http://www.geoecomar.ro/website/publicatii/Nr.19-2013/12_mehta_web_2013.pdf.

¹⁶ Inglis, W.A.; "Some Problems Set Us by the Rivers of Bengal", *Journal of the Asiatic Society of Bengal* (Nov. 1909), Vol. V No.10 pp.398.

second. When MoEF was questioned about who is assuring this flow through an RTI application, the response was amusing: "A continuous inspection is conducted by the undertaking itself." Thus, the institution that establishes the standard for freshwater flow seems to lack the ability, will, and purpose to guarantee that its specifications are followed. The regulator relies on the builder to guarantee compliance with the requirements. The north-eastern region has been identified as India's 'future powerhouse,' including at least 168 large hydropower facilities totaling 63,328 megawatts (MW) planned for the region (Central Electricity Authority 2001) Long-term, technological organizations in the water and power sectors (for instance, the Central Water Commission and the Central Electricity Board) require a complete overhaul to represent competence outside technical and technocratic thinking. Ecological and social characteristics of water (together with the regulatory structure of the surrounding environment) are both subordinate to and downstream of techno-economic considerations in the present judgment pyramid. However, reforming technocratic water and energy organizations will very certainly be a lengthy and tough task.¹⁷ To solve these concerns in the near term a stronger organizational framework for environmental and social governance is required and the guidelines need to be framed.

The ministry has recommended the establishment of a multifunctional Northeast Water Resources Authority (NEWRA), nonetheless, the topic deserves more discussion in the area. Critics believe it will turn into another bureaucratic entity focused on promoting mega water public works initiatives rather than guaranteeing socially and environmentally sustainable river basin planning. However, there is no clause in the Environment Protection Act 1986 or any other environment-related legislation that governs or limits the building of dams, canals, barrages, or bridges on the river. Unfortunately, the government perceives rivers like a commodity to be utilized for various water supplies, instead of as a commodity endowed with intrinsic financial, social, ecological, and cultural qualities. Thus, when authorities start deciding to construct a reservoir to store water, an organization to move water, or a hydropower project having a vast capacity for storage or which distracts the stream through long-distance subterranean tunnels, they are blind to the fact that these projects are

¹⁷ Dr. Rudra Kalyan, *The Ecologist Asia*; Vol 11, No 1, Jan-Mar 2003.

truly destroying an established precious asset. In India, there is no law requiring such initiatives to guarantee that streams flow perennially with freshwater.¹⁸

Additionally, there is no legislative or administrative structure in place to ensure that evaluation, planning, judgement, economic evaluation, or environmental impact evaluations take into consideration the price of damaging existing river supplies and the services provided by those resources. This indicates that the river like a resource has no value in the official process. Himachal Pradesh is the only Indian state with a well existing protocol on this subject. In September 2005, the government of Himachal Pradesh issued a letter mandating all hydropower plants to comply with the notification (existing, under development, and proposed) to discharge at least 15% of the river's minimum experience as a result at all periods. This was far from sufficient since rivers must be preserved for their environmental and social flows, but it was unquestionably a start in the right way. Finally, it cannot be overstated that 'pollution' takes up a substantial percentage of our river ecology related discussions.¹⁹ Numerous preventative strategies have been suggested to address the problem, however aside from pollution, in the contemporary period, numerous other human developing operations such as dam building, bridge construction for power production, and so on, contribute to ecological and environmental deterioration. The river, which is a significant supply of fresh natural water, is deteriorating gradually on a daily basis and some rivers are also on the verge of extinction.

However, The Ganga Flood Control Commission was set up in 1972 through a Government of India resolution for planning, phasing, monitoring, performance evaluation etc of flood management in the Ganga basin. Similarly the Ganga Action Plan, the Yamuna Action Plan and river action plans for a number of rivers have been taken up by the Union government under the National River Conservation Plan of Ministry of Environment and Forests. In State level as well constitution of such Basin authority on Teesta, Mahananda and other major rivers is the need of the hour. Earlier Mahananda Action Plan was initiated by the State Government but it's working now stopped mainly due to financial reasons. Formation of voluntary corporate bodies with public- private

¹⁸ NIRAJ VAGHOLIKAR AND P.J. DAS (2010), DAMMING NORTHEAST INDIA, (Oxford University Press).

¹⁹ *Report of the working group report on minimum flows set up by the WQAA*, Vol. 1, MINISTRY OF WATER RESOURCES, GOVT OF INDIA

partnership or Community conservation strategies are some of the effective steps taken by the Government at local as well as institutional level but without proper and continuous monitoring such projects are not so effective in protection of river ecology. In the lack of legal or institutional structures to limit the state's powers in either situation, the state has acted somewhat arbitrarily, with rivers being one of the numerous fatalities. If we failed to conserve our rivers today, all evidence of life may inevitably vanish from the world in the near future.

Tracing the “Common but Differentiated Responsibilities” (CBDR) Principle under Climate Change Regime

*Siddharth Singh*¹

Abstract

Differentiation has always been a central yet controversial aspect of the climate change regime. It has always remained a cause of deadlocks among the state parties during the negotiations. Countries understood that climate change is a global problem. However, not all nations are equally capable of addressing this menace. Developing and Least Developed Countries (LDCs) requires assistance and time to prepare themselves for the mitigation and adaptation measures. To balance this difference among the countries, the United Framework Convention on Climate Change (UNFCCC) adopted a principle of Common but Differentiated Responsibilities (CBDR). CBDR is an equitable principle that held developed countries accountable for their historical responsibilities while addressing the special needs of the other part of the world. Within twenty-eight years, the CBDR principle has transformed from an authoritarian Kyoto model to a self-differentiation Paris model. Several experts consider this principle to have diluted with its adoption under the latest climate instrument. It was found that the objectives of this principle are yet not achieved. This principle still needs to be applied appropriately to address the concerns of vulnerable countries that are regularly struggling with the threats of climate emergency.

Keywords: *CBDR, Climate Change, Differentiation, Kyoto Protocol, UNFCCC.*

I. INTRODUCTION

The foundation of the climate regime is based on the principle of Common but Differentiated Responsibilities (CBDR). It was first incorporated under the United Nations Framework Convention on Climate Change² (UNFCCC) in 1992. This principle got further strengthened after its adoption under the Kyoto

¹ Junior Research Fellow, Faculty of Legal Studies, South Asian University, New Delhi, India.

² United Nations Framework Convention on Climate Change, 9 May, 1992, 1771, *UNTS*, 107 [hereinafter *Convention*].

Protocol to UNFCCC.³ However, after its adoption under the 2015 Agreement, it has been diluted, and it does not hold developed countries accountable anymore for their historical liabilities. This principle found its bases under the notion of equity and pragmatism.⁴ This article shall present a conceptual framework of the CBDR principle. Further, it shall be emphasizing the incorporation of this principle into the climate change regime and aftermath. It shall be examining the structure of the CBDR principle under UNFCCC and Kyoto Protocol. Moving ahead, it will try to illustrate the subsequent development of this principle under the international climate regime. Lastly, this article will reflect upon the limitations of this principle and suggest its future implications.

II. “COMMON BUT DIFFERENTIATED RESPONSIBILITIES” (CBDR) PRINCIPLE: A BRIEF OUTLINE

Article 2(1) of the United Nations Charter guarantees sovereign equality to all States.⁵ The principle of sovereign equality further includes the principle of reciprocity.⁶ However, the principle of Common but Differentiated Responsibilities is a deviance to the principle of reciprocity.⁷ Such deviance signifies non-reciprocal arrangements based on the idea of substantive equality.⁸

³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 Dec., 1997, 2303 *UNTS*, 51 [hereinafter Kyoto Protocol].

⁴ Philippe Cullet, Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps, 5(2) *Transnational Environmental Law* 307 (2016).

⁵ United Nations, Charter of the United Nations, 1945, 1 *UNTS* XVI, (Apr. 22, 2020), <<http://www.un.org/en/sections/un-charter/chapter-i/index.html>>; Also See, Christina Voigt and Felipe Ferreira, Differentiation in the Paris Agreement, 6(1-2) *Climate Law* 59 (2016).

⁶ Tuula Honkonen, The development of the principle of common but differentiated responsibilities and its place in international environmental regimes, in Tuomas Kuokkanen (ed.), *International Environmental Law-making and Diplomacy: Insights and Overviews* (Routledge, 2016), 160.

⁷ Tuula Honkonen, *The common but differentiated responsibility principle in multilateral environmental agreements: regulatory and policy aspects* (Kluwer Law International, 2009) 32.

⁸ Philippe Cullet, *Differential Treatment in International Environmental Law* (Ashgate, 2003), 15.

The concept of differentiation is not new to the International Environmental Law. It was originated under the Treaty of Versailles in 1919, where the International Labour Organization has provided that “differences of climate, habits, and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labor difficult of immediate attainment.”⁹ Washington Treaty, 1922¹⁰ also provided for deviance in tonnage permission. Later this concept got recognition in the General Agreement on Tariffs¹¹ in the development of 1965 and 1979. Further, this principle was incorporated in the Law of the Sea Convention¹² to grant special favor to the developing and fish-dependent nations.

Emerging out of different International Law treaties, it finally got incorporated into the International Environmental regime under Principle 12 of the Stockholm Declaration.¹³ Later it got incorporated into several other Multilateral Environmental Agreements as 1991 Protocol to Convention on Long-Range Transboundary Air Pollution of 1979¹⁴, Vienna Convention, 1985¹⁵ and Montreal Protocol, 1987¹⁶; Convention on Biological Diversity, 1992¹⁷; United Nations Framework Convention on Climate Change, 1992¹⁸ and Kyoto Protocol, 1997¹⁹ and United Nations Convention to Combat Desertification, 1994²⁰.

⁹ The Constitution of the International Labour Organization, (Jun 28, 1919), 49 Stat. 2712, *TS*, 874 cited in Christopher D. Stone, Common but differentiated responsibilities in international law, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 278 (2004).

¹⁰ Multilateral Limitation of Naval Armament (Five-Power Treaty or Washington Treaty), (Feb. 6, 1922), *TS*, 671 cited in Stone, n. 8, 278.

¹¹ General Agreement on Tariffs and Trade, opened for signature (Oct. 30, 1947), 55, *UNTS* 187 cited in Stone, n. 8, 278.

¹² United Nations Convention on the Law of the Seas, (Dec. 10, 1982) *UNTS*, vol. 1833, 3.

¹³ United Nations, Stockholm Declaration of the United Nations Conference on the Human Environment, (5 to 16 Jun. 1972), Principle 12.

¹⁴ Convention on Long-Range Transboundary Air Pollution, 13 Nov. 1979, *UNTS*, vol. 1302, 217.

¹⁵ Vienna Convention for the Protection of the Ozone Layer, 22 Mar., 1985, 1513, *UNTS*, 323.

¹⁶ Montreal Protocol on Substances that Deplete the Ozone Layer, 16 Sept., 1987, 1522, *UNTS*, 3.

¹⁷ Convention on Biological Diversity, 5 June 1992, 1760, *UNTS*, 79.

¹⁸ UNFCCC, n. 1, 107.

¹⁹ Kyoto Protocol, n. 2, 51.

III. THEORETICAL BASIS FOR CBDR PRINCIPLE IN INTERNATIONAL ENVIRONMENTAL LAW

The principle of CBDR subsumes core fundamental aspects of Common Responsibilities and Differentiated Responsibilities.

A. Common Responsibilities

As provided in the Preamble of the 1992 Rio Declaration: “change in the Earth’s climate and its adverse effects are a common concern of humankind.”²¹

The problem of climate change is global that needs to be addressed by all the nations together.²² This proposition follows two reasons, firstly all the countries owe a duty of protection and preservation towards the environment since they are an inherent part of it. Secondly, it would not be possible for some nations to tackle this issue without the co-operation of others. It is the duty of States not to indulge in any activity inside their territories that may cause harm to the environment. Moreover, common responsibility seeks to enforce universal obligations both in developed and developing States.²³

B. Differentiated Responsibilities

It is difficult to determine the nature and extent of such responsibility.²⁴ The term differentiated responsibilities means that although protecting the environment from climate change is our collective responsibility, this responsibility gets separated among the developed and developing States based

²⁰ United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, 14 October, 1994, 1954, *UNTS*, 3.

²¹ UNFCCC, n. 1, 107.

²² Justin Lee, Rooting the Concept of Common but Differentiated Responsibilities in Established Principles of International Environmental Law, 17 *Vermont Journal of Environmental Law* 27 (2015).

²³ Duncan French, Developing states and international environmental law: The importance of differentiated responsibilities, 49 (1) *International and Comparative Law Quarterly* 35-60 (2000).

²⁴ Lavanya Rajamani, Differentiation in the emerging climate regime, 14(1) *Theoretical Inquiries in Law* 151-172 (2013).

on the socioeconomic inequalities in their contribution and capacity towards climate change.

The Preamble of UNFCCC recognizes this historical responsibility of developed countries.²⁵ However, developed countries never interpreted it as a matter of their liability, still is relevant, and makes a firm ground for differentiation for the developing countries.²⁶ It is alleged that since the industrialization, developed countries have emitted a lot of carbon into the atmosphere. It is because of this emission the whole world is facing the problem of climate change today. Thus, considering the polluter pays principle²⁷ responsibilities of countries to restore the environment shall be based on the proportion made to the contribution to climate change.²⁸ Further, it would be the developing countries that are more prone to the dangerous effects of climate change in the future.²⁹ Few scientists claim that climate change is a natural process, however even if we go by their argument, then the contribution to this natural phenomenon cannot be neglected.

According to Rajamani, where the contribution is based upon the lines of developing countries, the capacity element emanates from the perspective of developed countries.³⁰ When it comes to resolving the problem, it is pleaded that developed countries have adequate capacity and efficiency to tackle climate change, thus the ability to pay. Being more strong economies than developing countries and high GDP per capita, they could channelize their resources for

²⁵ UNFCCC, n. 1, 107.

²⁶ Yoshiro Matsui, Some Aspects of the Principle of Common but Differentiated Responsibilities, 2(2) *International Environmental Agreements: Politics, Law and Economics* 155 (2002) cited in Rachel Boyte, Common but Differentiated Responsibilities: Adjusting the Developing/Developed Dichotomy in International Environmental Law, 14 *New Zealand Journal of Environmental Law* 70-71 (2010).

²⁷ United Nations, United Nations Conference on Environment and Development, (3 to 14 June 1992), Principle 16 <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> (24 Apr. 2020).

²⁸ Edward A. Page, Distributing the burdens of climate change, 17(4) *Environmental Politics* 557 (2008).

²⁹ Boyte, n. 25, 70.

³⁰ Lavanya Rajamani, *From Berlin to Bali and beyond: Killing Kyoto Softly?*, 57(4) *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 909-939 (2008) cited in Boyte, n. 25, 70.

taking concrete measures against climate change. Moreover, this capability of the developed part enables them to ascertain a leadership role that will ensure the equal participation of developing countries as well.³¹ Both contribution and ability are related terms that determine the extent of responsibilities of the State.³²

As Principle 6³³ of the Stockholm Declaration provides, developing countries had other priorities needed to be settled that shall get compromised if they comply with the similar obligations observed by developed countries.³⁴ Many decisions like shifting from non-renewable sources of energy to renewable sources of energy are not easy for them to incorporate in their national regime as it requires a fund, technology, skilled labor, and their maintenance cost. More considerable hurdles in this direction are poverty, illiteracy, limited resources, unstable government, armed conflicts, inefficient & unskilled labor, natural and human-made disasters, a lower rate of human development, and lack of electricity supplies. Developing countries require more time to incorporate such mitigation and adaptation measures against climate change. Increasing their pace of development shall not be accessible without external assistance. Thus, the common responsibility for climate change was qualified with differentiation by differences in the capability and circumstances of the State parties.³⁵ The 1992 Rio Declaration³⁶ recognizes the special situation and needs of developing countries and those vulnerable towards climate change.³⁷ Principle 7 of the Rio Declaration provides that:

“States shall cooperate in a spirit of global partnership to conserve, protect, and restore the health and integrity of the Earth's ecosystem. Given the different

³¹ Boyte, *Supra* note 28. At 25, 73.

³² Harald Winkler and Lavanya Rajamani, CBDR&RC in a regime applicable to all, 14(1) CLIMATE POLICY 106 (2014).

³³ UNCED, n. 26, Principle 6.

³⁴ Pieter Pauw and Et Al., Different Perspective on Differentiated Responsibilities, (Jun.) Discussion paper, Deutsches Institut für Entwicklungspolitik 1 (2014), (21 Apr. 2020), <https://www.die-gdi.de/uploads/media/DP_6.2014..pdf>.

³⁵ *Id.*

³⁶ Winkler and Rajamani, n. 31, 102-121.

³⁷ Rio Declaration, n. 26 Principle 6; PHILIPPE SANDS and Et AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, p 233, (Cambridge University Press, 2012).

contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development given the pressures their societies place on the global environment and of the technologies and financial resources they command.”³⁸

This principle recognizes the role of developed countries taking the lead in environmental protection actions and protecting the interests of those incapable. However, it eliminated their legal responsibility for the environmental harm caused by past and present and made liable only for future obligations.³⁹ Article 3 and 4 of UNFCCC also reiterate similar provisions on the CBDR principle.⁴⁰

As per Cullet, “Different conceptions of justice can justify differential treatment in IEL.” He has considered equity as a root of differential treatment. He found that the world is governed by formal equality, and it has to observe substantive equality to ensure justice. This differential treatment enshrines substantive equality to uplift every weak aspect of society. Further, it has been perceived under two heads, the first part addresses the differences created by the past actions of one another. Thus to overcome those inequalities, it is necessary to adopt positive discrimination. Second is how differential treatment was used by nation-states to achieve the desired results under Environmental treaty negotiations.⁴¹

French has provided three justifications for CBDR principles.⁴² Firstly, International law places an obligation on States to consider the special needs and circumstances of the developing countries.⁴³ Secondly⁴⁴, the principle of

³⁸ Rio Declaration, n. 26, Principle 7.

³⁹ French, n. 22, 35-60.

⁴⁰ Article 3 of the UNFCCC states that: “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” Further, Article 4 provides that State parties shall observe common but differentiated responsibilities principle while taking actions in response of climate change. (See UNFCCC, n. 1, 107).

⁴¹ Cullet, *Supra*. 3, 307.

⁴² French, *Supra* n. 22, 52.

⁴³ *Id.*

⁴⁴ French, *Supra* n. 22, 55.

common but differentiated responsibilities further gets supported under provisions like Preamble and Article 7⁴⁵ of the Rio Declaration 1992, where it seeks to establish a relationship of “new and equitable global partnership” that shall enhance the co-operation between the States.⁴⁶ This idea of co-operation has been enshrined in the UN Charter, NIEO, and UNCLOS negotiations. Thirdly⁴⁷, the global South had seen environmental policies and Agreements of the North with suspicion up till the Rio Declaration. They believed commitments to these Agreements would become obstacles in their development plans. Further, they considered that environmental problems were created by developed countries and must be addressed by them only with higher obligations. To win over the trust of developing countries for seeking their participation, provisions for technology transfer and financial assistance were made part of the differential treatment.

IV. IDEA OF JUSTICE UNDER DIFFERENTIAL TREATMENT

Corrective justice relates to the past contributions of the developed countries towards the degradation of the environment. This form of justice ensures the liability and provides that differences among the nations need no further insight.⁴⁸ It disregards the socio-environment consideration to be a part of legal equality.⁴⁹ On the other hand, Distributive justice provides concern for the existing inequalities in the development of the State parties.⁵⁰ It carries a view that equality does not end with providing adequate means to all. However, it ensures that such means are producing the desired outcome or not.⁵¹ It is a well-recognized principle that equity follows justice.⁵² Yet, judicial equality has got limitations⁵³, thus mislead justice. Therefore makes it pertinent to trace different forms of justice under the lens of differentiation.

⁴⁵ UNCED, n. 26, Principle 7.

⁴⁶ Third Paragraph of Preamble to UNCED, UNCED, n. 26.

⁴⁷ French, *Supra* n. 22, 56.

⁴⁸ Cullet, *Supra* n. 3, 308.

⁴⁹ *Id.*

⁵⁰ *Id.* at 308-309.

⁵¹ *Id.* at 309.

⁵² The Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), (1985), *ICJ Reports* cited in Cullet, no. 3, 308.

⁵³ Cullet, n. 3, 308.

V. FORMS OF DIFFERENTIATION IN THE CLIMATE CHANGE REGIME

There is no agreement among the authors regarding the fixed forms of differentiation. They provide their variants of differentiation. It is to be noted that the Common but Differentiated Responsibilities principle is a form of differential treatment that found a place in the context of climate change.⁵⁴

Stone places three versions of differentiation. In his first version called as rational bargaining Common but Differentiated Responsibilities (CDR), negotiators shall agree upon mutually agreed benefits aimed to enjoy profit to one party more than the other. However, it would not allow any party to suffer a loss that may worsen its position existing before the Agreement. The second category involves an element of fairness to which negotiations happen in an equitable manner that allows the surplus to the weaker parties; however, it is still not keeping the other in the loss. He calls this second method as equitable CDR. In the third category called as inefficient CDR by him, the weaker parties shall be made entitled to the surplus to an extent where they not only receive surplus but the equitable share of rich existing before the negotiations.⁵⁵

For Cullet, differentiation has two forms: the allocation of rights and entitlements, the other relates to the redistribution of resources. In the former, he advocated for positive discrimination to overcome inequalities. It comprises of different provisions shall be made for various State parties. He considered that the primary aim of positive differentiation is not to eliminate differences but to ensure that inequalities must not be the outcome of any oppressive or adverse means. In his latter form, he seeks for a re-distribution of a finite resource among the nations from the haves to have not. This principle recognizes the loss caused to one party, however, seen as justified to serve the basic needs of the other. This form enables developing countries to observe provisions like the transfer of technology and fund from developed countries.⁵⁶

⁵⁴ *Id.* at 305.

⁵⁵ Stone, *Supra.* n 8, 276-301.

⁵⁶ Cullet, n. 7, 32-34.

Looking at the growing potential of developing countries like India fighting with the fundamental problems of poverty and power generation⁵⁷, there emerged a need in the international community to redefine the structure of the CBDR principle and create a third category between developed and developing countries for such State parties.⁵⁸ Further various methods are incorporated in a treaty to provide support to weaker nations as a delayed period for implementing the treaty, relatively relaxed norms, transfer of aid and assistance, etc. For example, the Montreal Convention of 1987 granted a ten years grace period to developing countries and established a fund for the enforcement measures.⁵⁹

VI. STATUS OF CBDR PRINCIPLE UNDER INTERNATIONAL LAW

The principle of CBDR, as provided under Article 3, is not binding but a soft law.⁶⁰ This Article has used “should” in all the places making this provision not compulsory on the parties.⁶¹ However, Article 4(2) of the UNFCCC obliges a party to follow the provision of the Convention legally. They are primary rules whose breach shall amount to a wrongful act.⁶² Although being a soft law, it has served two crucial goals as to present the moral perspective of climate regime and bring all the participants under one roof. Due to its different interpretations, the legal status of this principle is debatable. At the same time, the legal significance of this principle under the international climate change regime cannot be denied.⁶³ It can be concluded that although this principle is a soft law however, it has got legal implications attached to it.

⁵⁷ Lavanya Rajamani, *Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems*, 1(May) CENTRE FOR POLICY RESEARCH, CLIMATE INITIATIVE, WORKING PAPER (2013).

⁵⁸ Winkler and Rajamani, n. 31, 111.

⁵⁹ Stone, *Supra* n. 8, 278.

⁶⁰ Malgosia Fitzmaurice, *Responsibility and Climate Change*, 53 GERMAN YEARBOOK OF INTERNATIONAL LAW 106 (2010).

⁶¹ UNFCCC, n. 1, Article 3.

⁶² Fitzmaurice, n. 59, 107.

⁶³ Rosalind Cook, *Legal Responses for Adaptation to Climate Change: The Role of the Principles of Equity and Common but Differentiated Responsibility* (2010) Master's thesis, Universiteit Utrecht 26-27 (25 Apr. 2020), <<https://dspace.library.uu.nl/handle/1874/44925>>.

Stone provides that this principle is not a rule but an exception.⁶⁴ He has given few justifications in this regard. Firstly, Convention on heinous matters does not provide for any exception. Secondly, it is not appreciable to be a member of the Convention instead of favorable treatment. Thirdly, such preferential treatment may hamper the interest of those States who are genuinely observing the treaty standards. Fourthly, the even participation of minimum contributing countries can be purchased with the help of ‘side payments’ without affecting the objectives of a treaty.

Although the principle of CBDR has received much attention and recognition under various multilateral environmental agreements, it still lacks the status of customary international law.⁶⁵ This principle lacks a common understanding among the parties; for some, it is legal, while for others, it is moral.⁶⁶ Law is precise and binding, whereas principles hold a capacity to influence decision-makers, however, without any compulsion. Referring to a cumulative study of ICJ decisions, Maguire argues that CBDR has been efficient in providing desired interpretation; however, it does not have a legal value of itself.⁶⁷

VII. “COMMON BUT DIFFERENTIATED RESPONSIBILITIES” (CBDR) PRINCIPLE AND CLIMATE REGIME

While countries recognized the inevitable threat of climate change, the biggest question posed before them was who would reduce greenhouse gas emissions.⁶⁸ Keeping in mind the equity and leadership ability of developed countries,⁶⁹ UNFCCC adopted the CBDR principle seeking the subsequent participation of developing countries in it.

⁶⁴ Stone, n. 8, 282.

⁶⁵ Rowena Maguire, *The Role of Common but Differentiated Responsibility in the 2020 Climate Regime*, 2013(4) CARBON & CLIMATE LAW REVIEW p- 263 (2013).

⁶⁶ Tuula Honkonen, *The Principle of Common But Differentiated Responsibility in Post-2012 Climate Negotiations*, 18(3) REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW 257-267 (2009) cited in Maguire, n. 64, 263.

⁶⁷ Maguire, n. 64, 263.

⁶⁸ Mary J. Bortscheller, *Equitable but ineffective: How the principle of common but differentiated responsibilities hobbles the global fight against climate change*, 10(2) SUSTAINABLE DEVELOPMENT LAW & POLICY 49 (2010).

⁶⁹ UNFCCC, n. 2, Article 3.1.

A. Incorporation of the Principle under UNFCCC

Negotiations for UNFCCC demanded a legal, institutional framework that shall address the future issues related to climate change through periodic meetings and necessary protocols.⁷⁰ Although parties agreed for such a structure, however, contentious issues between them revolved around central obligation, implementation, and financial assistance.⁷¹ The UNFCCC has tried to serve the interest of both developed and developing countries while leaving a few provisions to be addressed in future meetings.⁷² The negotiations at UNFCCC have been attempting to effectuate the international principle of CBDRRC into the climate regime.⁷³ The Preamble Paragraphs of UNFCCC recognizes the past greenhouse gasses emission of developed countries and the need for the development of developing countries.⁷⁴ They further realize that climate change is a matter of global concern that can be addressed only through the cooperation and participation of all the states based on their differentiated responsibilities and respective capabilities.⁷⁵ They ask the developed country Parties to develop strategies accordingly.⁷⁶ Also, they undertake particular concerns of vulnerable countries.⁷⁷

Article 3 of UNFCCC introduces the CBDRRC principle along with the principle of inter-generational equity, the precautionary principle, and the right to sustainable development⁷⁸ to achieve the objective of the Convention.

B. Provisions Related to Common Responsibilities

Article 4.1 obliges all the parties to undertake measures related to mitigation and adaptation along with cooperation following the CBDR principle. Article 5

⁷⁰ Daniel Bodansky, *The history of the global climate change regime*, in Urs Luterbacher and Detlef F. Sprinz (eds), *INTERNATIONAL RELATIONS AND GLOBAL CLIMATE CHANGE*, (London, 2001), 32-33.

⁷¹ Rajamani, n. 23, 154.

⁷² Bodansky, n. 69, 32-33.

⁷³ Douglas Bushey & Sikina Jinnah, *Evolving Responsibility-The Principle of Common but Differentiated Responsibility in the UNFCCC*, 6 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 1 (2010).

⁷⁴ UNFCCC, n. 1, Paragraph 3 to Preamble.

⁷⁵ *Id.*, Paragraph 6 to Preamble.

⁷⁶ *Id.*, Paragraph 18 to Preamble.

⁷⁷ *Id.*, Paragraph 19, 20 and 22 to Preamble.

⁷⁸ Fitzmaurice, n. 59, 106.

requires that all parties support and cooperate in scientific research, programme, and efforts at the international and inter-governmental levels. Article 6 seeks all parties to promote and facilitate at the national or regional level and cooperate following global standards for developing education, training programme and public awareness on climate change. Article 9 establishes the Subsidiary Body for Scientific and Technological Advice open to all Member States to provide assessment and advice to the Conference of Parties (COP). Article 12.1 seeks communication of information from all the parties regarding national inventories, implementation of the Convention, and other relevant information. Article 10 establishes the Subsidiary Body for Implementation open for participation to all Member States to provide an assessment of the data to COP received under Article 12. Apart from the above provisions, Article 18 provides one vote to each party to the Convention; however, regional economic integration organizations may exercise votes of their member States if not opposed.

C. Provisions Relating to Differentiation

The CBDR principle under UNFCCC provides that countries shall be differentiated for their obligations towards climate change as developed and developing country parties. This principle further divides both the categories as per the levels of their commitments.⁷⁹ The industrialized countries were divided as Annex I and Annex II Parties. While Annex I parties include industrialized countries⁸⁰ and countries having their economies in transition, the Annex II parties include the members of OECD excluding such countries having their economies in transition.⁸¹ The other group of developing country parties was recognized as Non-Annex I Parties.⁸² They are the parties more vulnerable to the adverse effects of climate change and prone to economic impacts of climate change, including Least Developed Countries (LDCs) that have limited capacity to tackle the vulnerable effects of climate change.⁸³ This part was not held

⁷⁹ Bortscheller, n. 67, 49.

⁸⁰ The category of 'Industrialized countries' includes those countries who were member to the Organization for Economic Co-operation and Development (OECD) in the year 1992.

⁸¹ Bortscheller, n. 67, 50.

⁸² *Id.*

⁸³ *Id.*

legally responsible for cutting their GHGs emissions. Article 3.1 of the Convention recognizes the leading role of the developed country parties, whereas Article 3.2 addresses the special need and situation of developing country parties. However, instead of any mechanism to determine categorization, the countries themselves had to adopt the obligations of either category voluntarily.⁸⁴

Under Article 4.2, specially designed for developed country parties, provides “duty of conduct”⁸⁵ to reduce greenhouse gasses through mitigation measures, communicating information, making the calculation, and reviewing mechanism. Similarly, Article 4.3 obliges the developed country parties from Annex II to provide financial assistance to the developing country parties allowing them to fulfill their obligation. Such financial aid can be provided bilaterally, regionally, or through any other multilateral channel.⁸⁶ They are also obliged to support the country parties that suffered the adverse effect of climate change.⁸⁷ Further, Article 4.5 requires these countries to facilitate, financing, and to transfer environmentally sound technologies to developing country parties to meet their obligations. UNFCCC imposes leading responsibility upon the developed country parties to fulfill their obligation. In contrast, the developing country parties whose priority is economic development and poverty eradication is expected to participate subsequently.⁸⁸ The Convention provides flexibility not only to developing country parties, however to Annex I parties going through a transition in observing their obligations.⁸⁹ All the member parties are obliged to give special consideration to addressing specific needs, and concerns of developing countries including finance and technology transfer to Least Developed Countries,⁹⁰ countries with vulnerable economy due to climate change⁹¹ and the countries affected by climate change being classified as:⁹² Small Islands countries; Countries with low-lying coastal areas; Countries with

⁸⁴ *Id.*

⁸⁵ Fitzmaurice, n. 59, 106.

⁸⁶ UNFCCC, n. 1, Article 11.5.

⁸⁷ *Id.*, Article 4.4.

⁸⁸ *Id.*, Article 4.7.

⁸⁹ *Id.*, Article 4.6.

⁹⁰ *Id.*, Article 4.9.

⁹¹ *Id.*, Article 4.10.

⁹² *Id.*, Article 4.8.

arid and semi-arid areas, forested areas and areas liable to forest decay; Countries with areas prone to natural disasters, Countries with areas liable to drought and desertification; Countries with areas of high urban atmospheric pollution, Countries with areas with fragile ecosystems, including mountainous ecosystems; Countries whose economies are highly dependent on income generated from the production, processing, and export, and/or on the consumption of fossil fuels and associated energy-intensive products; and Landlocked and transit countries.

Article 12 provides for the communication of information with more stringency for developed countries. Article 12.2 and 12.3 require the developed country parties to provide information on their mitigation measures and those undertaken while granting financial and technological assistance. Article 12.4 makes it voluntary for the developing country parties to communicate the necessary information to implement its obligation. Article 12.5 obliges developed country parties to establish initial communication within six months, whereas for other parties, the period is three years from the date of enforcement of the Convention. However, LDCs are provided flexibility to communicate such information anytime. Moreover, Article 12.7 specifies technical and financial support for developing country parties to transmit such information.

The provisions of UNFCCC are in favor of developing country parties. Without any recognition of historical responsibility in the text, they expressly hold developed country parties liable for the fulfillment of an obligation under the Convention. UNFCCC has recognized the special needs of developing countries and given them the flexibility to fulfill their obligations as per their capacity.⁹³ Through this kind of differentiation, UNFCCC has sought the participation of all nations based upon their ability, thus ultimately serving its purpose.⁹⁴

D. Incorporation of the principle under the Kyoto Protocol

Kyoto Protocol to the United Nations Framework Convention on Climate Change establishes a strict binary mechanism for emission reduction in the light of the CBDR principle. It enhances cooperation among the Annex I parties and facilitates them in carrying out their obligation.

⁹³ *Id.*, Article 5(c) and 6(a).

⁹⁴ Maguire, *Supra* n. 64, 261.

E. Provisions Relating to Common Responsibilities

Article 10 obliges all parties to the Protocol to formulate their mitigation and adaptation measures, financial and technological transfer, scientific research, and educational programme that includes capacity building to climate change carried out at a national and regional level based on the principle of common but differentiated responsibilities. The parties observing this Article have to act in compliance with the provisions of Article 4. Article 21 allows any party to make a proposal for being a party to Annex or amend the Annex to this Protocol. Such accepted annex shall be communicated to all the member parties. Article 20 allows any party to propose amendments to the Protocol, and Article 22 provides one vote to each party considering the exception and limitation of regional economic integration organizations.

F. Provisions Relating to Differentiation

The Kyoto Protocol has adopted specific greenhouse gasses emission reduction targets for the developed countries only.⁹⁵ Along with them, developing countries also agreed to check their emissions and focus on sustainable development.⁹⁶ It has provided three flexible market-based mechanisms for the Annex B countries as International Emissions Trading, Cleans Development Mechanism, and Joint Implementation⁹⁷ to obtain their goals in a more cost-effective manner.⁹⁸ Article 17 of the Protocol permits International Emission Trading to allow Annex B countries to trade in emissions to fulfill the obligations under the Protocol. The Clean Development Mechanism provided under Article 12 ensures assistance to non-Annex I country parties in realizing sustainable development and contributing towards the objectives of the Convention, along with assistance to Annex I parties in the fulfillment of their commitments under the Protocol. It benefits non-Annex I party from the project activities producing Certified Emission Reductions (CER) and Annex I parties by using Certified Emission Reductions for observing compliance with their

⁹⁵ *Id.*, 264.

⁹⁶ Bortscheller, *Supra* n. 67, 49.

⁹⁷ Kyoto Protocol, *Supra* n. 2, Article 6.

⁹⁸ Per Kågeson, Applying the principle of common but differentiated responsibility to the mitigation of greenhouse gases from international shipping, (2011), (Apr. 20, 2020), <<https://www.vti.se/sv/sysblocksroot/swopec-test/cts2011.5.pdf>>.

commitments.⁹⁹ Article 6 provides Joint Implementation where to achieve the commitments under Article 3, any Annex I Party may transfer or acquire Emission Reduction Unit (ERU) emerging from mitigation actions from another such party. It establishes the Global Environment Facility (GEF) with the aim of providing co-operation in technology and fund transfer from developed to developing country parties.¹⁰⁰

Article 2 of the Protocol imposes an obligation upon Annex I countries to observe mitigation measures and cooperate with other parties to enhance their policies in such a manner to reduce the adverse effects of climate change on developing country parties. Article 7 requires all Annex I parties to communicate information based on their actions are undertaken to ensure compliance with the Protocol.

In order to enforce their national inventories of anthropogenic emissions and technology required for the implementation of the Convention, Article 11 entrust Annex II developed country parties to the Convention for the transfer of financial resources to the developing countries. Such flow of funds is to be observed by all the developed country parties with adequate burden-sharing through bilateral, regional, or multilateral modes.¹⁰¹

The differentiation under the Kyoto Protocol is applied at two levels.¹⁰² The first level of differential treatment is based on the industrial and non-industrial status of the parties, while the second further imposes individual reduction targets on industrialized parties.¹⁰³ Under the first head, the industrialized parties have been charged with the binding emission reduction targets and there is no such legal obligation for non-industrialized countries.¹⁰⁴ This distinction among the parties has resulted in the withdrawing of few UNFCCC parties from the Kyoto model.¹⁰⁵ The second head of differentiation under the Kyoto Protocol emphasizes the implementation of reduction targets by industrialized countries.

⁹⁹ Kyoto Protocol, *supra* n. 2, Article 12.3.

¹⁰⁰ Kågeson, *supra* n. 97.

¹⁰¹ Kyoto Protocol, *supra* n. 2, Article 11.3.

¹⁰² Maguire, *supra* n. 64, 263.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

However, it provides certain relaxation to the countries in transition.¹⁰⁶ Kyoto Protocol has been divided into two commitment periods. Under the first commitment period (2008-2012) the industrialized countries were obliged to reduce a minimum 5% of their total emission below 1990 levels.¹⁰⁷ Further, the second commitment period (2013-2020) seeks to cut at least 18% of their overall emissions below 1990 levels. This structure has upset the large emitter like the U.S., Russia, Canada, Japan, and New Zealand, and they withdrew themselves from such obligations. The Kyoto Protocol, under its second commitment period, did not adequately serve the purpose of reducing adequate emission targets thus raised a need for a newly negotiated instrument based on a perfect balance of equity and capacity.¹⁰⁸

The differential model adopted under the Kyoto Protocol has been made from the perspective of developing countries. Those provisions of this Convention that provide deviation in targets and implementation of time-frames for the developing country parties were the most controversial ones.¹⁰⁹

VIII. SUBSEQUENT DEVELOPMENT OF CBDR UNDER THE INTERNATIONAL CLIMATE REGIME

Where UNFCCC and Kyoto were the legally binding arrangements, all the other agreements afterward were part of 'soft-law.' One of the significant aspects that emerged under subsequent development of this principle was the dilution of the principle of Common but differentiated responsibilities.¹¹⁰ Since from Bali Action Plan, 2007¹¹¹ such a transformation could be seen under the climate change regime.

Mitigation actions from developing countries saw a shift from supported to unsupported actions.¹¹² The developing countries were required to observe UNFCCC imposed mitigation commitments, and any new imposition was

¹⁰⁶ Kyoto Protocol, *supra* n. 2, Article 3.6.

¹⁰⁷ *Id.*, Article 3.1.

¹⁰⁸ Maguire, *supra* n. 64, 263.

¹⁰⁹ Rajamani, *supra* n. 23, 155.

¹¹⁰ *Id.*

¹¹¹ Report of the Conference of the Parties on its thirteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth Session, Decision 1/CP.13 Bali Action Plan, U.N. Doc. FCCC/CP/2007/6/Add.1 (14 March 2008)

¹¹² Rajamani, *supra* n. 23, 162.

restricted to be imposed by the Kyoto Protocol.¹¹³ However, the Bali Action Plan sought to undertake “nationally appropriate mitigation actions” for developing countries.¹¹⁴ Further Copenhagen Accord provided for submission and implementation of mitigation actions from developing countries.¹¹⁵ Also, the Cancun Agreement made developing countries to differ from their usual emissions by 2020.¹¹⁶

Bali Action Plan, 2008 tries to enforce parallelism between developing and developed countries. It requires both of them to equally and voluntarily observe the nationally determined obligations.¹¹⁷ Moreover, such actions shall be reviewed through measurement, reporting, and verification. The developed countries argued that since the time UNFCCC and Kyoto were negotiated, the balance of power had been shifted in contemporary times.¹¹⁸ The United States sought to replace ‘quantified emission limitation and reduction objectives’ of the Kyoto Protocol with Commitments or Actions.

Similarly, the Copenhagen Accord, 2009,¹¹⁹ has been another non-binding, however, an influential agreement in the climate regime.¹²⁰ The mitigation targets have seen a shift from a prescription for developed countries to the prediction for developing countries.¹²¹ It allowed parties to carry out self-differentiation of their mitigation action¹²² voluntarily and not by emission reduction targets and timetables.¹²³ Despite being a critical Accord, it failed to provide an agreement for the post-2012 climate regime.¹²⁴

¹¹³ Kyoto Protocol, *supra* n. 2, Article 10.

¹¹⁴ Rajamani, *supra* n. 23, 162.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 156.

¹¹⁸ *Id.*

¹¹⁹ Report of the Conference of the Parties on its fifteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth Session, Decision 2/CP.15 Copenhagen Accord, U.N. Doc. FCCC/CP/2009/11/Add.1 (30 March 2010).

¹²⁰ Rajamani, *supra* n. 23, 159.

¹²¹ *Id.* at 160.

¹²² *Id.*

¹²³ Jeffrey McGee and Jens Steffek, *The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law*, 28 JOURNAL OF ENVIRONMENTAL LAW 57 (2016).

¹²⁴ *Id.*, 43.

Cancun Agreement, 2010¹²⁵ played a significant role in bringing down the political negotiations into the text seeking differentiation for all the State parties.¹²⁶ It has brought parallelism with a formation of similar obligations both for developed and developing countries.¹²⁷

Durban Platform for Enhanced Action, 2011¹²⁸ gave an extension to the Kyoto Protocol through a second commitment period from 2013-2020, where countries would not be bound to nominate targets.¹²⁹ It brought forth a need for an agreement to determine the climate regime post-2020.¹³⁰ Doha Amendment of the Kyoto Protocol, 2012,¹³¹ brought life to the Kyoto Protocol, however, with the least intention to incorporate it in the future.¹³² Ad-Hoc Working Group on the Durban Platform for Enhanced Action (ADP) was made responsible for drafting such an agreement that shall come into existence by 2015.¹³³

COP at Warsaw, 2013¹³⁴ decided that countries shall be submitting self-differentiated “Intended Nationally Determined Contributions” to address their

¹²⁵ Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its sixteenth session, Decision 1/CP.16 The Cancun Agreement: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, U.N. Doc. FCCC/CP/2010/7Add.1 (15 March 2011).

¹²⁶ Rajamani, *supra* n. 23, 161; McGee and Steffek, *supra* n. 122, 60.

¹²⁷ *Id.*, 161.

¹²⁸ Report of the Conference of the Parties on its seventeenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its seventeenth Session Decision 1/CP.17 Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Durban Platform, U.N. Doc. FCCC/CP/2011/9/Add.1 (15 March 2012).

¹²⁹ McGee and Steffek, *supra* n. 122, 60.

¹³⁰ Lavanya Rajamani, ‘Lima Call to Climate Action’: Progress Through Modest Victories and Tentative Agreements, 50(1) ECONOMIC AND POLITICAL WEEKLY 14 (2015).

¹³¹ Report of the Conference of the Parties on its eighteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its eighteenth Session, Decision 1/CP.18 Doha Amendment, U.N. Doc. (28 Feb. 2013), FCCC/CP/2012/8/Add.1.

¹³² McGee and Steffek, n. 122, 60.

¹³³ Lavanya Rajamani, *The Warsaw climate negotiations: emerging understandings and battle lines on the road to the 2015 climate agreement*, 63(3) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 723 (2014).

¹³⁴ Report of the Conference of the Parties on its nineteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its nineteenth Session, Decision

emissions. This approach has brought a change from strict differentiation of UNFCCC to self-differentiation in the climate regime, where the bottom-up approach of the Copenhagen Accord and Cancun Agreement was preferred over the top-down approach of the Kyoto Protocol.¹³⁵

While Durban to Warsaw, no reference has been made to CBDR principle, Lima Call for Climate Action, 2014,¹³⁶ managed to bring it in the 2015 Agreement.¹³⁷ However, similar to the U.S.-China Joint Announcement on Climate Change¹³⁸ agreement, the CBDR principle has been attached with a qualification “in the light of national circumstances” that gave an evolutionary interpretation to it.¹³⁹

In 2015, the CBDR principle got adopted in the Paris Agreement¹⁴⁰ as a facilitative model based on self-differentiation. It seeks differentiation for all countries with a weakened distinction between developed and developing countries. Thus, it does not define a set of countries rigidly as Annex I and Non-Annex I parties, however, invites contributions from all the parties. As per Article 2(2) of the Agreement, the CBDR principle should be reflected in the light of different national circumstances. It means that even the developed countries can evade their responsibilities in case of any problematic distressing situation. Paris Agreement has implemented a shift from a top-down approach to a bottom-up approach. This Agreement illustrates that while avoiding the distinction between the countries ambition has been compromised by the parties.

2/CP.19 Warsaw international mechanism for loss and damage associated with climate change impacts, U.N. Doc. FCCC/CP/2013/10/Add.1 (31 January 2014).

¹³⁵ LAVANYA RAJAMANI, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW*, p-175 (Oxford University Press, 2006).

¹³⁶ Report of the Conference of the Parties on its twentieth session, Addendum, Part Two: Action taken by the Conference of the Parties at its twentieth Session, Decision 1/CP.20 Lima Call for Climate Action, U.N. Doc. FCCC/CP/2014/10/Add.1 (2 Feb. 2015).

¹³⁷ Rajamani, n. 134, 14.

¹³⁸ U.S.-China Joint Announcement on Climate Change, Nov. 2014, (May, 4, 2020), <<https://obamawhitehouse.archives.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>>

¹³⁹ Lima Call for Climate Action, n. 135.

¹⁴⁰ Paris Agreement to United Nations Framework Convention on Climate Change, Dec. 12, 2015, *UNTS* 52.

Even the cumulative goal of all countries, as provided under their NDCs is insufficient to achieve the objectives of the Agreement.¹⁴¹

IX. PROBLEMS WITH “COMMON BUT DIFFERENTIATED RESPONSIBILITIES” (CBDR) PRINCIPLE

It is well-established that the principle of common but differentiated responsibilities is needed in International Environmental law; however, its extent is yet not determined. Biniiaz highlighted the inefficiency of this principle as, "(1) There is no agreement on what it means; (2) there is no agreement on when it applies; (3) it is over-argued; and (4) it breeds laziness in the negotiating process."¹⁴² Further, it is also not settled that when this principle ceases to exist.

CBDR principle, as incorporated under UNFCCC and Kyoto Protocol, kept obligations on only one group of countries that could not resolve the overall problem of climate change. At the same time, other groups may develop to such an extent that its emissions cannot go unchecked in the atmosphere. Countries like China and India, who were the part of developing countries, got protection under this rule to save themselves from liabilities, and presently they are among the top contributor to GHGs emissions.

Cullet argues that the socioeconomic situations of many developing countries have still not changed and thus, question the competency of this principle that failed in achieving its purpose. Also, this principle found to be inadequate in addressing the necessary population and societal realities within the countries.¹⁴³

X. CONCLUSION

The principle of Common but Differentiated Responsibilities is an equitable principle that is still in the transformation phase. This article traced the evolution of the common but differentiated responsibilities principle and provided theoretical insight over its future implications. It was incorporated

¹⁴¹ Correspondent, the world's climate goals are not sufficient. They are also unlikely to be met, (20 Nov.) THE ECONOMIST (2019) < <https://www.economist.com/graphic-detail/2019/11/20/the-worlds-climate-goals-are-not-sufficient-they-are-also-unlikely-to-be-met>> (accessed on 2 May 2020)

¹⁴² Susan Biniiaz, *Common but Differentiated Responsibilities*, p- 96 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 358-368 (2002) cited in Lee, n. 21, 33.

¹⁴³ Cullet, *supra* n. 3, 326.

under the UNFCCC in response to the contribution and capacity of the developed countries. As evident from the climate change negotiations, it is a much-debated issue and has got the immense potential to mold the shape of climate change agreements. In recent years, a shift has been seen from the prescriptive Kyoto model towards a self-differentiated structure. The problematic issue is that this change has come at the cost of ambition. Also, to be considered that the objectives of this principle have not been achieved even after twenty-five years of incorporation. In the realm of climate change need for this principle still exist, however, in a correct manner. With the latest adoption of this principle in the Paris Agreement, it becomes pertinent to reconsider its structure and its efficiency to address the much-required concerns.

Cyberspace Based Cross-Border Terrorism: An Overview of Global and Indian Legal Regime

*Veerendra Mohan*¹

Abstract

Conventional noisy cross-national and continental physical terror attacks have evolved dynamically in a contemporary form of terror power through borderless 5G cyberspace², leveraging remotely the world web repository, satellites, drones, robots and instant data sharing etc. digital technology, capable of freezing critical native infrastructures including health, financial institutions, energy facilities, and disruption of social harmony and state governance etc. Cyberspace terrorists trained in pervasive vitriolic activities like arousing indignation, separatism, mass sympathy and mobilisation; and hiring, training terror agents, terror fund raising etc., under State agencies like ISI or non-state actors with unfailing synergy have been mercilessly overriding and frustrating the States' anti-terror laws, endangering the ICT (Information and Technology) domain involving Computer Network exploitations (CNEs) and Computer Network Attacks (CNAs). The author, having experience of four decades, examined efficacy of extant laws to deal with this contemporary form of terror.

Keywords: *ICT environment, cyberspace driven cross-border terrorism, multinational cyberspace jurisdictions, dual criminality requirements, responsible state behaviour in cyberspace, pervasive terrorism, cyber sovereignty, self-defence doctrine.*

I. INTRODUCTION

The cross border terrorism using cyberspace, is a complex domain indelibly transforming conceptions of organised terrorists acts, requiring an indigenous, collective and collaborative unfailing global, technical and binding international constitutional/preambular safeguards and legislative responses criminalising even the conspiracy, solicitations, group forming, promoting, inducing,

¹ Research Scholar, Department of Law, University of North Bengal and Former Deputy Judge Advocate General, Ministry of Defence, India.

² GIBSON, WILLIAM (1984), NEUROMANCER, P. 69, (New York: Ace Books).

justifying, discrediting or humiliating victim, imparting training/instructions in firearms, nuclear material, detonative explosives, menacing, chemical or biological terror tools, possessions of terror software or hardware, deciphering encrypted information, collecting and dissemination of critical tangible terror literature, incitements and provocations advocating perverse ideological/religious/political opinions or eminent unlawful actions, glorifying or supporting of terrorists successes intended to disrupt public order or good governance, uploading maps, coordinating operational plans, uploading terror related weaponry/ ballistics /equipment literature, terror targets, tactics, purchasing/designing/launching and maintaining websites/file sharing sites/social networking sites, strategies, fundraising, virtual currency exchanges, tracking important public or private personalities/targets or carrying out their surveillance, offensive/ Jihadi/ radicalising/ ethnic/ strife or intolerance contents, integrating terrorists organisation, financial frauds, interfering/intercepting lawful actions against terrorism, commanding/controlling terrorists actions, racism or xenophobia, firearms/ammunitions/equipment trafficking, like inchoate terrorist offences, phishing and fraud etc. using multinational cyberspace jurisdictions through capacity building, striding aside the public as well as and private entities for a seamless sanctity of an open, secure, free, accessible and stable cyberspace much required as checks against the individual/institutional vulnerability, innovations, economic growth, sustainable development integrity, confidentiality, free flow of useful information, respect for cultural and linguistic diversity with an overarching objective to harness the cyberspace for growth and empowerment of people not just for India, but, for the entire humanity, by sustained and progressively advancing development against current trends in phishing, business spoofing, ransomware, honey trapping, hacking so and so forth, if need be to disrupt and deter the terrorists or prospective terrorists.

II. CURRENT CYBERSPACE INTERNATIONAL LAW LANDSCAPE

Internet is global, borderless and unfragmented (One World, One Internet), while at the application level 193 very different national jurisdictions coexist, cooperate or conflict (One World, 193 Jurisdictions). ICANN's CEO Göran Marby attempted in 2020 to disentangle the DNS from the "Political Internet

Governance" (PIG) controversies by introducing the term "Technical Internet Governance" (TIG). However, the discussion of this matter is not only not settled, but it has just begun, in particular with a view to the Chinese proposals to replace (or complement) the TCP/IP protocol with a new Internet protocol (New IP) and Russian initiatives to create options for a "national Internet segment", independent of the global DNS. However, the attempt to harmonise the legal systems of the 193 national jurisdictions is reaching limits. Technical realities determine political possibilities to some degree, as Larry Lessig noted in the late 1990s with his "Code is Law" thesis. The distance between "code makers" and "law makers" has not diminished in the last 20 years. "Code makers" have difficulties recognizing the political implications of their developments, "law makers" often have an inadequate understanding of how the technical infrastructure works. In his speech to the 14th Internet Governance Forum (IGF) in Berlin in November 2019, UN Secretary-General António Guterres pointed out the problem: *"There's an absence of technical expertise among policymakers even in the most developed countries, invention is outpacing policy setting, and measured difference in culture and mindset are creating further challenges. ... while industry has been forging ahead and at times breaking things, policymakers have been watching from the side lines"*³.

According to **Black's Law dictionary**, cyber terrorism is defined as the act of *"Making new viruses to hack websites, computers, and networks"*. The **U.S Federal Bureau of Investigation** defines cyber terrorism as a "premeditated attack against a computer system, computer data, programs, and other information with the sole aim of violence against clandestine agents and subnational groups".

A. UNCITRAL Model Law on E-Commerce⁴

Whereas NATO had put the cyber defence policy way back in 2008 followed by UNGGE in 2009. Successive "Group of Governmental Experts (GGEs)" are still struggling to control the cyber horns and we are still nowhere. In June 2021, the 25-member *"GGEs on Advancing Responsible State Behaviour In Cyberspace In The Context of International Security"*, adopted a consensus report on the

³<https://internet-governance-radar.de/en/whats-new/translate-to-englisch-blogpost/qiv-2021zusammenfassung>.

⁴ United Nations Resolution A/RES/51/162, Jan 30, 1997.

application of international law on cyberspace after protracted 18 months extensive deliberations, overcoming the earlier failed consensus on self-defence “international humanitarian laws”, inclusions, as well as the contentiousness over the right to take countermeasures in 2016-17, honouring ‘*opinio juris sive, necessitates*’, *lex lata, lex feranda* and the customary rules which have to be inseparably applied for the sake cyberspace sovereignty. A key portion of the Group’s work was conducted during the coronavirus (COVID-19) pandemic, which has highlighted the tremendous potential of digital technologies while accelerating the world’s dependency on them, thereby further underscoring the importance of responsible behaviour in the use of ICTs in the context of international security.⁵ Seized of the continued differences on information systems security owing to diverse national laws, regulations and practices related to the use of ICTs, and unequal awareness of and access to existing regional and global cooperative measures available to mitigate, investigate or recover from terror attacks, and related risks/vulnerabilities globally, the GGEs re-resolved that the use of ICTs for terrorist purposes, against ICTs or ICT-dependent infrastructure, may threaten international peace and security, and also that the diversity of malicious non-State actors, including criminal groups and terrorists, their differing motives, the speed at which malicious ICT actions can occur and the difficulty of attributing the source of an ICT incident etc. are risky. A host of necessities to bring in substantial clarity in issues of specificities requiring responsible states’ conduct in cyberspace, still remain in discussions only. Cross border terrorist narratives, incitements, recruitments, and radicalizations having found ways through offline disseminations requiring continuous scanning/monitoring of the sources in real-time, though been put in place as a policy of predictive policing, yet, remain amenable to frequent breaches. Proactively the States are being urged to adhere to ‘Responsible State Behaviour’ policy in the cyberspace domain in the same manner as they behave in the conventional domain and be always on the lookout for malicious actions and operations as these, do not always bring immediate results.

States are forbidden to consciously allow their territories to be used for wrongful acts using ICTs, it has clear connections to a nation’s capacity to address malicious or criminal use of ICT infrastructure. Another norm that States are

⁵ UN GA 14 July 2021; Report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security.

obliged to follow is not to conduct or support ICT activities that may potentially damage critical infrastructures.

B. Universal Anti-Terrorism Instruments (UATI)

The international legal framework for the fight against terrorism chiefly includes the UATIs (United Nations, their Conventions, Amendments and Protocols) as well as relevant United Nations Security Council resolutions (UNSCR).

C. UN Conventions, Protocol and Resolutions on Terrorism and International Criminal Law

Cyber-attacks seem to be covered under the banner of Article 2.4 of the UN Charter wherein the State are to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Consequently, a cyber-attack that cripples a country's banking system, energy network or causes significant damage etc. could be comparable to a situation in which this infrastructure is attacked through conventional military methods⁶. Security Council has bound itself by its statement that every act of terrorism constitutes a threat to international peace and security, besides being against the purpose and principles of United Nations. As per Article 7(1) read with Article 7(2) of the Rome statute, widespread and systematic terrorist attacks against the civilian population also constitute crimes against humanity. Terror attacks using cyberspace, though not specifically covered under the Article would be *infra legem*. Article 8 features a host of acts as war crimes that do not specifically refer to the crimes committed using cyberspace as a tool or weapons having kinetic connections, though cyberspace is comparable to a virtual projectile capable of delivering the operational plans, codes for remote detonation of fuses, misleading messages in armed conflicts etc. Another glaring lacunae lies in the Article 4 of the Statute whereby the Courts have no jurisdiction over any person under the age of 18 years at the time of the alleged

⁶ Erica Moret & Patryk Pawlak, The EU Cyber Diplomacy Toolbox: towards a cyber sanctions' regime?, European Union Institute for security studies, July 12, 2017, <http://www.iss.europa.eu/content/leucyber-diplomacy-toolbox-towards-cuber-sanctions-regime>.

commission of a crime thereby absolving the criminals below 18 years of age from individual or collective criminal liability.

Various preventive and suppressive terror related conventions identifying various terrorist conducts as offences, integrating the nations into a global legal regime that criminalises identified conducts of the perpetrators, penalise them with due concern for *aut dedere iudicare or extradite or prosecute*, have been legislated over a period of time by the UN. Additional protocols and numerous Resolutions have also been passed to deal with different facets and ever evolving cross-border terrorism. Participating in an association or group for the purpose of terrorism viz to participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group, has been mandated to be criminalised in the domestic laws by the member states. Likewise, 'receiving training for terrorism' viz to receive instruction, including obtaining knowledge or practical skills, from another person in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence have been criminalised.

D. UNODC (United Nations Office on Drugs & Crime)

UNODC intensely does member state's domestic criminal justice systems capacity strengthening, harmonising international legal instruments against terrorism, particularly imparting specialised knowledge of law including internet related terrorist acts, though not so adequate to deal with the pervasive terrorism, investigations, and prosecutions besides the essence of customary laws. UN has revolutionized inter-state collaborative cooperation at international and regional layers to defeat terrorism in any manifestation including cyberspace⁷.

E. Tallinn International Framework

Among the multinational organizations is the North Atlantic Treaty Organization (NATO) whose Cooperative Cyber Defence Centre of Excellence

⁷ UN Resolution 60/288

(CCDCOE)⁸ in Tallinn, Estonia, helped facilitate the original Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual 1.0)⁹ and Tallinn Manual 2.0¹⁰. Forging the views of internationally acclaimed expert scholars and practitioners, these manuals remain the most explored literature on the cyberspace laws ecosystem, and address the applicability of existing international laws to cyber warfare and cyberspace based cross order terror, focussing on attacks close to armed conflicts' threshold.

Cyber Sovereignty

Lacking in consensus until now, the issue remains debatable. UNGEE stated that international law applies to cyberspace, especially the UN Charter. For some nations, sovereignty has remained the keystone in the UN Charter and for some nations, the collective self-defence and non-interference in the internal affairs of a nation.

Utilitarian principle

Issue of Capacity building and helping those nations who cannot help themselves are not so easy to understand or implement in the extant ecosystem that has treaties on trust-building and confidence-building measures, regional confidence-building measures, and an elementary normative framework. But, how to go about implementing these. UNODC provides capacity-building legal assistance and training to member states to tackle investigation, prosecution and adjudication of terrorism-related offences besides digitization and relevant technologies, to prevent radicalization, recruitment and training of terrorists using cyberspace which saw a surge during COVID-19 rendering member States' to increased vulnerability to cybercrime and cyber-attacks.

Several CBMs are designed for seamless communication channel amongst states so that if any norm is broken, they can fall back. The states which are not in a position to develop indigenous security-building measures, are obliged to become active contributors to the international efforts.

⁸ <https://ccdcoe.org/>

⁹ NATO Cooperative Cyber Defence centre of excellence, TALLINN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2012) [hereinafter TALLINN MANUAL 1.0].

¹⁰ NATO Cooperative Cyber Defence centre of excellence, TALLINN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE OPERATIONS (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL 2.0].

Cyber Diplomacy Toolbox

UN and NATO have their own policy response framework, using cyber diplomacy toolbox for punishing cyberspace breaches by perpetrators/accomplices beyond the reach of law enforcement agencies. Also, there are statesmen, declarations, joint attribution statements, and very importantly the 28 nations' sanctions regime applicable in the cyber domain. NATO, within itself, has guidelines below the threshold of armed attack. NATO nations have been undertaking for a more coherent understanding of and also setting up mechanics of taking all those actions. European Union (EU) has adopted high profile sanctions regimes in recent years, including nuclear talks with Iran and North Korea. Besides resorting to this tool for conflict management and in support of rule of law, it employed the sanctions for countering international terrorism including against al-Qaeda), though, not so fool proof as to deter the perpetrators and accomplices as to most of the countries' war remains the last resort.

Incubator and Implementor Duo

The regional organisations serve as an incubator for generating ideas, practical effects and synergy with international laws. These organizations are immensely helpful as all concerns cannot be escalated to an international platform. That apart, these organizations also serve as implementors of the global mandate of international organizations like UNGEE. UN instruments are translated into reality through these organisations. Innovative ideas at the regional levels are invariably of global significance, thus, requiring better collaboration. Regional follow-up projects and collaborations with targeted norms campaigns are optimizing regional amalgamation. Alongside, capacity building measures also need to be undertaken. Also, creating an international legal structure without territorial bias.

Confidence Building Measures

Defensive measures automatically result in offensive capabilities *i.e.*, the retaliatory potential. So, is it true in Cyberspace security arena? A quintessential riposte to this daunting problem is the use of Inter-State confidence-building measures (CBMs). CBMs are pointers to ingraining robust cybersecurity themes, particularly at nascent stages of a country's entry into cyberspace for

repelling cybercrime threats, and, sync in the international consistent cybersecurity domain to combat cybercrime and cyber terrorism. CBMs acts as pressure valves to release mutual distrusts and tensions amongst states averting retaliatory measures i.e. cyber war. CBMs are incorporated into cyberspace covenants. CBMs are placed at the fulcrum of the UNGGE 2015 (Voluntary) norms of responsible state behaviour in cyberspace capitalizing on the framework of the Organization for Security and Co-operation in Europe (OSCE) *i.e.*, the 2013 CBMs. Miscalculations and misperceptions may potentially move the virtual world to the real one e.g., after the 2008 Mumbai attacks, 2010's `Pakistan-India Cyber war saw "cyber armies" from each country vandalizing official websites, intensifying diplomatic and military tensions. Ongoing tensions between the West and Russia, North Korea, and China also feature potent elements of cyber-distrust and readiness to proliferate into a cyberwar. These are typically the hybrid module of the cross-border terrorism.

F. 2001 Budapest Convention on Cybercrime¹¹

It is a common criminal policy signed by members and non-members for combating cybercrime, adopting appropriate legislations and fostering international co-operation in the world digitisation, convergence and continuing globalisation of computer networks which are vulnerable platforms for committing criminal offences including terrorism, by facilitating their detection, investigation and prosecution at both the domestic and international levels and by providing arrangements for fast and reliable international co-operation in seizing and provision of evidence relating to such offences honouring the interests of law enforcement and respect for fundamental human rights.

G. 2005 Warsaw Council of Europe Convention on the Prevention of Terrorism¹²

It criminalises certain acts amounting to terrorism, in particular, public provocation, recruitment, and training; and, seeks to bolster national and international co-operation to eradicate terrorism through individual state

¹¹ <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185>

¹² <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196>

prevention laws and simplified extradition of the perpetrators and mutual assistance arrangements. 2015 Additional Protocol¹³ to the Council of Europe Convention on the Prevention of Terrorism supplementing the convention further criminalizes certain additional acts stipulated in Articles 2 to 6 of the Protocol viz taking part in an association or group for the purpose of terrorism, receiving terrorist training, traveling abroad for the purposes of terrorism and financing or organizing travel for this purpose and exchanging information etc. regarding acts of terror.

H. Cross-border Information Sharing Laws

The 09/11 attack acted as a stimulus for advancing international harmony, cyber security international laws ecosystem and approaches to meaningfully and assertively deal with the prospective terror threats in all domains including the cyberspace, the mainstay being quick cross border information sharing. Adoption of the Resolution 1373 of 2001 by the Security Council is a proactive expanse in the adoption of policies and legal frameworks globally. Articles 19(3) and 20(2) are consistent with upholding national security and public order, and national or religious or racial hatred or discrimination and hostility or violence. Cyberspace often is used by terrorists for these purposes.

III. INDIAN SCENARIO

India has been targeted of intense terrorism for decades. Struggling through, however, it has maintained a fast-developing posture including its nuclear power status. Globally, India is amongst the fastest countries with exquisite dominance over the global IT market. Thus, potentially vulnerable to top tier national risk to the complex malicious subversive cyber-attacks or cyber aided physical territorial attacks using viruses, worms, phishing, malware, Trojans, etc. in ICT.

As defined in Section 2(y) of the Assam Rifles Act, 2006 (Act 47 of 2006), terrorist means any person who, with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people, does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire arms or other

¹³ <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/217>.

lethal weapons or poisonous or noxious gases or other chemicals or any other substances (whether biological or otherwise) of a hazardous nature in such a manner, as to cause or is likely to cause death of, or injury to, any person or persons, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community". Notably the definition is silent on hybrid module of cross border terrorism using cyberspace.

A policy framework named '*National Cyber Security Policy 2013*' was framed by the Department of Electronics and Information Technology (DeitY) under the Ministry of Communication and Information Technology (India) to build a secured, assured, regulatory, early warning, 24x7 emergency response teams (CERT), vulnerability management and response to security threats, protection of all e-governance initiatives, global best security practices, resilient etc. cyberspace framework for citizens, businesses and govt., laying down protection of entire ICT user and provider world and security breaches integrating all key players be it public or private. A national cyber co-ordination centre (NCCC) has also been brought in place specifically to tackle cyber terrorism with integration platform for CERT & ISACs. Home Ministry has set up '*Indian Cyber Crime Coordination Centre*' to tackle cyber-crimes and cyber terrorism. Cyber Swach Bharat Kendra (Botnet Cleaning & Malware analysis centre) has been set up to tackle threat bearing products and provide costless means and measures to get rid of the same, and, curtailing internet traffic expanse to Indian territories only

Indian legislators have taken years to recognise the Cyberspace vices and acknowledge its devastating impact on the national sovereignty, peace and security. Even after the UNCITRAL model law on e-commerce¹⁴ adopted by UN Commission on International Trade Law, and, having been the signatory to said model law, India took another 04 years to give effect to the said resolution and to promote efficient delivery of Govt services by means of electronic records. Thus, came the Indian legislation '*Information and Technology Act, 2000*' which came into force on 17th Oct 2000¹⁵. *This was, however, not legislated as the complete solutions to deal with all kinds of contingencies. Instead, in order to make the provisions compatible, the existing penal code,*

¹⁴ UN Resolution A/RES/51/162, Jan 30,1997.

¹⁵ Notification No GSR 788(E), Govt of India Extraordinary Part II, sec.3(ii).

evidence act including the Banker's Books Evidence Act and RBI Act, were amended. The IT law, 2000 has also not been an original thought. It was legislated with threefold objectives to give effect to model E-commerce law adopted by UNCITRAL in 1996, thus, providing recognising and legalising electronic documents, digital signatures, e contracts and establishment of regulatory regime to supervise the certifying authorities issuing digital signature certificates, as also creating civil and criminal liabilities for contravention of the provisions of the IT Act, 2000. With the passage of time, as the technology developed further and new methods of committing crime using Internet & computers surfaced, the need was felt to amend the IT Act, 2000 to insert new kinds of cyber offences and plug in other loopholes that posed hurdles in the effective enforcement of the IT Act, 2000. This led to the passage of the Information Technology (Amendment) Act, 2008 which was made effective from 27 October 2009. The IT (Amendment) Act, 2008 has brought marked changes in the IT Act, 2000 on several counts.

A. The Information Technology Act and Cyber Crime

The IT law vide Section 43, criminalises unauthorised accesses to a computer, computer system or network viz switching over a computer; using a software program installed on a computer; viewing the contents of a floppy disk; switching off a computer; taking a computer print-out; logging on the Internet; pinging a computer; and, gaining entry into, instructing or communicating with the logical, arithmetic or monetary function resources of a computer, computer system or computer network etc. Section 44 criminalises failure to furnish any document, return or report to the certifying authority. Section 65 criminalises, tampering including hiding or keeping secret; demolishing or reducing to nothing; or, changing in characteristic or position any the computer source document. Section 66 criminalises intentional causing of wrongful loss or damage to any person by unlawful means such as hacking; or, having knowledge that information residing in a computer resource document if concealed, destroyed or altered etc would cause damage to any person. Further the Act is committed with an intent to threaten the unity, security, sovereignty of India or to strike terror in the people or any section of people by denying or causing denial of access to any authorised person to access computer resource; or attempting to penetrate or access a computer resource without authorisation or exceeding authorised access; or introducing or causing to introduce any

computer contaminant, and, by such conduct causes or likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affects the critical information infrastructure specified under section 70; or knowingly or intentionally penetrates or accesses a computer resource without authorisation or exceeding authorised access, and by means of such conduct obtains access to information, data or computer data base that is restricted for reasons of the security of the state or foreign relations; or any restricted information, data, computer data base, with reasons to believe that such information, data or computer data base so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the advantage of any foreign nation, group of individuals or otherwise, are construed as 'Cyber Terrorism', commission whereof is criminalised under section 66 F. Further, Section 67 criminalises making of generally known, promulgate or issue copies for sale to public or disseminating of pornographic material on the website and Section 68 r/w 69 criminalises non-compliance of directions of certifying authority to interception or monitor or decrypt any information transmitted through any computer resource authorises the Controller or Certifying Authority whenever it is expedient to do so. Section 70 criminalises securing/attempt to secure access to a protected system, to wit, any computer resource which directly or indirectly affects the facility of Critical Information Infrastructure declared as such by appropriate Govt incapacitation or destruction whereof, has debilitating impact on national security, economy, public health or safety. Further, Section 73 criminalises publishing of electronic signature certificate or it's making available to others, knowing it as having not been issued by certifying authority or that the listed subscriber has not accepted it; or that the certificate has been revoked or suspended, except where it is for the purposes of verifying a digital signature created prior to such suspension or revocation. Further, Section 74 criminalises creation, publication or making an electronic signature certificate for any fraudulent or unlawful purpose. Section 69-A empowers the Central Government or any of its officers to issue directions for blocking for public access of any information through any computer resource. The intermediary who fails to comply with the direction issued under

sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine.

The Information Technology (Procedure and Safeguards for Monitoring and Collecting Traffic Data or Information) Rules, 2009 was promulgated under section 69B of the Information Technology Act, empowers monitoring and collection of traffic data/ information for forewarning imminent cyber incidents; monitoring network application with traffic data or information on computer resource; identification and determination of viruses or computer contaminant; tracking cyber security breaches or cyber security incidents; tracking computer resource breaching cyber security or spreading virus or computer contaminants; identifying or tracking any person who has breached, or is suspected of having breached or likely to breach cyber security; undertaking forensic of the concerned computer resource as a part of investigation or internal audit of information security practices in the computer resources; accessing stored information for enforcement of any provisions of the laws relating to cyber security for the time being in force; and, any other matter relating to cyber security. Rule 419(A) read with Sec 5 of IT Act, permits surveillance and interception of messages by Secretary and in exceptional circumstances by a Joint Secretary, a provision akin to Sec 91 of Cr PC which also permits surveillance by Court orders and of District Magistrates. Incriminating information collected during afore stated surveillance and interceptions, is admissible as evidence under The Unlawful Activities Prevention Act, 1967.

Shri Ajit Doval, KC, National Security Advisor, in his keynote address, while highlighting the Digital Revolution taking place in the country with the induction of a large number of digital services by the Governments at national and state levels, stressed over ensuring safeguards of the Indian Cyberspace¹⁶. Adding further he urged that Cyber Security remaining the foundation of any successful Digital Transformation, needs to be guarded against at all times. Any threats in the Cyberspace directly impacts the Indian National Security besides social and economic security.

B. Indian Penal Code on Cyber Terrorism

¹⁶ National Cyber Security Incident Response Exercise (NCX India) for Government officials and Critical Sector Organisations to strengthen India's Cyber posture, held on 18th Apr. 2022.

Treason, sedition and rebellion etc under sections 121, 121A, 122, 123, 124A, 153A and 153B of Indian Penal Code (IPC) read with section 118 of Indian Penal Code being 'Offences against the State', have been criminalised. Additionally, traversing beyond Sec 379 of IPC, Sec 411 of IPC criminalises acquisition of stolen cell phone, computer or digital or electronic data (Physical possession not being a sine qua non). Obtaining passwords, launching sham websites and phishing like fraudulent activities in cyberspace stand criminalised under Ss. 419 and 420 of IPC.

Spoofing or online forgery for committing other serious offences viz cheating, can be dealt under Sec 468 of IPC. Online forgery in a document in electronic forms or acts of disrepute can be dealt in Secs 469 and Sec 500 of IPC respectively. Acts of online threats, insults, provocation intended to breach the peace through email or any other electronic form, amount to an offence under Sec 504 of IPC. Online criminal intimidation with respect to the life of a person, property destruction through fire or chastity of a woman amounts to an offence under Sec 506 of IPC.

C. The Personal Data Protection Bill, 2019.

In India, the protection of data, its usage, and issues related to it are currently regulated by the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (“Data Protection Rules”) notified under the Information Technology Act, 2000 (“IT Act”)¹⁷. After the landmark judgment¹⁸, the Supreme Court of India “**Right to Privacy Case**”, the need was felt to have a stronger legislation in place to protect the personal data¹⁹ and privacy of individuals. Bill was introduced by the Ministry of Electronics and Information technology in Lok Sabha. It was also inspired by the principles of the General Data Protection Regulations, 2016. The aim and premise of this Bill are to protect personal information and create a Data Protection Authority to do so for controlling data use by both public and private entities and means to regulates the collection of data by both Indian

¹⁷ Information Technology Act 2008, Section 43.

¹⁸ Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., 2017 10 SCC 1.

¹⁹ Aditi Phadris & Neha Alawadhi, JPC members record dissent towards parts of personal Data Protection Law, BUSINESS STANDARD, (Nov. 23, 2021) https://www.business-standard.com/article/current-affairs/jpc-members-record-dissent-towards-parts-of-personal-data-protection-law-121112200607_1.

governments and businesses. It also applies to international companies that deal with the personal data of Indian citizens. This bill provides certain rights to data principles with respect to their personal data, such as confirmation on whether their personal data has been processed, seeking correction, completion, or erase of their data, and restricting continuing disclosure of their personal data. The Joint Parliamentary Committee (JPC) constituted in December 2019 with 20 members from Lok Sabha and 10 from Rajya Sabha, on 21st September 2021 have finally tabled the PDP Bill.

IV. STEPS TAKEN TO CURB CYBER-TERRORISM

Various measures have been taken to combat cyber terrorism. Some of the steps taken are as under:

*National Cyber Crime Reporting Portal*²⁰, has been launched for enabling victims and complainants to register online their cyber-crime related grievances. This website only handles complaints about cybercrime, with an emphasis on cybercrime against women and children.

Indian Computer Emergency Response Team, a national nodal agency has been created for responding to computer security incidents as and when they occur.

National Cyber Security Policy, a policy framework has been set up by the Department of Electronics and Information and Technology to protect the public and private infrastructure from *cyber*-attacks.

Cyber Swachhta Kendra (Botnet Cleaning and Malware Analysis Centre), malicious programs detection and free tools to remove such programs center has been set up.

Cybercrime Coordination Cells, at national level [National Cyber Co-ordination Centre (NCCC)]; state level [State Cyber Crime Co-ordination Cells (SCCCC)];

²⁰ www.cybercrime.gov.in: The Government has launched online cybercrime reporting to enable complainants to report complaints pertaining to Child Pornography/Child Sexual Abuse Material, rape/gang rape imageries, or sexually explicit content. The Central Government has rolled out a scheme for the establishment of the Indian Cyber Crime Coordination Centre (I4C) to handle issues related to cybercrime in the country in a comprehensive and coordinated manner.

and District Cyber Crime Cells (DCCC) have been set up with powers to scan and collect meta data of intelligence value in cohort with other intelligence agencies, and, share it with intelligence agencies for timely preventive actions wherever needed.

National Technical Research Organisation (NTRO), Erstwhile National Technical Facilities Organisation (NTFO), is a super technical intelligence feeder on internal and external security to various intelligence agencies including those of the Indian Armed Forces, has been establishment under National Security Advisor. Alongwith Indian Airforce, it operates a number of 'Very Long-Range Tracking Radar (VLRTR)' systems for Missile Monitoring and detection of spaceborne threats in aid of Ballistic Missile Defence, using Technology Experiment Satellite (TES), Cartosat-2A, EMISAT and Cartosat-2B besides Radar Imaging Satellites; RSAT-1 and RSAT-2. It also operates Ocean surveillance ship-INS Dhruv.

National Critical Information Infrastructure Protection Centre (NCIIPC), is an organisation of the created under Sec 70A of the Information and Technology Act, 2002(amended 2008) under NTRO.

National Counter Terrorism Centre (NCTC), was set up post 26/11 Mumbai attacks related intelligence and operational, this agency with abilities of real time intelligence inputs of actionable value specifically to counter terrorist acts against India, was raised on the US pattern.

Signals Intelligence Directorate, a joint service organisation with elements of Indian Army, Navy and Air Force with widespread 'Wireless Experimental Units (WEUs)' for monitoring military links of other countries.

Aviation Research Centre, has been set up as part of the Research and Analysis Wing (R&AW) of the Cabinet Secretariat (Special Requirements) for carrying out extensive aerial surveillance, signal intelligence (SIGINT) operations, photo reconnaissance flights (PHOTINT), monitoring of borders, imagery intelligence (IMINT).

National Intelligence Grid (NATGRID), has been set up to store citizens data with accessibility to RAW, CBI, IB etc.

New Media Wing (NMW) and the Electronic Media Monitoring Centre (EMMC), has been set up to carry out media surveillance and shares data with other intelligence units.

National Cyber Coordination Centre (NCCC), an operational cybersecurity and e-surveillance agency has been set up to screen communication metadata and co-ordinate the intelligence gathering activities of other agencies. It has expanded the charter of the Computer Emergency Response Team, India, (CERT-IN), which has jurisdiction over not only government, but also public-private and private sectors.

The National Crime Records Bureau (NCRB), Intelligence Bureau (IB), the National Investigation Agency (NIA), the Central Bureau of Investigation (CBI) and the Narcotics Control Bureau (NCB), have been set up under the Ministry of Home Affairs, Govt of India for collection of intelligence data which is accessible by the NCCC. Likewise at the State levels crime investigation cells associated with the State Criminal Investigation Departments (CID) have cyber-crime branches.

National Investigation Agency (NIA), has been established post the Mumbai terrorist attacks of 2008, to take *suo moto* cognizance of terrorist crimes staring at the Indian national sovereignty, security, integrity, and friendly relations with foreign States, as also to deal with crimes under laws enacted to implement international treaties, agreements, conventions, and resolutions of the United Nations, its agencies, and other international organizations and matters connected therewith or incidental thereto, and, to raid, and seize properties with links to terrorist crimes without permission of the a state police head, provided NIA DG sanction has been accorded, invoking 'The Unlawful Activities (Prevention) Amendment (UAPA)'. The NIA Amendment Act in 2019 expanded the type of offences to include cyber terrorism within the ambit and scope of investigations and prosecution by the NIA.

The National Critical Information Infrastructure Protection Centre has been set up to gather intelligence using sensors and platforms which include satellites, underwater buoys, drones, VSAT-terminal locators and fiber-optic cable nodal tap points, to monitor, intercept and assess threats to crucial infrastructure and other vital installations.

Presently, specialised wings of the Govt viz National Intelligence Grid, Crime and Criminal Tracking Network System (CCTNS); and, Central Monitoring System; Unique Identification Authority of India (UID scheme); Indian Computer Emergency Response Team (CERT-In); and National Counter Terrorism Centre (NCTC) are in place establishing cross communication links amongst computers of various ministries/departments; finger printing, collecting, storing, analyzing, transferring and sharing of data between various police establishments as respects all available information on any criminal or any suspect stored on the servers of other police stations or departments; monitoring communications viz text messages, phone calls, online activities, social media conversations and contents; quick responses to cyber security incidents pan India etc. Also, efforts are on by the Govt of India to completely integrate the cyber policing, creating a predictive data base highlighting hotspots and affording real time cluster mapping visuals using satellite imagery besides the global view of family/kins and crime/criminal antecedents/connections.

V. INVESTIGATIONS AND PROSECUTION

Ordinary criminal investigative domain and investigators are not equipped to deal with the sophisticated means and technical know-how with which cyber terror is carried out as also the very nature of the contents which are in virtual domain. At present, our country does not have an efficacious legislative framework to meaningfully investigate the cyber terror offences, and, collect the actionable evidence which pre-dominantly lies in digital form.

The certification under Section 65 B of Indian Evidence Act 1861, and last years' Supreme Court's observation on admissibility of whatsapp message as evidence, "What is the evidential value of WhatsApp messages these days? Anything can be created and deleted on social media these days. We don't attach any value to the WhatsApp messages". "Prima facie we are not satisfied with the HC direction for depositing the money in an escrow account. We are not considering the purported admission in WhatsApp messages"²¹, has become a real impediment in true dispensation of justice, despite the tangible chain of its existence is available with the investigating agencies.

²¹ A2Z Infraservices Ltd. v. Quippo Infrastructure Ltd. (Now Known as Viom Infra Ventures Ltd.) SLP(C) No. 8636/2021

Indian laws do not give any credence to the VOIP (Voice Over Internet Protocol) records of calls, file sharing, screen sharing which has become the main source of communication between people, distance being no bars, because of its efficacy over the traditional landline and mobile communications which inherently give out the geo locational identity besides being cost less. India lacks in high class forensic investigations capabilities in providing quick results in identifying the perpetrators and their modules.

VI. CONCLUSION

Modern Information technologies can leverage economic as well as social benefits. The states have worked diligently to realize a common vision of an ICT environment that is safe, free, peaceful and accessible. In all attempts, the issue does not seem to be resolved. From a psychological perspective, cyber and terrorism are two growing yet convincing fears that remain unresolved and need rigorous analysis to resolve the fear of the unknown. The source of the problem is not just the technologies that are prone to vulnerabilities, errors, and flaws but human behaviour is too at fault due to its inclination towards the negative and destructive forces, mainly to overcome insecurities, feelings of revenge, cheating, and rebel to destroy. Cyberspace and associated ICT methods have been used by several State and non-State actors for a variety of malicious purposes including cross border terror activities.

The Information Technology Act, 2000 has outlined bound offences and penalties to overpower omissions, that are known to return inside the characterization of cybercrimes. Change is necessary and needed, as the dilemmas posed by new technical advances every day cannot be prevented. Criminals have changed their tactics and embraced advanced technologies, and non-public corporations and organizations in India will have to change their mechanisms to tackle the issues in a coordinated manner to protect society, the legal system, and compliance authorities.

Owing to the fast-expanding terrorists' reliance on internet and a hierarchical global reach, all nations need to respond in closely coordinated ways to disrupt cross border terrorism with a robust and equally sophisticated legal system at international, regional, sub regional and national levels, as the growing technological advancements in digital world with advanced features like screen

sharing etc. UN Security Council unitedly resolved²² to combat terrorism, imposing obligations on member states to transpose various UN conventions, protocols, evolving a domestic prohibitor & preventive legislative structure and incidental rules and policies etc. to criminalise, investigate, detect, collect intelligence, arrest, extradition and prosecute terrorism. Resolution 1624(2005), in its preamble itself repudiates incitements of terrorists acts or attempts at justification or glorification of such acts intended to further incite. Resolution 1963(2010) seeks united approach to prevent ICT and connected resources from terrorist exploitations. Still an end to the cross-border terrorism using the cyberspace is nowhere in sight. A lot needs to be done to criminalise the novel methods with which the Terrorists using the cyberspace keep on causing destructions and infringing and disturbing people's rights.

The need of the hour is Globally integrated special international laws and integrated worldwide cyberspace courts and specialised cyber police and procedural codes penetrating beyond state boundaries including extraterritorial prescriptive jurisdictions for detecting, investigating, extraditing, trying and punishing the cyberspace mounted acts of terror. Preferably, it should be integrated with the military laws as it remains the last resort against the terrorism.

²² UN Security Council Resolutions 1373(2001) and 1566 (2004)-UN Charter Ch VII.

NOTES AND COMMENTS

Pros & Cons of Triple Talaq: Post Shayara Bano Judgment

*Amrita Singh*¹

*Dr. Ravi Kant Verma*²

Abstract

“We are the nation which proudly professes about it being the largest democracy and ensures to both men and women equal rights meanwhile it claims itself to be a secular state. However, under all these pretty claims there lies heinous and discriminatory laws which jeopardize the lives of many people who are in most cases unable to earn a living for themselves. The different courts in India have passed various judgements in the cases of Triple Talaq which is not helping the Muslim women as well. Triple Talaq, a patriarchal practice should be banned because first, it is unconstitutional; secondly, it leaves the women who are divorced and dependent in acute poverty; thirdly, it is un-Quranic.

Key-Words: *Triple Talaq, Equality, Democracy, Unconstitutional etc.*

I. INTRODUCTION

In *Shayara Bano v. Union of India*³, the Indian Supreme Court pronounced a split, though bold and progressive verdict setting aside the practice of *instant triple talaq* or *talaq-e-biddat*. Against the backdrop of this judgment, this paper traces the jurisprudence evolved by Indian courts vis-à-vis personal laws and therefore the right to spiritual freedom. Two central arguments are presented within the course of this paper. First, the courts haven't adopted a uniform approach when handling issues connected to non-public laws. Second, the courts by means of the doctrine of essential religious practices have, besides interfering within

¹ Research Scholar, Faculty of Juridical Sciences, Rama University, Kanpur, Uttar Pradesh.

² Associate Professor, Faculty of Juridical Sciences, Rama University, Kanpur, Uttar Pradesh.

³ (2017) 9 SCC 1.

the domain of private laws, attempted to fashion the faith specific personal laws as per the understanding of the respective judges. In reference to this, the paper briefly considers the efficacy of the top-down approach of private law reform which has been practiced in India within the post-independence period. While showing that the top-down approach of private law reform has not fared well within the Indian context, the paper suggests a special and more inclusive approach which may be adopted within the endeavour to reform personal laws. During this paper, I try to analyse the recent developments against the populist grain by clearing a number of the misconceptions surrounding the rights of Muslim women under the Muslim personal law regime.

II. RELIGIOUS BASIS OF INSTANT TRIPLE TALAQ

Unlike other religions where marriage has been traditionally viewed as a sacrament, under Muslim law, marriage is a civil and social contract. Talaq-ul-Sunnat of the divorce sanctioned by Prophet is sub-divided into: (i) Talaq-e-Ahsan (ii) Talaq Hasan (iii) Talaq-e-Biddat.

In the Talaq- e- Ahsan form, once the husband pronounces talaq, there has to be a three-month iddat period to factor in three menstrual cycles of the woman. This time is meant for reconciliation and arbitration. During this period, if any kind cohabitation occurs, the talaq is considered to have been revoked.

In Talaq-e-Hasan (Proper), there is a provision for revocation. The words of Talaq are to be pronounced three times in the successive periods after menstrual cycles. The husband has to make a single declaration of Talaq and then waited for another menstrual cycle to pronounce another declaration. The first and second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming conjugal relations, the words of Talaq become ineffective as if no Talaq was made at all. But if no revocation is made after the first or second declaration then lastly the husband is to make the third pronouncement in the third period the Talaq becomes irrevocable and the marriage dissolves.

The Talaq-e-Biddat which allows men to pronounce talaq thrice in one sitting, sometimes scrawled in a written talaqnama, or even by phone or text message. Thereafter, even if the man himself perceives his decision to have been hasty in hindsight, the divorce remains irrevocable. It is a disapproved mode of divorce.

The Talaq-ul-Biddat has its origin in the second century of the Islamic-era. According to Islamic scholar and jurist Ameer Ali, (1849–1928), this mode of Talaq was introduced by the Omayyad Kings because they found the checks in the Prophet's formula of Talaq inconvenient to them.

The Talaq-e-Biddat was declared unconstitutional by the Hon'ble Supreme Court in the case of *Shayara Bano Vs Union of India in Original Civil Writ Jurisdiction in Writ Petition (C) No. 118 of 2016 and violative of fundamental rights and to the extent the Section 2 of the Shariat Act was held to be void.*

Then the Parliament has enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019 (Hereinafter referred to as 'Act') and the Act was notified on 31.07.2019 in the Gazette of Government of India wherein the Section 2(c) of the Act defines the talaq means s talaq-e-biddat or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband.

Section 3 of the Act specifies that any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.

Section 4 of the Act specifies that Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

III. CONSTITUTIONAL RIGHTS OF EQUALITY FOR MEN AND WOMEN & IT'S IMPACT ON THE SOCIETY

The Constitution of India grants equal protection of law to all the people in India. But when it comes to religious matter and their related matter (marriage, divorce, custody of children, etc.), Muslims in India are subjugated by the Muslim Personal Law which came into action in 1937. The changes in the laws of the religious minorities were surprising, as preservationist elites had impressive roundabout impact over these laws. Arrangement elites changed minority law just in the event that they found valid legitimization for change in gathering laws, bunch standards, and gathering activities, not just in protected rights and transnational human rights law. Muslim support and separation laws were changed on this premise, giving ladies more rights without relinquishing

social convenience. Lawful assembly and the standpoint of arrangement creators - explicitly their way to deal with managing family life, their comprehension of gathering standards, and their regulating vision of family life- moulded the significant changes in Indian Muslim law. More gender-equalizing lawful changes are conceivable dependent on similar sources.

Constitution of India provides that for women and children special provision can be made by the state and the women empowerment enjoys constitutional protection.⁴ Constitution of India lay down certain principles of policy that are to be followed by State. Men and Women citizens shall enjoy equal right to an adequate means of livelihood.⁵ Constitution of India also provides that 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'⁶

Among Muslims, where photography was a taboo as was loudspeakers being used for *azaan*, but slowly they have given way. What is non-negotiable is the constitutionally endowed right to profess, propagate and practice one's religion while living within the ambit of the rules and laws that define a civilized society. But then again, the constitution is just reconfirming to what is already rejected and treated as a sinful act in Quran and Sharia alongside. In that context, the demands for abolition of triple talaq first arose among the educated class of Muslims as they understand the rigidity behind this idea and also, they have a fair idea what kind of people still practices this gruesome custom. Illiteracy and the lack of knowledge is clearly visible within this community.

Statistics show that triple talaq is not the preferred mode of divorce among Muslims. Advent of technology has complicated things further. Talaq by messaging service or email or by voice-mail have showcased the fault-lines that have always existed between a 1500-year-old religion and 21st century. Although surveys show that only 0.75 out of 100 divorces among Indian Muslims have been accomplished through Triple Talaq, even that small number is undeniably a matter of concern.

Definitely the banning of instant triple talaq has been a relief to the women who has suffered this cruelty. But the biggest factor is that at first place when the

⁴ Article 15(3), Constitution of India.

⁵ Article 39, Constitution of India.

⁶ Article 44, Constitution of India.

case of triple talaq occurs, the community or the leader of the community doesn't cooperate and support the victim. Because of their typical conservative mindset, that if this thing has happened then there is nothing can be undone has made the women feel helpless and therefore pleaded to the Supreme Court. When it comes to triple talaq the victims of triple talaq suffers because family, friends and other people around them have already made up their mind that they couldn't help in any way if the word talaq has been pronounced thrice. The fact is that that no one proper knows the laws of Islam made for divorce process. Not even all of the religious leaders know the proper way of divorcing. Mainly the illiterates or those who doesn't know what is written in Quran are the only ones who choose this type of divorce. Instant triple talaq is not only due to Illiteracy but also due to its social acceptance, although Prophet Muhammad and the second caliph made it a punishable offence.

IV. ROLE OF JUDICIARY IN PARADIGM SHIFT OF JURISPRUDENCE

The current scenario around triple talaq is centered on the Sharaya Bano and several batches of petitions as well as Supreme courts own suo moto PIL to consider whether certain aspects of Islamic personal laws amount to gender discrimination and hence violates the constitution. The petition hence challenges the validity of triple talaq on the touchstone of Article 14, Article 15, Article 21 and Article 25.

In the case of *Shahid Azad v. Union of India* on 28 September, 2018, the Hon'ble Supreme Court has crystallized the law after detailed deliberations in such manner that Given the fact that **Triple Talaq** is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in *Rashid Ahmad v. Anisa Khatun*⁷, such **Triple Talaq** is valid even if it is not for any reasonable cause, which view of the law no longer holds well after *Shamim Ara v. State of U.P.*⁸. This being the case, it is clear that this form of **talaq** is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to

⁷1931 SCC OnLine PC 78: (1931-32) 59 IA 21: AIR 1932 PC 25.

⁸(2002) 7 SCC 518: 2002 SCC (Cri) 1814].

save it. This form of **talaq** must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce **Triple Talaq**, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces **Triple Talaq**. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him."

The Kerala High Court in the case of *Kayyumparamb Ummer Farooque v. Peredath Naseema*⁹, has also considered the same provisions, the decisions of various High Courts and the Supreme Court and has approved the proposition to the effect that the instant dissolution of marriage by the husband without any effort for reconciliation is not sufficient to affect a divorce under the Mahomedan Law. Even a Bench of this Court in the case of *Masroor Ahmed v. State (NCT of Delhi)*¹⁰ after following the law laid down in the case of *Shamim Ara vs. State of U.P.*¹¹ has approved the aforesaid principle of law. In the case of *Shayara Bano*¹² before declaring the practice of **triple talaq** to be unconstitutional, as detailed hereinabove, the provisions of Article 25(2) of the Constitution have been considered by His Lordship Justice Kurian Joseph in his opinion and His Lordship goes on to hold that there cannot be any constitutional protection to such a practice and he declares it to be ultra vires the Constitution and the fundamental rights available to a citizen. His Lordship Justice Rohinton Fali Nariman before finally declaring the law (by majority) as detailed hereinabove in para-104 has analysed various judgments not only of the Constitutional Bench of the Supreme Court and other Division Benches but judgments of various High Courts, the importance of gender discrimination, safeguards against arbitrary divorce, various forms of **talaq** prescribed in the Muslim Personal Law, the constitutional protection available under Section 25 and the conclusion arrived at para-104 is a result of all those discussions and

⁹(2005) SCC Online Ker. 471.

¹⁰(2008) 103 DRJ 137.

¹¹ (2002) 7 SCC 518.

¹² (2017) 9 SCC 1.

analysis. Before doing so, Justice Nariman also refers to concept of arbitrariness as envisaged under Article 14 of the Constitution, the law laid down in the case of *Shamim Ara*¹³ and the judicial precedents with regard to declaring a law to be constitutionally ultra vires invalid and comes to the conclusion that the system of **triple talaq** is unconstitutional, arbitrary and violative of Article 14 of the Constitution.

V. CONCLUSION

What the Supreme Court does within the case of *Shayara Bano*¹⁴ could also be a declaration to the effect that the practice of triple talaq is unconstitutional, arbitrary, and can't tend effect to or practiced. If in spite of such a declaration of law by the Supreme Court to prevent the use of this system of talaq is still practiced, the legislator/Union of India, as a measure of deterrent in its own wisdom, legislates a law to declare it to be an offense and makes it punishable, we see no reason to hold that this is often an arbitrary or an unreasonable act or a colorable exercise of power. In fact, in furtherance to the law declared by the Supreme Court within the case of *Shayra Bano*¹⁵ the ordinance in question is for shielding the right available to a Muslim woman and to enforce the law declared by the Supreme Court in its right earnest in letter and spirit. If we undergo the aims and objects which compelled the legislation to be brought into force, we discover that the legislature/Union of India was of the opinion that in spite of the practice of triple talaq being declared as unconstitutional, the said practice continues unabated and, therefore, to curb the same the impugned ordinance in question has been brought into force. That being the factual position, the contention of the petitioner that it had been not necessary to bring any such legislation or ordinance, in our considered view could also be a misconceived submission that cannot be accepted. Generally, human rights are equated with more freedom and progress. However, it becomes pertinent to note that conferring rights don't always end in emancipation. The most reason behind this exclusionary nature of human rights is that the universal assumption on which it's based. The darker side of human rights most apparently manifests itself just in the case of women as they are caught at the intersection of community identity and thus the narrative of modernity. One such Universalist subject is

¹³ *Supra* Note 1.

¹⁴ (2017) 9 SCC 1.

¹⁵ (2017) 9 SCC 1.

that the image of thoroughly victimized Muslim women who is in need of protection through the liberal rights discourse. This debate around triple *talaq*, centered on the *Sharaya Bano* and a variety of other batches of petitions also as Supreme courts own *suo moto* PIL considers certain aspects of Islamic personal laws which amount to gender discrimination and hence violates the constitution misses the aim of intersectionality. As per the liberal understanding of rights for the empowerment of women we'd wish to subordinate the category of religion and culture. However, constitutional rights would remain a dead letter if we don't understand the way during which identity politics unfolds especially just in the case of women. The whole *triple talaq* issue has become a battleground for the culture versus modernity debate. It is vital to know that women's experiences cannot be understood in these reductive binaries as "she" is produced from the very power relations which subordinate them. During this paper, the author deals with the question of triple *talaq* in the light of the recent petition filed within the Supreme Court for declaring such *talaq* invalid. The author says that there is an already existing legal precedent established by the apex court with respect to triple *talaq* which should be followed instead of resorting to a confrontational approach that may become hegemonic to Muslim women themselves. The author shall advocate that taking a cue from third-wave feminism, the identity of Muslim women must be understood at the intersection of gender and religion. The violence Muslim women endured itself isn't important; it's her Muslim-ness and thus the projection that she is that the victim of archaic and oppressive personal laws which alone can give her that special status and set her apart from all other victims of domestic violence.

NOTES AND COMMENTS

Municipal Solid Waste Management: An Analysis of Current State of Affairs in India

Vatsala Mishra¹
Mayank Singh²

Abstract

It's not the insufficiency but the underlying competency that must be questioned. This article endeavors to align the roles of the Legislature, Judiciary and Executive in ensuring effective management of solid wastes. It dives into the ineffectiveness of existing legal provisions and adherence to unscientific norms for waste disposal.

The lacunae of Solid Waste Management Rules, 2016 becomes traceable by indiscriminate storage and collection of wastes by waste generator and waste collector discussed intermittently throughout this article, besides exhibiting their ignorance by inviting mismanagement at the stake of healthy environment and life.

Keywords: *Solid Waste Management Rules, 2016, Wadhera Case, Almitra Case, Ratlam Case, Ministry of Housing & Urban Affairs, integrated solid waste management, waste segregation, open drains.*

I. INTRODUCTION

Utility of a thing lies in one's eyes meaning a thing isn't a waste until it's fully disposed of. With surging needs to cope up with developing society accompanied with population growth, urbanization and technological advancement, further growth in per capita consumption and ignorance of waste

¹ B. A. LL.B. (Hons.), Final Year. Law College Dehradun, Uttarakhand University, Premnagar, Dehradun Uttarakhand

² Assistant Professor, Faculty of Law, Law College Dehradun, Uttarakhand University, Premnagar, Dehradun Uttarakhand

segregation at source exacerbating waste management at present in a developing country i.e., India. Consequently, strict adherence to regulation of waste generation becomes an immediate reaction to resolve this mushrooming problem.

II. WASTE: MUNICIPAL SOLID WASTE

According to the 'Solid Waste (Management & Municipal Handling) Rules, 2016, under sub-rule (46) of rule 3, “‘solid waste’ means and includes: solid or semi-solid domestic waste, sanitary waste, commercial waste, institutional waste, catering and market waste and other non-residential wastes, street sweepings, silt removed or collected from the surface drains, horticulture waste, agriculture and dairy waste, treated bio-medical waste.

Further, it excludes industrial waste, bio-medical waste and e-waste, battery waste, radio-active waste generated in the area under the local authorities and other such entities”³.

A. Municipal Solid Waste Management

It is a process which begins at pace of waste generation by ensuring waste segregation into typically dry and wet wastes, further collection of segregated wastes by authorized waste collectors, thereafter its transportation from storage facilities through adequate vehicle for its final disposal. Aftermath of disposal, real concerns of release of greenhouse gases (CH₄, CO and H₂S) adversely contribute to the climate change which nowadays lurking in the shadows of sustainable environment.

III. SOLID WASTES AND LEGISLATIONS

A. International Approach

Stockholm Declaration on Human Environment, 1972

By these major concerns of environmental rights and sustainable environment by concrete waste management are addressed under Principle 1 and Principle 2

³. Solid Waste (Management & Municipal Handling) Rules, 2016, Government of India, 2016 (India).

respectively. Further resort to prohibition of waste disposal in sea (Principle 7) and no resort to ill impacting activity to environment to be made (Principle 17).⁴

The aforesaid conference later called as Magna Carta on human environment as was highlighted in *K. Guruprasad Rao v. State of Karnataka*⁵.

United Nations Environment Programme (UNEP)

To fulfill its commitment to implementation of 17 Sustainable Development Goals in the 2030 Agenda including Goal 3 which intends to secure healthy lives to every human by reducing waste and pollution. To deal with solid waste management, primarily minimization of waste generation to be promoted. However, where waste generation cannot be stopped, recycling of wastes to be resorted to. Consequently, aiding in the economic growth of a country along with providing employment opportunities.⁶

Our Common Future

The report titled 'Our Common Future' as to solid waste, it addressed rapid increase in solid waste pollution problems and anticipated its unhealthy impacts on human lives, downplaying economic development and resulting unemployment in the Third World city(s). Furthermore, issue of unattended dumped wastes called for suggestions for the methods of reclamation.⁷

World Charter for Nature, 1982

The states of managing and maintaining land, not adversely impacting the resources co-existing thereof (Principle 4). Further activities causing irreversible risks to environment must be restraint through technological advancement

⁴. Declaration of the United Nations Conference on the Human Environment (1972), (Mar. 15, 2022), https://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736/Demo/treaties/media/1972%20Stockholm%201972%20Declaration%20of%20the%20United%20Nations%20Conference%20on%20the%20Human%20Environment%20-%20UNEP.pdf.

⁵ (2013) 8 SCC 418, 471.

⁶ UN Environment Programme, Solid Waste Management, (Mar. 15, 2022, 03:30 PM), <https://www.unep.org/explore-topics/resource-efficiency/what-we-do/cities/solid-waste-management>.

⁷ UNGA, Report of the World Commission on Environment and Development: Our Common Future, 1987 (Mar. 15, 2022, 03:30 PM), https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

(Principle 11). Furthermore, stressed in addition to the enactment of such environment conservation programmes relating thereto at domestic levels in the Charter.⁸

Earth Summit, 1992 (AGENDA 21)

“Earth Summit” was the Conference held at Rio de Janeiro in 1992, from June 3rd to June 14th. It laid down 27 principles reasserting the Stockholm Declaration, 1972.⁹ Among various documents, AGENDA 21 was adopted which as to solid waste, provided for formulation of national programmes in every signatory(s) to the Conference as to solid waste disposal with international aid, sustainable human settlement development to be promoted by integrated approach, well planning of urbanization particularly in developing countries. The industrialized countries were obliged to invest 1% of their expenditure on waste management and disposal of sewage. In addition to, it expected by 2025, disposal of all wastes in accordance with national and international guidelines.¹⁰

World Summit on Sustainable Development, 2002 (Johannesburg Declaration on Sustainable Development, 2002)

Also, known as “Earth Summit”, provided for ten-year framework to be formulated to encourage and promote sustainable consumption and production resulting in reduction of wastes among others, the 3Rs for wastes minimization, emphasis on public-private partnership in sanitation and waste management and also pollution containment initiatives by 2004.¹¹

B. NATIONAL APPROACH

The Constitution of India

⁸ World Charter on Nature, 1982 (Mar. 15, 2022, 06:30 PM) https://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736-Demo/treaties/media/1982%20UN%20World%20Charter%20Nature%201982.Pdf.

⁹ S. C. SHASTRI, ENVIRONMENTAL LAW 473 (6th edn. 2018).

¹⁰ United Nations Conference on Environment & Development, *AGENDA 21*, (Mar. 15, 2022, 04:15 PM) <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

¹¹ Report of the World Summit on Sustainable Development, Johannesburg (Mar. 15, 2022, 04:30 PM) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/636/93/PDF/N0263693.pdf?OpenElement>.

Provisions under the Constitution of India which strictly stresses the environment protection turn out to be lightly when it comes to implementation as directed to the states for its policy formulation. The *provisions shall not be enforceable by any court* as per Article 37¹². When Article 47 directs the state to safeguard the public health it also includes healthy environment of its people along with it shall endeavor to protect and improve environment under article 48A, incorporated by the 42nd Constitutional (Amendment) Act 1976. In addition to, it is our duty too (clause (g) of Article 51A), to protect and improve our natural environment by virtue of being a human and acting rational. Admittedly, article 21 includes right to healthy environment for one's right to life and if violated can be remedied under article 32.¹³

When clause (c) of Article 51 provides the state to foster respect for international treaty and agreements it also implicitly urges its subjects to cooperate with the state. Therefore, Article 253 bolsters the Parliament to enact laws for implementation of any treaty, agreement or convention with foreign country at any organized or constituted international conference, association or other body (Schedule VII Entries 12 & 13).

Criminal Laws

- Indian Penal Code (IPC), 1860¹⁴

Chapter XIV of the Code of 1860 penalizes acts or omissions affecting the public health, safety, convenience, decency and morals. As per section 268 of the Chapter, when municipal authorities adequately providing services or we, people, contributing in causing nuisance, are said to be penalized as per this section.

Section 269, applies when a waste collector or a waste-picker collects the waste without safeguards, results in several infectious diseases which amounts to a negligible act on concerned authorities' ends. Moreover, when a malignant act contributes to the likelihood of spread of infectious disease dangerous to life is said to be punishable for imprisonment extending to two years or fine, or both. (Section 270)

¹² INDIA CONST. Article 37.

¹³ Subhash Kumar v. State of Bihar, AIR 1991 SC 424.

¹⁴ Indian Penal Code, 1860, & 268, 269, 270, 278, 290, No. 45, Acts of Parliament, 1860 (India).

When any person makes the atmosphere noxious to the health of persons in its vicinity is punishable with fine extending to five hundred rupees. (Section 278)

To broaden the ambit and to punish an accused escaping his liability arising from public nuisance, section 290 provides for punishment of fine of two hundred rupees for acts, not otherwise punishable.

- Section 133 of Code of Criminal Procedure, 1973¹⁵

It provides for conditional order to be issued by specially empowered appropriate Magistrate(s) by the State Government for removal of public nuisances. The said Magistrate may order to remove or desist or stop or fence or confine the nuisance the directed manner.

In *Municipal Council, Ratlam v. Vardichand*¹⁶, the Supreme Court underscored the duties of municipal authorities to curb public nuisance and should adhere to the executive order passed thereof. It widened the power of a Magistrate as a whole.

Environmental Laws

- The Environment (Protection) Act, 1986¹⁷

In furtherance to the Stockholm Conference in June, 1972, being a signatory India enacted this Act. The Act states measure-taking power of the Central Government which includes planning of nation-wide programme & its implementation for safeguarding environment (Section 3), to curb environment pollution matters pertaining to ensure quality of water and air along with measures for containment of hazardous substances (Section 6) and for effecting the provision of the aforesaid Act relating to limiting standards for environmental pollutants' emission, processual mechanism thereof inter alia (Section 25).

- The Municipal Solid Wastes (Management and Handling) Rules, 2000¹⁸

¹⁵ Code of Criminal Procedure, 1973, & 133, Acts of Parliament, 1973 (India).

¹⁶ AIR 1980 SC 1622.

¹⁷ The Environment (Protection) Act, 1986, & 3, 6, 25 No. 29, Acts of Parliament, 1986 (India).

¹⁸ The Municipal Solid Waste (Management and Handling) Rules, 2000, Government of India (India).

As empowered under the aforesaid Sections of the Environment Act of 1986, the Central Government laid down the Rules of 2000 to manage the solid wastes generated in a municipality region. It laid down duties of administrative authorities. It failed to apply in rural areas, lacked attention towards significant duties of waste generators and absence of penal provisions for its non-implementation. Therefore, the Rules of 2016 were introduced.

- The Solid Waste (Management & Municipal Handling) Rules, 2016¹⁹

In furtherance to exercising its powers laid down under aforesaid sections of the Environment Act of 1986, and to fill up the gaps created by the Rules of 2000, the Solid Waste Management (SWM) Rules 2016 were formulated. Some of the crucial aspects of Rules of 2016 are as follow:

The duties of a waste generator (Rule 4) are as follows:

- (i) Duty to segregate into bio-degradable wastes (wet wastes), non-bio-degradable wastes (dry wastes) and domestic wastes of hazardous nature (such as treated bio-medical wastes) in suitable bins (that is green, blue and black bins respectively) and hand over to authorized waste collector or rag-pickers.
- (ii) Intimation to local authority three days prior ensuring segregation of wastes at source and collection by authorized waste collectors (people >100).
- (iii) Resident Associations, all hotels & restaurants etc. required to ensure waste segregation at source facilitating waste collection and handing over of recyclables to permitted waste-pickers or waste recyclers.
- (iv) Duty to resort to bio-methanation/composting for bio-degradable waste disposal.
- (v) Duty to specify minimum 5% of the total plot extent for recycle facility by the developers of the SEZs, or industrial units.

Collection and disposal of sanitary wastes:

¹⁹ The Solid Waste (Management & Municipal Handling) Rules, 2016, Government of India (India).

- (vi) Duty of the manufacturer or brand proprietors of sanitary pads or diapers to avail a pouch for its disposal along with the packet. Also, to educate its consumer of its disposal and wrapping accompanied with co-operation at waste generators' ends.
- (vii) Duty of manufacturer or brand proprietor launching products containing glass, plastics, tin etc. required to make monetary contribution to local stakeholders authorized for efficient waste management system.

Duty of Urban Development Ministry:

- (i) To draft National Policy and Strategy on SWM.
- (ii) To review steps taken by the State Government and its local authorities.
- (iii) To organize skill programmes for the local bodies.

Promotion of Waste to Energy Plant:

- (i) Duty of Power Ministry to limit tariff on power produced from Waste to Energy Plant and its compulsory purchase by DISCOMs.
- (ii) Duty of New and Renewable Energy Sources Ministry to grant certain incentive for laying foundation of waste to energy plant.
- (iii) Wastes possessing calorific value (of 1500 K/cal/kg \leq) to be put into use for waste to energy plant generation either by refused derived fuel or through releasing feed stock for refused derived fuel (RDF) preparation. Further, for co-processing it provides use of high calorific wastes in cement or thermal power plants.

Duties of the Secretary and Commissioner of State Urban Development Department and Municipal Administration respectively, Local Bodies' Director, local authorities and village Panchayat:

- (i) Duty to draft state policy and SWM strategies in consultation with interested stakeholders (including waste pickers' representative, SHGs).

- (ii) Duty to introduce 'user fee' to be paid by waste generator to the waste collector.

In *M. C. Mehta v. Union of India*²⁰, the Supreme Court directed the concerned waste generating authorities including the local bodies to ensure no part of waste to be burnt and ample safeguards taken for its disposal through scientific means that is environment friendly.

IV. SOLID WASTES AND JUDICIARY

The unavailability of proper legislation led to judicial activism and judicial orders directing concerned authorities to take adequate actions to prevent the environment pollution. In *Gobind Singh v. Shanti Sarup*²¹, the apex court held consideration of viewpoint of Magistrate in case of health, security and convenience of largely public concerned to be the secure route as he himself observed the nature of hazard. Furthermore, Magistrate can compel municipal authorities to construct drains and enhance sewerage system for the well-being of residents. Moreover, financial stringency is no ground to justify inaction on the part of municipal body. (*Municipal Council, Ratlam v. Shri Vardichand and Others*²²).

In *Dr. B. L. Wadhera v. Union of India and others*²³, a public interest litigation under Articles 21, 32, 48A and 51A of Constitution of India was filed bringing non-performance of mandatory duties of municipal bodies in light. The apex court observed collection and disposal of wastes are mandatory duties of the municipal authorities. Simultaneously, the residents of locality have constitutionally guaranteed right to live in a clean city which is to be ensured by municipal authorities. Yet again, defense of unavailability of funds, inefficiency of staffs and required machinery was dismissed, by the court, for non-performance on authorities' part. The court directed the involved Government, municipal and other concerned authorities:

1. The Court supported the experimental move of poly bags distribution and its door-to-door collection. It directed waste collection and transportation to disposal site on everyday basis.

²⁰ (2016) 4 SCC 269.

²¹ (1979) 2 SCC 267.

²² (1980) 4 SCC 162.

²³ (1996) 2 SCC 594.

2. It directed the construction of incinerators in hospitals with 50 or more beds.
3. As to disposal of hospital wastes in AIIMS, New Delhi, it was directed to install ample number of incinerators.
4. In case of private hospitals, the authorities were directed to arrange for waste disposal and held liable for negligence.
5. Regular inspection by the central authorities.
6. Appointment of the Municipal Magistrates to try the guilty of offences. Further awareness through aids of Doordarshan and public announcements.
7. To educate the Delhi residents of their duties under relevant legal provisions.
8. To address the non-handing over of the Sanitary Landfill Sites (SLF), it disallowed the disposal of solid wastes at that place for then. Nonetheless, it directed the government to hand over two required sites placed at Badarpur and Mandi Village to municipal authorities.
9. As to compost plants, the court directed to restart the Okhla plant.
10. The court directed municipal authorities to use filled up SLFs for only forestry purposes and development of gardens and forests.
11. The local authorities were asked for the construction of some additional collection centers.
12. The governments were directed to grant required financial aid to the municipal authorities in judicious manner.
13. Anticipating future concern relating to non-availability of SLFs for waste disposal purposes, involved authorities to act jointly and engage expertise of bodies such to figure out the alternate method(s) for waste disposal.

Failure in implementing the fourteen points laid down in *Wadhera Case*²⁴, the court showed disappointment in *Almitra H. Patel v. Union of India*,²⁵ it compelled to levy charges for waste-littering and scientific wastes disposal to be implemented. Identification of landfill sites and compost sites of free of cost and unauthorized lands encroachment to be prevented. The slum problems relating

²⁴ Dr. B. L. Wadhera v. Union of India and others, (1996) 2 SCC 594.

²⁵ (2000) 2 SCC 679.

to sanitation must be improved and Magistrate²⁶ to be appointed. Besides, until the proper enactment, fine of fifty rupees to be imposed for the said nuisance causing acts. The Supreme Court further clarified under a public interest litigation filed under Article 32 of the Constitution that it not for the court to tell the authorities their acts and duties to resolve the issues but can only remind the authorities to take actions and ensure cleanliness of city.

V. SOLID WASTE AND EXECUTIVE

Swachh Bharat Mission (SBM): The increase from 95,00,000 tonnes per annum (TPA) of waste treatment capacity, at the time of its launch (Oct 02, 2014), to nearly 238,00,000 TPA encompassing decentralized facility indicate applaudable achievement made by the Mission. Thereafter, on October, 01, 2021, with an allocation of Rs 1, 41,600 crores (for Urban SBM) its second phase was relaunched as SBM 2.0.²⁷ As per the latest finding of the Parliamentary Standing Committee Report, the execution of solid waste management in rural areas remained behind as merely 22% of total villages under the said Mission could be targeted while 2021-22 up to February 07.²⁸

Programmes such as *Star Rating of Garbage-Free Cities*, *Swachhta He Sewa Campaign*, and *Compost Banao*, *Compost Apnao Campaign* initiated to meet the vision of Urban SBM by public engagement and awareness as solid waste management also continue to function under the aegis of MoH&UA.²⁹

Swachh Survekshan Toolkit, 2022: It suggests the following interventions required to be made to ensure the waste segregation at source:

- Facilities of waste segregation, collection and its storage thereof ensured to be followed, that is fulfilment of Solid Waste Management Rules 2016;
- Organization of awareness initiatives to educate household residents;

²⁶ Code of Criminal Procedure, 1973, & 20, 21, Acts of Parliament, 1973 (India).

²⁷ Government of India, *Swachh Bharat Mission- Urban 2.0* (Ministry of Housing & Urban Affairs, 2021).

²⁸ Jebaraj, Priscilla, "Few villages received waste disposal infrastructure: panel", THE HINDU, Mar. 24, 2022.

²⁹ Swachh Bharat Mission Urban 2.0, India, (Apr. 01, 2022, 11: 00) <https://sbmurban.org/>

- Resort to two-bin issuance cannot be a pre-requisite for any waste segregation at source drive, in any city;
- Training of all waste-pickers as to segregation of waste to be ensured;
- Allotment of separate days for wet and dry wastes to be made;
- Maintenance of records quantum of segregated waste (collected & transported);
- Waste management chain must remain segregated throughout;
- Penalization of contracted agencies in case of un-segregated waste via door-to-door waste collection, by ULB;
- Incentivizing waste composting by residents at their ends;³⁰

Informal Waste pickers' Integration³¹: The suggested interventions to be made under the toolkit of Swachhta Survekshan Programme are as follow:

- Identification of waste pickers or Self-Help Groups (SHGs) to be conducted;
- Integration of informal waste pickers to be initiated via enrolment drive;
- Formation of organization of integrated informal waste pickers to warrant transparency;
- Maintenance of ward list record mentioning ID numbers of waste pickers;
- Adequate training of identified waste pickers to be integrated;

Hybrid Annuity Model (HAM), NITI AYOOG – Solid Waste HAM & Liquid Waste HAM: NITI Ayog launched Hybrid Annuity Model to encourage Public-Private-Partnerships and formulated Model Concession Agreements to furnish guidance to the Urban Local Bodies (ULBs) in managing waste generated thereof. As per the Model, the expenditure was divided into capital (ULBs) and operational (civic bodies). For Solid Waste HAM, the concessionaire required to ensure bio-remediation waste disposal method, establishment of waste treatment plants; primary waste collection accompanied with secondary stage waste collection efficiently carried out; thereafter, its appropriate waste management. Moreover, revenue generated by selling of recycled wastes to be shared between the concessionaire and civic bodies. The user fees must be collected by the

³⁰ Swachh Survekshan Toolkit, 2022, India (Mar. 29, 2022, 10:45 AM) <https://www.mygov.in/mygov-survey/swachh-survekshan-2022/>

³¹ *Id.*

concessionaire. It promotes bankable approach, fund raising facilities from multilateral companies, no need of engaging multiple contractors, the concessioner exercising his power to select any of the state's technology consistent with environment laws and promotion of integrated solid waste management by involved concessionaire.³²

Other initiative such as AMRUT (Atal Mission for Rejuvenation and Urban Transformation) Programme intends to promote the efficient drainage system by its construction and enhancement to lessen and do away with flooding of drains.

³³

VI. CONCLUSION

Waste segregation in waste management has a pivotal role to offer as it is observed to lessen more than half of the workload at disposal facilities. Indeed, awareness among waste generator is a major hurdle and awareness drives and such similar initiatives might be one of the solutions. In addition, the other answer is the engagement and drawing of attention of people through relating their major day-to-day interests with this concern i.e., the active involvements of public figures in stressing its importance through various platforms; engagement of our tomorrow that is children in schools and their parents during 'parents teacher meeting' must be attempted. Also, provision of different colored bins to the waste generators, as backed by the apex court itself, must be promoted. It's the extra efforts on the part of the ones who are well off to be made, to protect our environment well.

Priority must be given to the health and security of the waste workers as they are exposed to vicious gases and contact incurable/untraceable diseases. Enough safety facilities and measure should be provided to the waste workers along with identification aids. However, physical security must be accompanied with financial security too. Therefore, one of the human capitals i.e., 'education' that is to be assured to the waste workers besides mandatory health insurance(s). Therefore, waste pickers must be trained, as well as, made aware first about the nature of wastes and significance of their role being played. Moreover, to

³² Avinash Mishra and Priyanka Anand, "*Sustainable Solid and Liquid Waste Management*", *Kurukshetra* 43 (Oct. 2021).

³³ MoH&UA, Atal Mission for Rejuvenation and Urban Transformation Programme, India, (Mar. 31, 2022, 05:00 PM) <http://amrut.gov.in/content/innerpage/the-mission.php>

prevent child waste labor, their parents must be made aware of free education provision. The engagement of middle role played by waste seller/keeper(s) in awareness initiative, by incentivizing them by the appropriate government, could offer a great aid in lessening the burden.

Unquestionably, there are ways which are being implemented and attempted to curb the problem of waste mismanagement but still India is lagging way behind in coping with the set environmental targets. The municipal wastes must be our primary concern because they form the nucleus of waste generated every day in our country. The sustainable environment is crucial for our impending future, either we could just rely on them and act recklessly or we could just wary on our endeavors and act sparingly. Moreover, it's everyone's effort that counts, whether waste generator(s), waste collector(s) or waste disposal facilities to ensure the adequate implementation of existing rules, schemes and judicial pronouncements. Hence, well managed environment ultimately leads to the formation of the 'welfare state'.

BOOK REVIEW

OUR CONSTITUTION DEFACED AND DEFILED (1974) by N.A. Palkhivala, Macmillan Company of India, Limited, Delhi, pp. 175.

On 15th August 1947, at the stroke of the midnight hour, India awoke to life and freedom. A new nation was born; we did so legally speak, by an act of the British parliament, the Indian Independence Act of 1947, that provided for the creation of a constituent assembly to prepare the constitution for our country.¹ The glory of the Indian Independence struggle has imbued within the hearts of all Indian citizens a deeply rooted sense of honour and pride. However, the journey from the birth of a new constitutional republic to 75 years of independence has not been as easy as it may appear to be. In this context, the Indian constitutional history owes its gratitude to Shri N.A. Palkhivala, the greatest advocate of all times, often regarded as the centrepiece of the rights of the citizens.²

This academic piece attempts to review the book titled, “Our Constitution Defaced and Defiled” which is the collection of Mr. Palkhivala’s essays. Broadly, the book can be divided into two parts. The Part I of the books consists of ten essays concerning the area of fundamental rights, freedom and others. Part II of the book interestingly includes, one essay which talks about the power of the Union Parliament to amend the Indian Constitution. The book is commendable work of Mr. Palkhivala which is a great contribution to the study of the fundamentals of Indian constitutional framework. The book is credible work of excellence and brilliance. The title of the book itself attracts the attention of the reader to analyse and identify the grounds which impelled the author to accept such title. Through this book, the author elaborates his thoughts and ideas over the critical issues of parliamentary supremacy, rule of law, human rights and others.

The author in his introductory remarks of the book notes, “1947 and 1973 are the key dates in India’s twentieth century history. The first marked the end of

¹Rohinton Nariman On Guardian Angel of Fundamental Rights *available at*: <https://www.youtube.com/watch?v=2ImP3E86OxY> (last visited on April 19, 2022)

² *Ibid.*

the struggle for winning freedom.”³ The terminology of words used by the author reflects that 1973 marked the beginning of the struggle of the Indian republic to protect the fundamental ethos of the Indian constitution particular the initially thought to be ‘eternal idea’ of freedom. The texts express the intent of the author to reflect that the spirit of Indian constitutionalism from the acts of the people occupying the corridors of political power was under grave threat. The tyranny of the majoritarian rule attempted threatened the very basic ideals of judicial independence, human rights and others. The author in the chapter titled, ‘Democracy and Freedom’ lists three prerequisites for the continuance of a free democracy⁴-

- sense of discipline,
- spirit of moderation,
- willingness for unbiased participation in public life.

The author terms liberty to be an ‘Eternal Flame’ and argues the institutions, ideals and notions of democracy always evolve with time and changes in society. He enumerates three conditions for survival of free democracy, namely, a sense of discipline, the spirit of moderation and the willingness and capacity of the people to take disinterested part in public life.⁵ The author in the other essay argues for the significance of guaranteed fundamental rights to limit the power of the state. The author advocates the guaranteed fundamental rights protects the people from the tyranny of the state. He argues that mere presence of elected government is not enough and thus, fundamental rights must be constitutionally guaranteed to the citizens for due protection of their human rights.⁶ Further, in the other essay, the author supports the institution of protection to individual property and argues for importance of the fundamental right to property. The

³ N.A. PALKHIVALA, OUR CONSTITUTION DEFACED AND DEFILED, P- 8 (Macmillan, Delhi, 1998).

⁴ *Id.* at 13-14.

⁵ *Id.* at 17-18.

⁶ *Id.* at 20. The author writes:

The mere fact that the country is governed by the elected representatives of the people is no guarantee. that the basic human rights will be respected. Some of the worst tyrannies in history and even today-and some of the most ruthless suppressions of the voice of dissent-are to be found in countries where the legislature consists of the elected representatives of the people (...). *Id.* at 30-33.

author goes on to argue that without the fundamental right to property several other crucial fundamental rights could not be enjoyed by the people.⁷

The author in another essay also criticizes the Article 31C of the constitution and argues that insertion of the designated article has the potential to subvert several intrinsic features ensuring fundamental freedoms to the citizens.⁸ The author discusses within the chapter titled, “Deviations from the Constitution” several instances where, the union government in name of exercising powers under legitimate jurisdictions, acts to encroach upon the jurisdictions of the state government.⁹ The author discusses how the acts passed by the central government in name of entries in the union list actually severely impacted the jurisdiction of the state governments in terms of administration and legislative powers. The essay titled, ‘The Supreme Court and High Court as guardians of liberty’ analyses the legal significance of following cases decided by the Supreme Court:

- Parliamentary Privileges case¹⁰
- Bank nationalisation case¹¹
- Privy purse case¹²

The author while, analysing the legal relevance of the above stated cases also studied important role played by the supreme court of India as the supreme judicial institution of the Indian republic. The author noted that the Supreme court in its capacity as the highest constitutional court of appeal worked to the

⁷ *Id.* at 39, 40. The author notes:

It would be no exaggeration to say that without the right to property it would be impossible to work the Constitution. For example, many of the legislative entries in the Seventh Schedule, including entries which set out the subject-matters in respect of which taxes can be levied by the Union and the States, necessarily presuppose the right to private property. The existence of the separate States would be in direct jeopardy, and the democratic way of life — the very institution of Parliament with its necessary incidents like free elections, freedom to oppose and the right to dissent — would be paralysed, if the right to private property were abolished.

⁸ *Id.* at 53-61

⁹ *Id.* at 72-73.

¹⁰ *Id.* 79-80. Keshav Singh vs Speaker, Legislative Assembly, AIR 1965 All 349, 1965 CriLJ 170

¹¹ *Id.* 87-89. R.C. Cooper v. Union of India AIR 1970 SC 564; 1970 SCR (3) 530.

¹² H.H. Maharajadhiraja Madhav Rao Jiwaji Raoscindia Bahadur v. Union of India, 1971 AIR 530, 1971 SCR (3) 9.

expectations of the founding fathers of the constitution. The author noted that the court while, ensuring due adjudication of disputes in the case, which also involved the interests of ordinary citizens, executed its constitutional role in the best manner as was expected from the institution. Further, the author also discussed the controversies concerning the appointment of the Justice A.N. Ray as the Chief Justice of India in the other chapter titled, 'A Judiciary Made to Measure'. The author in this chapter discussed the detrimental impact of a committed judiciary in the country. He stated: "It would be a work of supererogation to spell out the frightening consequences for the entire country if the executive is permitted to appoint judges who share the philosophy of the ruling party". The author further stated, "Every judge of the Supreme Court could then be selected on such reprehensible considerations". The author remains extremely critical of a committed judiciary and the interference of the executive in the functions of the judiciary.¹³ In the last essay titled, 'Parliament's Power to Amend the Constitution' the author discusses that the power of the parliament to amend the Indian constitution is limited. He argues that in India, the Indian Constitution is supreme and the parliament is its creature thus, the parliament cannot destroy the basic and fundamental features of the Indian Constitution. The author also discusses the *Kesavananda Bharati v. State of Kerala*¹⁴ case which propounded the doctrine of basic structure. The purpose of which is that while, the constituent powers of the union parliament to amend the constitution is plenary yet, it should not be exercised in such a manner as would destroy or abrogate the constitution's basic structure. Further, the author lists following essentials of the constitution:

1. The supremacy of Indian Constitution,
2. Sovereignty of Indian Republic,
3. Integrity of India
4. Republican Character of the State,

¹³ *Id.* at 100. The author writes:

In other words, what the Government really wants is that the Chief Justice should subscribe, not to the philosophy of the Constitution but to the philosophy of the ruling party. In all other democratic countries, a judge is expected to shed his political philosophy after he takes his seat on the Bench; whereas our government expects our judges to injecting politics into justice.

¹⁴ AIR 1973 SC 1461.

5. Democratic Nature of the country which does not merely means adult franchise
6. Secular nature of Indian State
7. Independence of the Indian judiciary and other judicial institutions
8. Indian form of federalism
9. Balance between the Legislature, Executive and the Judiciary
10. Amending nature, feature and also the procedure of the Indian Constitution

ANALYSIS and CONCLUSION: India is a constitutional democracy where every institution is controlled and regulated by the constitution. The checks and balances system particularly, the separation of power (limited usage of power) can be attributed as the most significant cornerstone of constitutional democracy. Further, it has been consistently laid down by the supreme court that all organs of the state are creatures of the constitution, with no unfettered powers. The constitution has thus, devised a structure of power relationship with checks and balances. However, judicial institutions in India, in several instances of judicial overreach have breached this principle and consequently upset the delicate balance, which the framers of the Indian constitution had thought to exist. Such acts of breaching the idea of balance of power (*Lakshman Rekha*) could also be postulated by one as a species of "acts defacing and defiling the constitution".

The Indian Constitution fundamentally postulates for the creation of a democratic state.¹⁵ The foundational notion of a democratic state indicates a fundamental framework where with the simultaneous existence of an independent judiciary, policy decisions are taken by an institution which is 'of the people, for the people, by the people'. The term, 'of the people, by the people and for the people' signifies that, the government of the day is made for the people, by the people (through elections) and answerable to the people.¹⁶

¹⁵ Sumant Batra, *Constitution of India: Of the people, for the people and by the people* (Ministry of External Affairs, Government of India).

¹⁶ "Why do we say Government of the people, by the people, for the people?", (Apr. 19, 2022), https://www.bookbrowse.com/expressions/detail/index.cfm/expression_number/600/government-of-the-people-by-the-people-for-the-people); "The Gettysburg Address: Transcript of Cornell University's Copy", (Apr. 19, 2022), https://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm.

This intrinsic feature establishes a framework of political accountability of governance towards the people and the system of popular government. The acts of judicial overreach in terms of judicial review interfering in the sphere of policymaking and discretionary wisdom of the executive leads to governance by judges which, if not stopped would lead to judicial imperialism without political accountability. Judges are not only free from appellate review (in case of the Supreme Court) but of elections also and have an issue tenure. Thus, governance by judges, is unable to include some critically sensitive features of democracy. Therefore, public law must in principle respect conventional limitations on judicial power which are fundamentally crucial to the functioning of a democratic state ensuring absence of the tyranny of the unelected and also meeting such necessary essential features of democratic governance that are indispensable to the Indian Constitutional framework.

No governance mode is perfect. The actual unfolding of democracy and the working of a constitution and institutions under it may suffer from inadequacies and imperfections. However, such inadequacies must not give the Judicial institutions in India the ground for redressal by judicial drafting or redrafting of legislative provisions or formulation of policy frameworks. While judicial modesty and restraints must be well accepted in matters of policy and law, the executive and legislative branches of the state must only exercise the right to experiment over policy-related affairs. Even though, the Constitution of India is the supreme legal document and all the three organs' functions under the constitutional framework yet, the importance of Indian parliament cannot be undermined and its role cannot be performed by the Judiciary. Since, judicial interferences within the realms of legislature or executive could also deface or defile the constitution.

Rebant Juyal*

* Faculty, Dr. Ambedkar Center of Excellence (DACE), Central University of Assam, Silchar. India.

BOOK REVIEW

Environmental Law in India (2nd ed.2005) by P Leelakrishnan, LexisNexis Butterworths Pvt.Ltd, Viaya Building, 17 Barakhama Road, New Delhi-110001, Pg 340, Price-295

Environmental problems in developing countries like India are of a qualitatively different, the extent of damage is not only limited to the current world population but would mar the chances of the future generations of all kinds of life forms. The indiscriminate use of earth's resources today has led to problems of pollution, climate change, water scarcity, biodiversity loss, loss of forest cover, etc. which are apparent and there may be many other latent problems waiting to emerge. The author made the study of environmental law in India an important and indispensable subject which deals with the above issues. The book examines the growing law and environmental jurisprudence relating to the field, the historical promise, the contributions of the court with relevant landmark judgements and the international experiences in this regard. The book under the review is divided into twelve chapters. The book opens with the chronological information of table of cases passed by the courts which is contained in various chapters.

In the first chapter, it takes a look at the law and practices in ancient law. It deals with the general concept regarding the origin of environmental law, its relation with other disciplines and laws. It has mentioned that human civilization has advanced to a level where everyday affairs of life are managed and guided by the products of technology and for large sections of human populations, it is simply unimaginable to think of survival without the support of modern scientific discoveries. But at the same time, scientific and technological advances have given the human beings more power to control the environment, instead of being under its control. These advancements in the field of science and technology have undoubtedly led to the human development but unfortunately relying on the exploitation of natural resources. Most of the modern comforts which are available to mankind in the present age are the outcome of this rendezvous idea of development. It has also explained the United Nations Conference on Human Environment, held in Stockholm in the year 1972, which was a landmark event towards the protection of deteriorating

environment at international level. The provisions of the Constitution of India along with the concepts of civil liability, *mens rea* and strict liability are highlighted with in this chapter.

The author in chapter two briefly states the importance of forests and the difficulty in forest management attributed to the conflicting claims between environment and development. Wherever the state has chosen to exploit forests, it has seriously undermined the tribes' way of life. In a society based on the rule of law conflict of values is to be reconciled and priorities set. This process should precede, and also form the basis of formulation of legal policies.

The author then begins with an explanation of the laws relating to forest protection, in effect in India. The Forest Act 1927, is vehemently criticized of having laid a revenue-oriented approach leading to grave repercussions. It was also brought to fore that the judicial attitude was pro State power initially. The concept of reserved and protected forest deprived the forest dwellers of their traditional rights and privileges. The author points out the lacunae in the Forest (Conservation) Act of 1980. He states that the 1980 Act is nowhere talking about conservation but is merely a tool of discretion in the hands of the government to decide the use of land. The authors have also evaluated the Forest Act 1980 in light of the 1988 Policy. They hold the opinion that the 1980 Act has put fetters on the free functioning of the 1988 policy by re-introducing the regulatory regime and defining a controlling role of the government.

Then, the author puts forth the concept of sustainable development. The *T.N Godavarman Tirmulkpad v. Union of India*¹ is a remarkable illustration of the concept of sustainable development. Its author points out that how the Courts have been successful in safeguarding the rights of the tribals as well as of the forest dwellers on forest produce and snubbing the colonial approach of the government. The judiciary is playing an active role in promoting and making the globally accepted principles of sustainable development, a part of Indian environmental conservation framework. So with growing population, needs and knowledge, the responsibility of forest sector is not now limited to meeting the environmental concerns only but encompasses livelihood issues, which in turn will affect the economic and social needs of the country. In addition to taking

¹AIR 1997 SC 1228.

care of the global environment conservation and forest dependent communities, forest policies need to be framed envisaging long-term goals of sustainability.

The author has put forth the concept of eco-tourism as it is growing industry in India. Therefore, the question arises whether tourism will lead to disturbances in environmental equilibrium. Although tourism helps in mobilisation of funds for the development of the national economy, however, this does not mean that tourist activities should go beyond the boundaries of being environment friendly. The court should lay emphasis on sustainable development, which has to be accepted as a viable concept for eradicating poverty and improving the quality of human life, while maintaining the equilibrium of the ecosystem. In other words, society has to prosper, but not at the cost of the environment. This concept will have to be accepted in the field of eco-tourism.

The author in chapter three explains that the roots of environmental law can be found in the common law concept of nuisance. Nuisance can be divided into two categories that is the private and public nuisance. While private nuisance is interference with the use of land, public nuisance denotes an interference with a right common to the general public. Although both categories have substantial nexus with environment management, the law of public nuisance has a predominant connection with environmental law.

The author in chapter four, concept regarding the coastal zone management and has discussed that the protection of coastal zones is another challenge for environmental law in India. It enumerated the legal controls on coastal zone management with a comparative glance at a few other coastal states like the UK, USA and Sri Lanka.

The author in chapter five deals with the mechanisms necessary to protect land and water resources. The measures have been taken for the conservation on biological diversity along with the instances and case laws. India presents a pulsing paradox of poverty in the midst of abounding natural resources and has mentioned that saving the natural resources is a big challenge.

The author in chapter six has covered the statutory attempts in India to control pollution. The overview of this chapter reveals a picture of active judicial interference to enforce pollution control laws. It has also explained that the clear constitutional and statutory provisions have been further strengthened and

supplemented by active judicial intervention in enforcing law relating to protection of environment and prevention of pollution that has contributed significantly to the growth of jurisprudence on environmental law in India.

As far as the legal framework on environment is concerned the most significant Act which operates is the Environment Protection Act. The Environment (Protection) Act 1986 has added a new thrust to environmental protection in India which was enacted under the provisions of Article 253 of the Constitution of India with a view to implementing the decisions of the United Nations Conference on the Human Environment, which was held in Stockholm in the year 1972, has been covered in detail in chapter seven. The concept of Environment Audit, Environmental Impact Assessment an important legal tool for environmental protection has been dealt in this chapter.

A reading of Chapter eight provides a fair idea about the evolution of the principles of environmental jurisprudence in light of the Fundamental Rights especially right to life, encompassing right clean, humane and healthy environment, and also inclusive of right to be rehabilitated as well compensated fairly. The decisions of courts have widened the scope of the right to life, the right to a clean environment and laying down that protection and improvement of the environment is a mandate to every institution public or private, and individual to be followed in all spheres of their activities. The courts in India have, therefore, lived up to the need of the hour, and have made significant contributions in evolving new principles and remedies in the field of environmental protection. The author further explains the justifiability in the light of interwoven web of Part III, Part IV and Part IV-A of the Constitution.

Chapter nine explains the impact of mass disasters like that of Bhopal gas leak disaster. In *Union Carbide Corporation v. Union of India*² Chief Justice RN Misra said that, judges of are human beings and their hearts also bleed when such calamities like Bhopal gas leak incident occur. It is against this background that the author has pointed out that one has to examine recent trends in Indian Tort Law as an instrument of protection against environmental hazard. The environmentalist's social workers, the general public and government institutions start thinking about new ways and means of preventing similar tragedies in the future. This process leads to legislative and administrative

²AIR 1992 SC 202.

activism. This chapter also deals regarding the concept of absolute liability, the doctrine of *parens patriae* which relates to the rights of a person, real or artificial, to sue and to be sued on behalf of another who is incapacitated to take up the case before a judicial forum as effectively as the former can, along with the illustration and case laws.

Most decisions relating to the environment are the outcome of public interest litigation which is well entrenched in India. The parameters of public interest litigation are explored in chapter ten including the polluter pay principle, precautionary principle and public trust doctrine for the protection of environment. The illustration and case laws add to enrichment of the topic. The author in chapter eleven has discussed that a meaningful impact assessment is necessary for a viable environmental regime with balanced and sustainable growth of industries. It has also discussed that the modern technological state intensifies the conflict between environmental values and development needs.

The author in chapter twelve points out that, the public participation is the balancing wheel on which a democratic process moves. Public participation in environmental decision-making augments environmental protection measures, and reflects the aspirations of the present, as well as future generations. Law cannot be allowed to lag behind changing social situations. The recent law on right to information, makes administration process more transparent and public participation more meaningful. Public participation and scrutiny will force the decision-making machinery to act in a more just and fair manner in facilitating the realisation of the right to a healthy environment. At the end of the book, one finds bibliography and a topical index which provides information regarding the convention's statutes, rules, regulations, reports, and articles contained in various chapters.

The author has brought out a comprehensive work that provides a useful guide for readers to address the concerns for the protection of environment, its sustainability and use of resources.

Ashima Rai*

* Research Assistant, Research Scholar, Department of Law, University of North Bengal.

Printed at North Bengal University Press, Raja Ram Mohanpur, P.O. North Bengal University,
District: Darjeeling (W.B.), India, Pin - 734013,
for the Department of Law, University of North Bengal

DEPARTMENT OF LAW, UNIVERSITY OF NORTH BENGAL

The Department of Law is prominently situated on National Highway 31 between Bagdogra and Siliguri in the District of Darjeeling, West Bengal. The distance from Bagdogra is six kilometers and from Siliguri is seven kilometers. The Department has its own campus in the south Block of the North Bengal University. The sprawling campus of the University enjoys the pristine beauty of the eastern Himalayas and is the intellectual hub of North Bengal. Siliguri is an important sub-division of the district and commercial capital of North Bengal. Located at the foot hills of eastern Himalayas, Siliguri is the gate way to North eastern India and land locked countries like Bhutan and Nepal. It shares a huge and porous international border with Bangladesh, Nepal and Bhutan. It is well connected with all metropolises and major cities by air and rail.

The Department of Law was formerly known as the University College of Law and was established as such in the year 1974. It was upgraded as the Department of Law in the year 2000. Presently the Department offers a B.A. LL.B. [Honours] 5 year integrated course, LL.M. course and Ph.D. The intake at the LL.B. level is eighty, and the LL.M. course which was started in 1993 has twenty five seats. The criteria of admission both at LL.B. and LL.M. is on merit. The Department has a rich Ph.D. programme. It was started in 1999 and since then more than 24 Ph.D. degrees have been awarded. Presently there are about twenty five scholars engaged in doctoral research under various faculty members under the UGC Regulation, 2009. The Department attracts scholars and students from all over India and especially from Sikkim, Assam, Tripura, Arunachal Pradesh, Uttar Pradesh and Orissa. It also attracts students from Bhutan, Nepal and Bangladesh. The self financing P.G. Diploma course on Environment has presently been discontinued.

The Department was jointly selected by the British Council, Delhi, University of Warwick, U.K., and the National Law School of India University to carry out the 'Human Rights Outreach Project'. It was also a partner institution with CEERA, National Law School of India University for carrying out environment education for forest personnel, Tea Garden personnel and judicial officers.

The Department has published number of books as well as Booklets in Human Rights, Environment Legislations in Bengali and Nepali. It has a Legal Aid Clinic in collaboration with the State Legal Services Authorities. It runs a very successful NSS programme.

*Published by University of North Bengal,
Raja Rammohunpur, P.O. North Bengal University,
Dist. Darjeeling, West Bengal, India
Pin- 734013
Phone No.: (0353) 2776 307, 2776 310, 2776 325
Fax: (0353) 2776 307, 2699 001
Website: www.nbu.ac.in
email: nbukwdepartment@gmail.com*