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Introduction

In a democratic form of governance, the State is having the responsibility of performing a model role. Only a model State can be a good regulator, good commander and a good administrator. But unfortunately, this is not the course of events which often happens. Many a time, State is seen as manipulator, violator, crocked Shylock and such so many. The development in public law was in tune with this reality and public law remedies were basically to control the cunning administration from intruding into personal rights. To a great extent public law remedies through writ system was turned to be successful in spite of the conventional limitations of writ remedies. If we take into account the history of judicial review in India, the magnitudes of judicial decisions are sundered round the fulcrum of controlling the cunning administration in their attempt to suppress the rights and liberty of individuals through covert actions. In spite of the fact that there are exceptional judgments like *A.D.M. Jabalpur* v *Shivkant Shukla*[1], *Lakhan Pal* v *A.N. Ray*[2], *BALCO Employees Union (Regd)* v *Union of India*[3], where

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1 AIR 1976 S.C. 1207.

2 AIR 1975 Del. 66.

3 2002(3) SCC 333.

judiciary has failed to properly deal the administration, by and large breaking the conventional ruts, the Indian judiciary was successful in controlling the cunning administration and the hidden traps which the administration has created. If we take into consideration a few examples, the point will be clear. There existed a view that writ of certiorari and prohibition could be issued only against decision taken by lower courts or tribunals[4]. This made the situation, that decisions taken by administrative authorities are outside the pale of judicial review. Later, this conventional view was changed and decisions taken by administrative authorities were also brought under judicial review widening the scope of judicial control over administrative authorities.

The liberalization of locus standi and introduction of public interest litigation made the administration accountable even in situation where there is no specific person who could prove injury from administrative action. Perhaps the cunning approach taken by the administration with respect to appointments could be approached only with surprise in *A.K. Kraipack* v *Union of India*[5]. The contention was that the Interview Board was biased because of the presence of one of the applicants in the interview Board. The argument could have been appreciated if the bone of the contention was how much was the involvement of the applicant in the Interview Board and how far the Interview Board was biased because of the presence of the applicant in the Interview Board. But the argument was whether bias which is part of principles of natural justice which is applicable to administrative adjudication could be extended to administrative action. Thus, the confusion created by the State was whether principles of natural justice could be extended to administrative action also and in the present case administrative action was, appointment. The point to note in this regard is that if principles of natural justice including principles of fair hearing is extended to administrative action, it will be a serious curb on the exercise of responsibilities by administrative authorities. On the contrary if bias which is part of principles

4 See East Indian Commercial Company v Collector of Customs, AIR 1962 SC 1893. See also Brij Khandelwal v Union of India, AIR 1975 Del. 184

5 AIR 1970 SC 150.

of natural justice is decided to be not applicable in administrative action, the court is reaching a conclusion that the selection in which one of the members of the interview board or in similar such situations, the Court has to keep as a silent spectator. Both these approaches would have serious consequences. Overcoming this precarious situation, and following the ratio laid down in *Ridge* v *Baldwin*[6], Supreme Court reached the conclusion that in an administrative action, though the authority is not bound to comply with principles of natural justice; it has the responsibility to comply with the concept of fairness and situation that one of the applicants is a member of the interview board is against the concept of fairness. The theory of fairness has got widened by subsequent judicial pronouncements and it was turned to be more in its content than principles of natural justice[7].

Lifting the Limitations of Conventional Writ Remedies

According to the conventional approach regarding writ jurisdiction, in judicial review, the court can only either uphold or quash the administrative action. The idea was that it can't mend or correct an administrative action or grant any incidental relief to victims of illegal or wrong administrative action. However, this approach went radical changes later. Thus, in *Rudal Shah* v *State of Bihar*[8], compensation was awarded for illegally detaining Rudal Shah for fourteen years even after acquittal in a criminal case. Highlighting the significance of compensatory jurisprudence in writ proceeding, it was observed that right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield[9]. It was also laid down that the compensation awarded shall not be

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6 [1963] 3 All E R 66.

7 See Maneka Gandhi v Union of India, AIR 1978 SC 597. Even good governance and corruption free government governments are now treated as part of modern meanings of fairness in administrative action. See Dev Dutt v Union of India, AIR 2008 SC 181.

8 (1983) 4 SCC 141.

9 *Id* at 144.

a bar for bringing future lawsuits against the State and its officials for appropriate damages relating to his unlawful detention. In *Sebastian M. Hongray* v *Union of India*[10], though the amount was awarded as exemplary cost for wilful disobedience of court order, the proceeding was the aftereffect of a writ of Habeas Corpus brought before the Supreme Court. Later awarding compensation in writ proceeding turned to be common and recognised as a tool for getting relief against administrative abuse of power[11]. The unconventional approach taken by judiciary is not confined to awarding of compensation alone. Writ remedy has been extended in other areas also. Thus in *Bhagat Ram* v *State of Himachal Pradesh*[12], an enquiry conducted against a forest watcher which subsequently led to his removal was challenged not in compliance with principles of natural justice. The normal procedure to be followed by the Court was highlighted in the following words - :[13]

> Ordinarily where the disciplinary inquiry is shown to have been held in violation of principle of natural justice, the inquiry would be vitiated and the order based on such inquiry would be quashed by issuance of a writ of certiorari. It is well settled that in such a situation, it would be open to the disciplinary authority to hold the inquiry afresh. That would be the normal consequence.

But taking into account the unique situation in the case including that the appellant is less educated and there is very minor infraction of duty the Court reached the conclusion that it may not be fair to a low paid class IV government servant to face the hazards of a fresh inquiry. Adopting a benevolent approach and breaking the conventional ruts of writ of certiorari, Supreme Court observed[14] -:

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10 AIR 1984 SC 1026.

11 See Neelabati Behera v State of Orissa, AIR 1993 SC 1960, Chairman, Railway Board v Chandrima Das, AIR 2000 S.C. 98.

12 (1983) 2 SCC 442.

13 Para. 13.

14 Para.16

> Keeping in view, the nature of misconduct, gravity of charge and no consequential loss, a penalty of withholding his increments with future effect will meet the ends of justice. Accordingly, two increments with future effect of the appellant be withheld and he must be paid 50% of the arrears from the date of termination till the date of reinstatement.

Somewhat same was the view adopted by the Supreme Court in *Shiv Shankar Dal Mills* v *State of Haryana*[15]. The increase in market price under a Haryana Act was found to be ultra vires and unconstitutional which led to return of huge money by Market Committee to dealers. In a conventional writ proceeding, the proceedings should end there. But Supreme Court went forward and took into consideration that the traders have collected the amount from the purchasers and return of the amount will lead to unjust enrichment. To avoid this situation Court prepared a scheme and directed that the excess one percent market fee collected from purchasers shall be deposited in the Court, and Registry will take appropriate steps to return the amount to purchasers.

The same tune of development could be identified in controlling discretionary power, contractual liability of state, promissory estoppel, legitimate expectation and so many other areas in public law. Thus, the development of public law remedies was made the cunning administration more and more accountable and liable.

The Concept of State and its Relevance in Public Law

The development in all these regards were ubiquitous, venerable and helpful to make the administration accountable to a large extent. But the point to note in this regard is that, to attract the public law remedies, the opposite party shall be State. Thus, for more than three decades starting

15 AIR 1980 SC 1037. Similar approach was taken in many cases including A.L. Kalara v The Project & Equipment Corporation of India Limited, AIR 1984 S.C. 1361, Suman Gupta v State of J& K, AIR 1983 S.C. 1235, Azad Rishaw Pullers Union v State of Punjab & Others, AIR 1981 SC 14.

from 1960s, the attempt of the court was to bring more and more institutions within the definition of the State, and make them accountable under public law. This trend was started in India by the celebrated decision of Supreme Court in *Rajasthan Electricity Board v Mohan Lal*[16]. This was a case where the findings in a number of previous decisions including *University of Madras v Shantha Bai*[17] was thwarted and rejecting the ejusdem generis rule of interpretation and adopting liberal interpretation to the term State, Supreme Court reached the conclusion that Rajasthan Electricity Board will come within the meaning of State. Later more institutions were brought within the purview of State applying the tests laid down in Mohanlal's case and a lot of other parameters were laid down to bring more and more institutions within the umbrella of the definition of the State[18]. The approach in this regard was clear, bring more and more institutions within the definition of State and extend control over them by invoking writ jurisdiction. This approach was effective when India was wedded to a socialistic pattern of society and the strategy of development was based on public sector undertakings. The key sectors like transportation, telecommunication, education, health care, fuel, insurance were all under public sector and could be brought within the definition of the term State easily. Extending judicial control over these entities through writ jurisdiction by bringing them within the definition of State was the approach adopted and to a great extent the attempt turned to be successful also in India.

Impact of Liberalisation and Privatisation on the Concept of State

However, liberalization, privatization and denationalization, reversed the whole trend. Almost all sectors which were vested with the State got transferred to private hands and if something remains the same is also getting transferred. The present trend shows that the very theory behind privatization that the public

16 AIR 1967 S.C. 1857.

17 AIR 1954 Mad. 67.

18 See R.D. Shetty v International Airport Authority, AIR 1979 SC 1628.

sector in running in loss is not correct. Even industries which were making profit were also getting privatized. The exclusion of public sector and the substitution of private sector is the modern slogan. The present attitude of privatization is clear from two instances from Kerala. Kerala Government wanted to retain the affairs of Thiruvananthapuram International Airport. But the same was transferred to Adani group concluding that Adani Group was offering much lucrative terms. Hindustan Latex, is another public sector Company under Central Government in Kerala running in profit. When the Central Government decided to privatise the Company, State of Kerala tried to purchase the shares of the company. But the move of State of Kerala was thwarted and it was suggested that the transfer could only be done to a private entity. Thus, the fathoms of privatization are getting unmeasurable. And no judicial or political solution to the situation can be expected in India in the near future. This leads to a situation that the conventional control mechanisms by bringing the institutions within the definition of State and extending control over them through writs turns to be difficult. Thus, in the present scenario, after privatization of Air India, *Air India* v *Nergesh Misra*[19] may not have any relevance. Similarly, even the *Rajasthan Electricity Board* v *Mohan Lal* may not have relevance in the modern era of private electricity companies. To overcome this situation, the attempt of the judiciary in this regard was to bring institutions which are not State within the strict definition of the term was started with the wide interpretation of Art. 226 and by coming to the conclusion that even private institutions performing public functions could be brought within the writ jurisdiction of High Courts under Art. 226 of the Constitution. It was somewhat established that though the High Court could exercise the jurisdiction under Art. 226 against such institutions, Supreme Court can't exercise the jurisdiction under Art. 32. The reason for the approach is the very fact that Supreme Court's jurisdiction under Art. 32 is confined to the violation of fundamental rights. However, if State means power, and fundamental right can be claimed only against State, the very purpose of Art. 32 gets defeated when

19 AIR 1981 SC 1829.

State is vanishing. Further though the High Court can exercise writ jurisdiction to enforce legal rights against private institutions or individuals performing public functions, the scope of enforcing fundamental rights under Art. 226 is getting diluted for fundamental rights could be claimed only against State. The approach of Kerala High Court in *Bharat Kumar's case*[20] may be treated as a move to deal with the piquant situation. The case basically linked with declaration of Bundh. It is undisputed that when Bundh is being declared by political parties or some or other organisations, the freedoms and right to life of individuals are affected in many ways. But the crucial question in this regard is could it be treated as violation of fundamental right. It was specifically contended that political parties or some or other organisations declaring Bundh can't be treated as State and thus they can't be held liable for violation of fundamental rights. But this argument was rejected by the High Court and without bringing the political parties within the strict bounds of the term State. Kerala High Court adopted the view that Bundh interferes with fundamental rights of citizens / persons and declaration of Bundh is unconstitutional. On appeal Supreme Court also accepted this view[21]. Though this approach could mend some of the defects of the conventional writ remedies which is basically based on the philosophy of State, the judgment was devoid of any jurisprudential basis of changing the conventional definition of State and extending writ jurisdiction even over the non-conventional State institutions. The only practical benefit of the decision was that instead of declaration of Bundh it was turned to be declaration of harthal.

Development of Parallel Mechanisms to Control Abuse of Power

Accepting the reality that power has been shifted to private hands, and the writ remedies may not be effective to control power wielders, mechanisms were developed in India also along with other countries to control power wielders. This has led to the emergence of other control

20 Bharat Kumar v State of Kerala, AIR 1997 Ker 291.

21 Communist Party of India (Marxist) v Bharat Kumar & Ors. (Supreme Court of India, decided on 12th November 1997).

mechanisms like Private Sector Ombudsman, Regulatory Authorities, and Vigilance Commission, a new approach to role of Comptroller and Auditor General and many other such types of institutions. But this parallel mechanisms has not yet developed properly and the scope of such agencies to provide reliefs to individuals aggrieved by misuse of power by power wielders are yet remains underdeveloped. In the present scenario, one must think about a much less cumbersome, simple remedy which could be invoked irrespective of whether the authority is State on non -State.

Civil Law Remedies as an Alternative to Public Law Remedies

At the vanishing point of State and State power, one must think about remedies which could be invoked against State and non-State entities. Even assuming that the State and state power will continue to remain in some isolated pockets, the search will be relevant as it is one of the settled principles of public law that writ remedies will be available only if there is no efficacious remedy and exhaustion of alternative remedy is a condition precedent for invoking writ remedies. In this context one has to take into account Sec. 9 of the Code of Civil Procedure. As per Sec. 9 of the Civil Procedure Code, the civil courts shall have jurisdiction to try all suits of civil nature excepting suits of their cognizance is either expressly or impliedly barred. Thus, generally speaking, Civil Courts could initiate proceeding against administrative abuse of power and writ remedy could be invoked only on successful proof that civil remedy is not an adequate and effective remedy or the remedy under Civil Procedure Code is a cumbersome remedy. Unfortunately, this line of development did not develop in India. A thinking was formed even in the judiciary that the remedy before the ordinary civil courts will not be an efficacious remedy against the administrative abuse of power and writ proceeding could be invoked disregarding civil remedies. A lot of reasons could be attributed for this. The first among them may be the difficulty of the citizen to file suit against administration because of the operation of the principle of sovereign immunity.

Sovereign Immunity and Extent of Liability of the Administration

The first barrier against the individual to initiate civil proceeding against the State for administrative abuse of power may be the plea of sovereign immunity. The historical classification of state functions as sovereign and non-sovereign heads was well rooted in the English administrative law. Basically, the plea of sovereign immunity was based on the concept that King can do no wrong. This immunity was later claimed by administration and administration started to cover up the flops from judicial proceedings putting forward the plea of sovereign immunity. Though the concept of King was not applicable in India, by the extension of British rule in India by the Government of India Act, 1858, the conventional functions discharged by the East India Company viz. trade and commerce was treated as non-sovereign functions and the newly extended functions of the British Crown was regarded to be sovereign functions. This was so happened because the Act provided that the Crown will be liable for all matters for which East India Company would have been liable. The East India Company was established as a trading company and its liability was confined to matters relating to trade and commerce. Thus, once a statute provide that the Crown will be liable for all matters for which East India Company would be liable, the indirect effect of the statute was that the Crown would not be liable for matters for which East India Company would not be liable. Thus, though the very basis of classification of state functions under sovereign and non-sovereign heads in England and India were based on different principles, the liability of British Crown in civil proceedings on the ground of wrongs committed by the administration happened to be classified under sovereign and non-sovereign heads. This position was continued under the later statutes also and the classification of functions discharged by the State under sovereign and non-sovereign heads continued. The principle was reflected in *P&O Steam Navigation Co*. v *Secretary of State for India*[22]. The case involves injury sustained to the petitioner due to

22 (1861) 5 Bom. H.C.R. App. I

the negligence of some of the employees engaged in the maintenance of Hidarpoor Dockyard. The question involved was whether maintenance of a dockyard is a sovereign or non-sovereign function. It was held that maintenance of a dockyard is a non-sovereign function and thus the sovereign immunity can't be pleaded and the petitioner is entitled to get compensation. In *Nobin Chunder Dey's*[23] case also the same principle was applied. In this case the issue was non issuance of license for sale of liquor and drugs in spite of the fact that the petitioner was the highest bidder in the auction and complied with all formalities for getting the license. The principle followed by the court was that the grant of license for sale of liquor and drugs is a sovereign function and administration could not be held liable even if there is misuse or abuse of power. Though the position could have been changed when the Indian Constitution was brought into force, unfortunately, the existing position was continued and Art. 300 of the Indian Constitution provides that until a law is made in this regard the existing position will continue. The attempt to change the position by enacting appropriate law in this regard has not got materialized, and the classification of state function under sovereign and non-sovereign heads continued. After the commencement of the Constitution, the matter was considered in *State of Rajasthan v Vidhyawati*[24]. This case involves rash and negligent driving of an employee of State of Rajasthan which led to an accident and death of petitioner's husband. It was argued that as the driver was involved in the function of official discharge of duty of serving District Collector, the plea of sovereign immunity will be applicable and State will not be vicariously

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23 Nobin Chunder Dey v Secretary of State for India, (1876) ILR 1 Cal 12. However, it is to be noted that a more restricted approach was taken by the Madras High Court in Secretary of State for India v Hari Bhanji, (1882) ILR 5 Mad 273. In this case sovereign function was interpreted to mean act of state, which was explained as Acts done by the Government in the exercise of the sovereign powers of making peace and war and of concluding treaties. It was further explained that Acts done in the exercise of sovereign powers but which do not profess to be justified by Municipal law are what could be understand to be the acts of State of which Municipal Courts are not authorized to take cognizance.

24 AIR 1962 SC 933.

liable. To counter this argument, it was contended that at the material time when the accident occurred the driver was not in the service of the Collector but he was bringing the vehicle back from workshop after necessary repairs. However, Supreme Court adopted a pragmatic view and reached the conclusion that the very basis of sovereign immunity is based on feudalistic notion of justice. It was also decided that after the British rule and commencement of Constitution, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious act of its servant. The consequence of the decision was that irrespective of sovereign or non sovereign functions, the State will be vicariously liable for all tortious acts of its servants. However, this pragmatic approach remained in India only for three years. In 1965, in the famous case *Kasthurilal v State of U.P.*[25], the matter again came for the consideration of the Supreme Court. This was a case where a police constable misappropriated gold belonged to the petitioner and which was in his possession on his arrest and in police custody. Reversing *Vidhyawati's case*, Supreme Court went back to the old principle of categorizing state functions into sovereign and non sovereign and fixing liability only for non sovereign functions. Arresting somebody confiscating gold etc. were considered as sovereign function for which the State is not liable. The subsequent development in this regard was to distinguish between sovereign and non sovereign functions. Though due to the continuous interference of judiciary, the scope of sovereign functions got limited, the theoretical distinction between sovereign and non sovereign function continued making administration not liable for sovereign functions and making civil remedies unavailable. On the other hand courts started to award compensation in writ proceedings disregarding the distinction between sovereign and non sovereign functions. It was got settled that in writ proceedings the plea of sovereign immunity will not be applicable. Though writ proceeding can't be initiated for getting compensation only, awarding compensation was turned to be the one of the basic purposes of writ proceedings. This award

25 AIR 1965 SC 1039. It is unfortunate to note that even the limited interpretation of sovereign function which was laid down in Secretary of State for India v Hari Bhanji, (1882) ILR 5 Mad 273, was not followed in this case.

of compensation can never be treated as restitutional in nature. It is a lump sum amount granted by the court without properly assessing the quantum of injury suffered. But something is better than nothing and writ proceedings happened to be the general remedy when compensation being claimed which led to the situation that writ proceedings turned to be a substitute for civil proceedings, though it was not a real substitute[26].

However, by 1990s the approach of the judiciary has again undergone radical change. It seems that the new approach was started with the decision in in *N. Nagendra Rao & Co*. v *State of Andhra Pradesh*[27]. The case is an outcome of a civil proceeding initiated against State of Andhra Pradesh, for negligent handling which led to destruction of fertilizer seized by officers on a wrong allegation of lack of license to store such commodity. Though the State put forward the plea of sovereign immunity, the plea was rejected. It seems that the plea of sovereign immunity was limited to act of state as laid down in *Secretary of State for India* v *Hari Bhanji*[28]. The Supreme Court clarified the position in the following words[29]:-

> However, since 1965 when this decision was rendered the law on vicarious liability has marched ahead. The ever-increasing abuse of power by public authorities and interference with life and liberty of the citizens arbitrarily, coupled with transformation in social outlook with increasing emphasis on human liberty resulted in more pragmatic approach to the individual's dignity, his life and liberty and carving out of an exception by the court where the abuse.

It seems that the approach of the court was to ameliorate the distinction between public law remedies and private law remedies in the endeavor of control of misuse of power.

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26 This strategy of awarding of compensation could be seen in a lot of cases including Rudhal Shah v State of Bihar AIR 1983 SC 1086, Sebastian M Hongray v Union of India AIR 1984 SC 1026, Bhim Singh v State of Rajasthan AIR 1986 S.C 494.

27 AIR 1994 S C 2663.

28 (1882) ILR 5 Mad 273.

29 N. Nagendra Rao & Co. v State of Andhra Pradesh, AIR 1994 S C 2663, Para .15

With regard to sovereignty the Supreme Court further observed[30]- :

> The old and archaic concept of sovereignty thus does not survive. Sovereignty now vests in the people. The legislature, the executive and the judiciary have been created and constituted to serve the people. In fact the concept of sovereignty in the Austinian sense, that king was the source of law and the fountain of justice, was never imposed in the sense it was understood in England upon our country by the British rulers.

But in the same judgment it was observed that the State could be having some inalienable functions which could be treated as sovereign functions. It was also observed that the arrest, seizure etc. under the Criminal Procedure Code is one of the inalienable functions of the State. In *Kasthuri Lals's* case this inalienable functions are being exercised, the application of sovereign immunity in *Kasthuri Lal's* case may be right but its application would not be available in large number of other activities carried on by the State by enacting a law in its legislative competence. It was also pointed out that a law may be made in this regard stipulating the inalienable functions of the state. It is to be noted that Criminal procedure Code has been mentioned one such law. But the irony of the decision is that one of the most important area of misuse of power by the state is through the agency of police and that area has been treated as inalienable function of State which could attract sovereign immunity.

As pointed out in *Kasthurilal's case*, in this case also Supreme Court emphasized the need of having appropriate law to govern the extent of tortious liability of State. But normally nothing could be expected from legislature in this regard as it may not be a popular law and the development in this regard can only through judicial decisions. It is to be remembered in this regard that to deal with such situation law was enacted in America in 1946 as Federal Torts claims Act and in England Crown Proceedings Act of 1947. Though the First Law Commission of India, as early as 1956 after conducting an extensive study regarding laws prevailing in different

30 Para. 22.

countries recommended for the enactment of appropriate laws ameliorating the distinction between sovereign and non – sovereign functions nothing concrete did come out in this regard. The matter was again considered in *State of Andhra Pradesh v Chella Ramakrishna Reddy*[31]. This was a civil proceeding initiated before the civil court for a gang attack and hurling of bomb into jail were the petitioner and his deceased son was kept in detention in connection with a criminal case. The petitioner and his deceased son were aware about the possibility of such an attack in jail and they have demanded for additional police protection. But the request was not taken seriously by the police and this negligence actually led to the attack in jail. For this negligence on the part of the police the present civil proceeding was initiated. May be because of the fact that arrest, detention in jail etc. were all inalienable state functions, both the trial court and on appeal the High Court dismissed the suit applying the principle laid down in *Kasthurilal's* case. But on appeal to Supreme Court, Court has emphatically laid down as follows-:[32]

> Any watertight compartmentalisation of the functions of the State as "soverign and non-sovereign" or "governmental or non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken.

It is further interesting to note that though the proceeding was started as a civil proceeding when it reached before the supreme court the

31 (2005) 5 SCC 712.

32 *Id* at 723.

proceeding was linked with Art. 21 and compensation was awarded taking into account the decisions reached by the High Courts and Supreme Court in its writs jurisdiction. This has clearly created an impression that when compensation is claimed against the state under tort the principle laid down in Public law remedies that there is no distinction between sovereign and non sovereign functions will be equally applicable in private law also. Ameliorating the distinction, it was further observed-:[33]

> Though most of these cases were decided under Public law domain, it would not make any difference as in the instant case, two vital factors, namely, police negligence as also the Sub-Inspector being in conspiracy are established as a fact. Moreover, these decisions, as for example, *Nilabati Behera* v *State of Orissa*[34], *In Re: Death of Sawinder Singh Grower*[35], and *D.K. Basu v State of West Bengal*[36], would indicate that so far as Fundamental Rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of State, which must fail.

The significance of the decision is that the approach taken in *Nagendra Rao's* case that a proceeding initiated under Cr.P.C could be treated as inalienable stands vacated and even for negligence on the part of police civil proceedings were found to be maintainable.

The judgment shows a reversal of the previous law. It was thought that until a law was enacted, the plea of sovereign immunity will prevail. But the present approach shows that until a law is enacted demarcating the inalienable functions of the state, sovereign immunity will not bar an

33 *Id* at 726.

34 (1993) 2 SCC 746.

35 (1995) Supp. (4) SCC 450.

36 AIR 1997 SC 610.

individual from initiating civil proceeding. Thus, the conventional approach that civil remedies in the nature of compensation may not be effective against administrative abuse of power as the State may escape from liability by putting forward the plea of sovereign immunity may not be correct now. Assessing compensation through ordinary civil proceeding will be much better than awarding compensation through writ proceedings due to different reasons. Writ proceedings are not basically for compensating the parties. In writ proceedings compensations are awarded as no other remedy could be granted. The compensation cannot be treated as damages because it is not assessed by applying the principle of restitution. Compensation in writ proceedings is awarded on surmises and presumptions. That is why in some cases it was observed that awarding of compensation in writ proceedings will not be a barrier for initiating subsequent civil proceedings. But if civil proceedings are brought against administration claiming compensation, a proper assessment will be possible and the victim could get restituted.

Another barrier for invoking civil remedy against administrative abuse of power was the difficulty in bringing official documents. It was thought that once immunity is pleaded in the court regarding production of document under the relevant provisions of the Official Secrets Act, no subsequent question arises. However, the law in this regard underwent substantial change and the plea of administrative privilege was substituted by public interest privilege and now it is for the courts to decide whether the claim for privilege is maintainable or not. The position was further changed by the enactment of Right to Information Act, 2005. Now most of the official documents are open documents and production of the contents of the same does not depend upon the mercy of the concerned officer.

The barrier of Sec. 80 notice, which was a real hurdle for a party to invoke civil remedy before the ordinary civil courts turned to be of little significance after the amendment to Sec.80 of C.P.C. which provides that for immediate reliefs, without prior notice under Sec.80, appropriate remedies could be granted.

Development of consumer dispute redressal forums and such other para judicial mechanisms like private sector ombudsman and regulatory authorities has reduced the work load of civil courts. At the same time the huge hike in number of pending writ proceedings before the High courts and Supreme Court is alarming. It is another surprise to note that most of such writ petitions does not contain any substantive question of law to be decided by the Constitutional Courts. But because of the fact that Art. 226 of the Constitution is broadly worded, High Courts are bound to decide the petitions in spite of the fact that the issue may not be so serious for the High Courts to intervene.

Proceedings before the ordinary court is cumbersome and time consuming also may not be correct in the present context. After the recent amendments to the Civil Procedure Code the proceedings before the civil court has become much simpler and disposal of civil disputes are quicker. Further the percentage of property disputes are in a decline. It is to be again noticed in this regard that the backlog of cases pending before the lower court is getting minimized. In addition to all these, the developments in ADR mechanisms especially the huge hike in disposal of disputes through Arbitration, conciliation and mediation has considerably changed the very outlook of our dispute redressal mechanism. All these tremendously contributed and still contributing in reducing the work load of ordinary civil courts. But most of these parallel judicial systems of adjudications are not suitable when administrative actions are under challenge. The system of mediation or the process of negotiation may not be an effective mechanism for disposal of disputes between private individuals and state.

Now let us look into the effectiveness of remedy of injunction and declaration against administrative abuse of power. The remedy of injunction has its origin from the law of equity. In India the remedy is now granted under the Specific Relief Act, 1963. There are different classifications for the remedy of injunction. Primarily, injunction can be classified into temporary injunctions and permanent injunctions. Temporary injunctions

are granted during the pendency of a legal proceeding. For getting a temporary injunction against the administration like all other injunction suits, the plaintiff need to prove that there is a prima facie case and the element of balance of convenience.

The injunction could again be classified into prohibitory injunction and mandatory injunction. Prohibitory injunction could prevent an administrative authority from proceeding further. In this regard it could be very well equated with writ of prohibition. Mandatory injunction commands an authority to do something. In this regard it could be equated with writ of mandamus. Further the remedy of declaration could be invoked to quash decisions taken by an administrative authority. In that respect declaration could be equated with writ of certiorari. Above all, in appropriate cases, along with the remedy of injunction and declaration compensation can also be claimed.

Thus, the remedies which could be invoked by writ of certiorari, prohibition and mandamus could be invoked through the remedy of injunction and declaration. Perhaps the scope of remedy of injunction and declaration may be wider than writ remedies. Another argument that civil proceedings are costly compared to writ proceedings also may not be right. The argument is based on court fees to be paid in civil proceeding. But if the remedy is only the remedy of injunction and declaration, the value of subject matter of right is only five hundred rupees and for which a court fee of rupees around fifty rupees need to be paid. Further the litigation before the courts at our vicinity is cheaper and other incidental expenses like lawyers' fees, difficulties in journey etc. are much less for villagers from India.

In spite of all these the civil remedies especially the remedy of injunction and declaration has not turned to be popular against administrative abuse of power. Different reasons could be attributed for this. The most important reason may be the lack of awareness. Even among lawyers there is a misunderstanding about the effectiveness of the remedy of injunction

and declaration when the opposite party is administration. It seems that there is a belief that against the powerful administration the civil remedy is in inadequate. But this is a wrong notion. In addition to mechanisms contained in Contempt of Courts Act, there are ample provisions in the Indian penal Code to enforce the decisions of the lower courts. Further the attitude of lower courts when remedy of injunction or declaration is sought is not satisfactory. The courts are rather reluctant to invoke the remedy at appropriate time. If proper training is given convincing the judicial officers at the lower level about their power and scope of remedy of injunction and declaration to prevent administrative abuse of power a lot of present difficulties to fight against administrative abuse of power could be mended.

Conclusion

There were a lot of historical reasons for considering writ remedy as the main or sole mechanism for controlling administrative abuse of power. Much of the reasons turned to be irrelevant or has turned to be of a little significance now. If a proper mechanism to fight against administrative abuse of power is provided and encouraged through the local courts, irrespective of whether the entity is State or non-State, the remedies which could be invoked by the parties would get widened and administration could be made more accountable. What is all required in this regard is a more serious awareness about the broad jurisdiction of the ordinary civil courts not only among the public but also among lawyers and the judicial officers of the lower judiciary. It is further necessary to develop a jurisprudence that to invoke writ proceeding, it is necessary to establish either no remedy is available through ordinary civil courts or the remedy available through the ordinary courts is cumbersome or onerous to comply with. A collaborative approach of all these will lead to not only an effective control over administrative abuse of power irrespective of whether the entity is State or non state but also reducing workload of constitutional courts and a better and speedy administration of justice.

Inter-State Migrant Labours and Welfare Schemes Project Roshni – An Inclusive Study in Ernakulam District

A.Arsha and Prof (Dr) Bindu M. Nambiar***

Introduction

Migration existed throughout the world at all times. It plays a vital role in human civilisation. In the development of various countries across the world, migrant labourers have played a pivotal role. Migrant workers, when compared to others, enjoy significantly less legal protection in the recipient State and have been the victims of the State's arbitrary or unjust exercise of authority. The migrant population contributes to a significant chunk of the people within the labour force in India. As the Inter-State Migration in India is large, it needs to be given high priority with interventions for a specific policy. The governments and the policymakers can play a vital role in ensuring that the migrant workers are given a protective cover through the introduction of various social security and welfare schemes. Inclusion is the mechanism for providing equal accessibility to opportunities and resources for people who might otherwise be omitted or marginalized, such as those with physical or mental disabilities and members of other minority groups. In the educational arena too, the concept of inclusion has played a

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significant role in the 21st century. Inclusive practices are nothing but the attitudes and approaches that ensure all learners' access to conventional education. Everybody works to make sure all learners feel wanted and valued and get the proper support to help them develop their aptitudes and achieve their goals. It can also be practiced in the context of marginalised communities such as migrant workers.

The Migrant population forms one-third of the entire population of India. Most people have migrated from one place to another, searching for jobs in various parts of the country. The main reasons which have been identified among the migrants are lack of livelihood and skill development in the place of their migration along with lack of identity, political representation, minimal payment, and limited access to many of the amenities provided by the state government are the significant difficulties they face. The migrant workers being in considerable numbers must be given due attention as they constitute a major part of the population. A significant role can be played by both the government and the policymakers to ensure safe migration and provide the migrants with decent working and living conditions at the place of destination with suitable access to social security and different welfare schemes. Though on a large scale, the socio-economic factors related to the migration beyond the boundaries are well studied and documented, the concept of interstate migrant workers has not been considered adequately.

Census 2011

As per the Census of 2011, 31% of the population in India are migrants of which, 70% are the female migrants.[1] The primary reason for the migration of the female population is largely associated to marriage or migration of parent or other earning members of the family. In Kerala we can see a contrasting pattern of migration. There has been a large scale

1 Samrant Bansal, *45.36 crore Indians are internal migrants*, THE HINDU, (December 15, 2016) https://www.thehindu.com/data/45.36-crore-Indians-are-internal-migrants/article16748716.ece (last visited Dec 21,2021).

outflow from Kerala to other States but at the same time we can see large scale migration into Kerala, especially from States like Tamil Nādu and Karnataka, in the early 70's, 80's and 90's. From the year 2000 onwards, the pattern has changed and there was large scale inflow of migrant population from other states like Bihar, Orissa, Bengal and North east. The development pattern that State of Kerala reflects is on a large scale characterised by social development and is very much disproportionate to the level of economic growth.[2] The National Sample Survey has reported that the migrants from other states are more than 1 million and thus, the inflow of migrants into Kerala when compared to other parts of the country has largely exceeded the limit of sustainability,which in turn causes many problems.[3]

The issue of migration has been given sufficient consideration as a result of which there is a huge gap between of number of migrants and their accessibility to the basic amenities like education, health etc. There exists social and economic inequality which has led to an increased degradation in the living environment with social exclusion playing havoc on their day to day life. The much required change is to be made in a right based approach so that the basic services shall be accessible for all without any discrimination.[4]

Social Protection for Migrants

The social security measures for the migrant workers are included within the concurrent list of the Indian Constitution. The Directive Principles of State Policy under Part IV of the Indian Constitution is enshrined with

2 Narayana D. & C.S. Venkateswaran, DOMESTIC MIGRANT LABOUR IN KERALA 36 (Gulati Institute of Finance and Taxation, 2013)

3 National Sample Surveyhttp://164.100.161.63/sites/default/files/publication_reports/Quarterly%20Bulletin%20PLFS%20January%20March%202021P.pdf (last visited Dec. 6, 2021)

4 National Workshop on Internal Migration and Human Development in India, Workshop Compendium, Vol. I: Workshop Report, UNESCO and UNICEF (August 2012)

welfare measures which are required to be implemented by the appropriate Government. Hence the State is bound by the Indian Constitution, to protect the marginalized sections. The measures of social protection are regarded as a set of public measures which is developed by the state to meet the obligations both nationally and internationally for the elimination of poverty, deprivation and vulnerability. The protection has to be awarded to all the strata of the internal migrants, especially to the migrants who fall under the poorest strata of the internal migrants. The various social security measures and schemes in aspects of food, health, education and entitlements of housing have to be invoked and applied both at the place of origin and also at the place of destination. Presently the welfare measures are of the nature that they are available only at the place of birth and not at the place of destination. The migrants are facing an identity crisis and are socially invisible, and are therefore losing the entitlements under the social protection cover due to such flimsy and trivial reasons.[5]

A holistic approach on a large scale is certainly preferable and can help in the design and implementation of newly developed sustainable policies and inventive methods. Along with the Central Government, Local Governments can also play a major role in promoting and protecting interstate migrants by providing them with access to social services and thus moulding them to become them better socially and politically conscious citizens.

The government accords a very low priority to the interstate migrants due to the knowledge gap with regard to the nature, extent and magnitude of these migrants. Increasing urbanisation has changed the migration pattern and dynamics. The major challenge is the lack of a holistic approach towards designing and implementing sustainable policies and the creative practices for the implementation of the guidelines. A major role in the development of the migrants and the dependents is to be played by the Local Self

5 Bhagat, R. B., *Internal Migration in India: Are the Underprivileged Migrating More?*, APPJ 31(.2010)

Governments through inclusive urban policies and a right based approach, which guarantees economic and social security as well as safeguards to their basic human rights. Some of the important schemes and benefits which are available for the migrants are as follows: -

I. Ayushman Bharat - Pradhan Mantri Jan ArogyaYojana[6]

The Ayushman Bharat - Pradhan Mantri Jan Arogya Yojana is the national public health insurance scheme launched on 23rd September 2018 by the Ministry of Health and Family Welfare. This scheme is considered the flagship scheme of Government of India to attain the Universal Health Coverage (UHC) vision and the Sustainable Development Goals, which aims to leave no one behind. The scheme provides access to health insurance in a comprehensive manner at the primary, secondary and tertiary level, free of cost to low-income people and helps them transform the sectoral and segmented approach to the need-based health care service. People under this scheme can access their primary care service from a family doctor. In contrast, if there is a requirement for additional care with need for special treatment, the same can be made available. For those requiring the hospitalisation, the same can also be provided. The Ayushman Bharat attains the goals through the Health and Wellness Centre components and Pradhan Mantri Jan Arogya Yojana. The former is established to provide the services to address the primary health issues of the disadvantaged population in the needy area and ensure that the emphasis is laid on promoting health and prevention to ensure that the individuals and communities choose healthy behaviour.

6 KARUNYA AROGYA SURAKSHA PRADHITHI, https://sha.kerala.gov.in/pradhan-mantri-jan-arogya-yojana-pm-jay/(last visited Nov. 21, 2021)

II. Aawaz[7]

The Kerala State Government introduced the Aawaz Health Insurance Scheme and Accidental Death coverage from November 1st 2017, the 67th Anniversary of the formation of the Kerala State, to ensure that the migrant workers are provided with health care assistance and free and accessible medical facilities. As part of the scheme, the migrants and the beneficiaries are provided with a Biometric card to ensure cashless medical treatment. All the migrant workers between 18 and 60 years are eligible for enrolment in the scheme after producing a valid Aadhar, Passport, Election ID or Driving License. The medical treatment shall be available in all the Government Hospitals and all the empanelled private hospitals across Kerala. The Health Insurance Scheme ensures the benefit of an amount up to Rs. 15,000 and the Accidental Death Scheme covers an amount up to Rs. 2, 00, 000/-. The enrolment schemes are monitored by the Labour Officers of the respective districts. The project, when launched, was advertised across the state in different languages like Hindi, Bengali, Oriya and Marathi. Complaint Redressal Mechanisms were also established to ensure the smooth functioning of the programme.

III. Interstate Migrant Works Welfare Scheme[8]

This welfare scheme was introduced by the Kerala State Government in May 2010 so that a worker can be issued with a membership card for healthcare assistance in case of either death or any chronic diseases. Through the card, each registered worker shall get Rs. 25,000 as healthcare assistance along with an amount of Rs. 100 per day with a maximum amount of Rs. 2,000/- during the treatment of the disease.

As a consequence of the accident, if the labourers are unable to take up any jobs for more than six months; then they are eligible to get an amount

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7 AWADESH KUMAR SINGH, MIGRANT WORKERS IN INDIA – A STUDY 67 (Serial Publication 2020)

8 AWADESH KUMAR SINGH, *supra* note 7, at 84

of Rs. 25,000/- as special assistance. Retirement benefits are also available for the labourers who have registered for more than three years, subject to a maximum of Rs. 25,000/-. In the event of death at the workplace, financial assistance up to an amount of Rs. 50,000 shall be given, and Rs.10,000/- shall be awarded in the event of the natural death of the migrant's dependants. Financial assistance shall be provided for the body's transportation to the native place, depending on the location of residence.[9]

IV. Changathi[10]

The project Changathi is also a state-level initiative of Kerala that helps the children of migrant workers to be proficient in Malayalam within four months. The project was launched to put an end to the social exclusion faced by the migrants. The children were provided with a study material –a textbook titled '*Hamari* Malayalam.' Weekly six hours of class are provided to the students either near their place of work or near their place of stay. It was set up through study centres with clusters of 15 to 20 participants. There was a huge response from the side of the migrants and many children registered.

V. Apna Ghar Housing Scheme

The Apna Ghar housing project is yet another state level initiative of Kerala introduced to ensure that the migrant workers can get rental housing at an affordable rent in the state. The scheme aims to provide, promote, develop and establish residential accommodation, education, healthcare, other associated infrastructure and services to labourers, workers and low-wage employees in Kerala. The hostels are available with dormitory-style rooms with cooking and dining facilities and washrooms at a subsidized rate.

Kerala is the first state in the country to introduce a social security scheme for the migrants through the Kerala Migrant Workers Welfare

9 Jonathan Moses and Irudayarajan ,*Labour Migration a and Integration in Kerala*, JLD 19 (2012)

10 AWADESH KUMAR SINGH, *supra* note 7, at 90

Scheme 2010, which aimed at the accident and medical care, children allowance and termination allowance.[11] The scheme is still active, but out of the total number of workers, only 539136 have registered for the scheme[12]. The migrant workers of the State of Kerala remain like the bonded labourers. Most of the welfare schemes and legislation provides very few provisions for the security and welfare of the family, including their healthcare and education.[13] The major challenge faced by the children of the Interstate Migrant Workers is pertaining to their education as they mainly face issues like isolation due to lack of communication skills and difficulty in following the native language of the host State.

Project Roshni and Inclusiveness in Education

The Ernakulam District Administration had taken a simple step towards bringing inclusiveness in education by introducing Project Roshni in 2017. The Roshni project aimed at the educational development of migrant workers. From the pilot study, which was conducted under the flagship of Sarva Shiksha Abhiyan, it was understood that though the children were enrolled in the schools, they were not regular to the class and many children used to drop out from the school midway through the academic year, major reason being the difficulty faced by the children in coping with the environment at the school. The children are taught Malayalam, English, and Hindi using code-switching as the main pedagogical tool 90 minutes before class. The NGOs also played a pivotal role in the functioning of the project.

A study was conducted among the Inter-State Workmen to analyse the awareness and application of Project Roshni in the district of Ernakulam.

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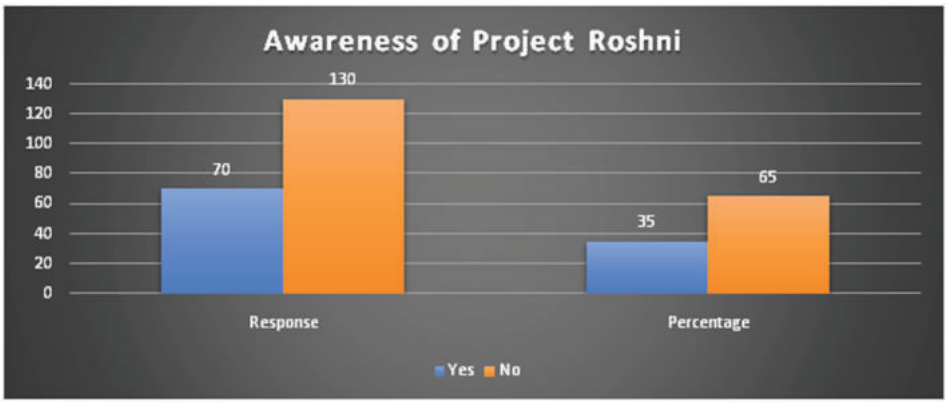
11 K.P.M. Basheer, *Kerala's scheme for migrants*, THE HINDU BUSINESS LINE, Feb. 16, 2015.

12 *Id*.

13 Mitra, A. and Gupta, I. *Rural migrant and labour segmentation: Micro level evidence from Delhi slums*,37 EPW 163-168 (Jan 2002).

Sl. No	Awareness of Project Roshni	Response	Percentage
1	Yes	70	35
2	No	130	65
		200	

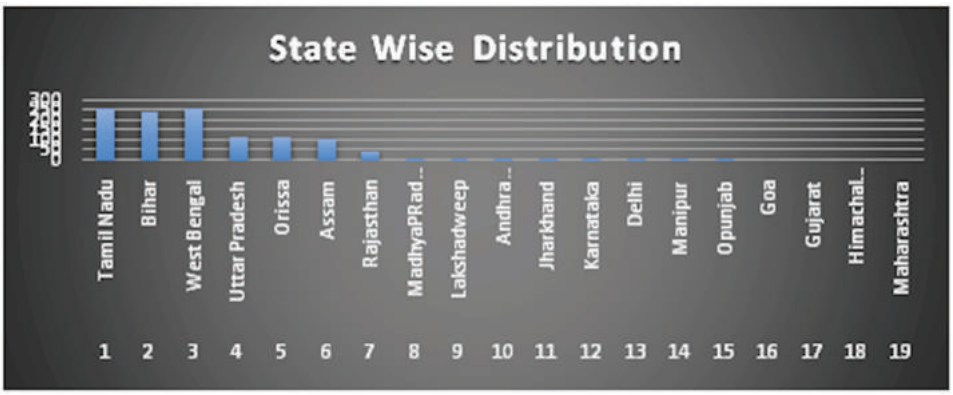


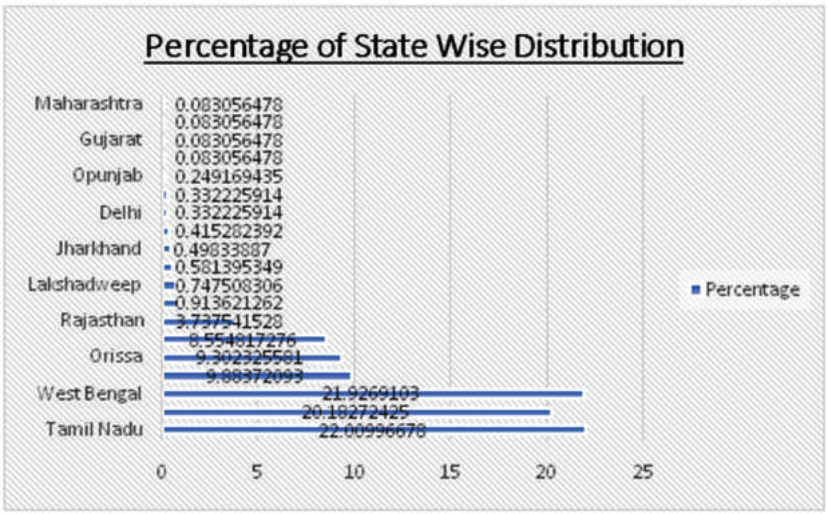
The table and the figure reveal that out of the total 200 persons, only 35% of the population is aware of the project, and the remaining 65% is unaware of its existence. The primary reason for this seems to be illiteracy and ignorance.

The volunteers of the Roshni Project assist the migrant students in acquiring proficiency in Malayalam, English and Hindi through experiential learning by application of Code-Switching technology. The technology used is that their mother tongue and the targeted language are mixed so that the children grasp the language in a thorough manner. The respective teacher interacts with the students in a simple, understandable language, either in Malayalam or mother tongue, whichever they are comfortable with. The sentences are also written on a board so that the sentences are pronounced syllabically. The children are able to read the same graphically.

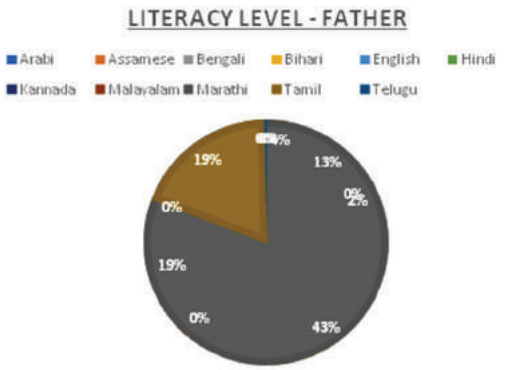
The Graphical representation region wise distribution of students are given below.

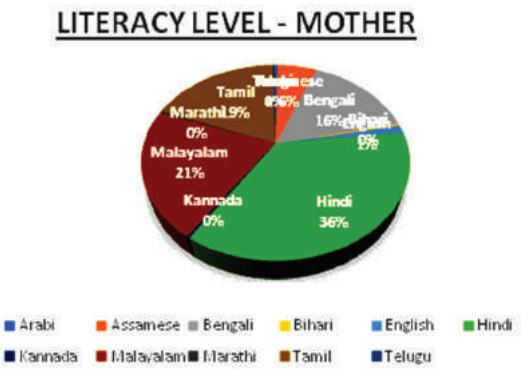
Sl. No	State	Number
1	Tamil Nadu	265
2	Bihar	243
3	West Bengal	264
4	Uttar Pradesh	119
5	Orissa	112
6	Assam	103
7	Rajasthan	45
8	Madhya Pradesh	11
9	Lakshadweep	9
10	Andhra Pradesh	7
11	Jharkhand	6
12	Karnataka	5
13	Delhi	4
14	Manipur	4
15	Punjab	3
16	Goa	1
17	Gujarat	1
18	Himachal Pradesh	1
19	Maharashtra	1





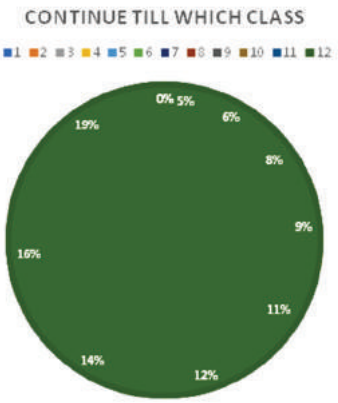
The parents of the children who are covered under the Project Roshni have significantly low literacy level. It has been found that from total parent respondents of the, the parents of children from the State of Tamil Nadu are comparatively in a better position to read, speak and write Malayalam when compared to others who only know to speak Malayalam. The respondents from the other states speak very less Malayalam at home and they prefer to speak in their native language at home when compared to the migrants from Tamil Nadu who have progressed to speaking more Malayalam. The following figure indicates the number of parents who could read and write in their native language





The study also took the perception of the children to understand their opinion about the education system and their feeling of inclusiveness. They opined that the education system provided by the state was helpful and it was an assistance mainly in the value education. The students also opined that they are very much interested in continuing their education in Kerala. Most migrant workers were reluctant to send their wards to the schools initially. But there has been a change in the attitude after the introduction of the project, Roshni. The responses of the children of the migrant workers who have been staying in Kerala for more than 5 years and their interest in continuing with the education is mentioned below.

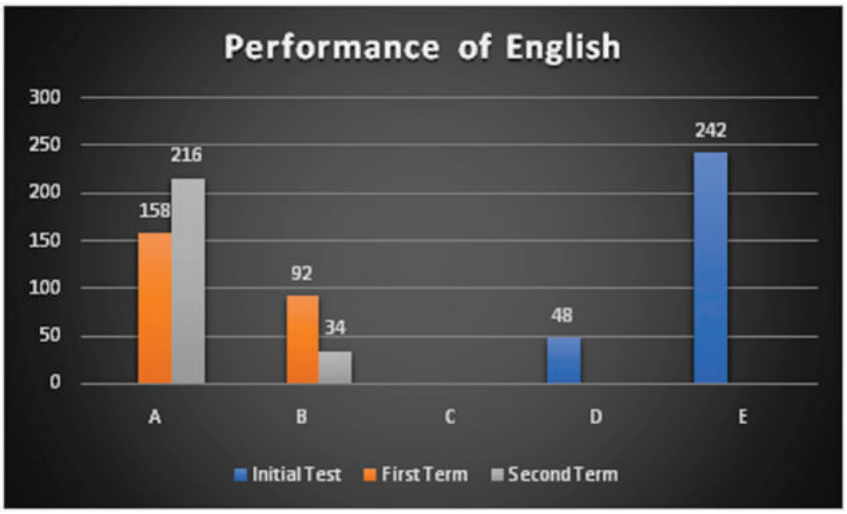
Continue till which class	No. of students
3	7
4	26
5	18
6	2
7	13
8	9
9	22
10	102
12	100
Graduation	17
Post-Graduation	02



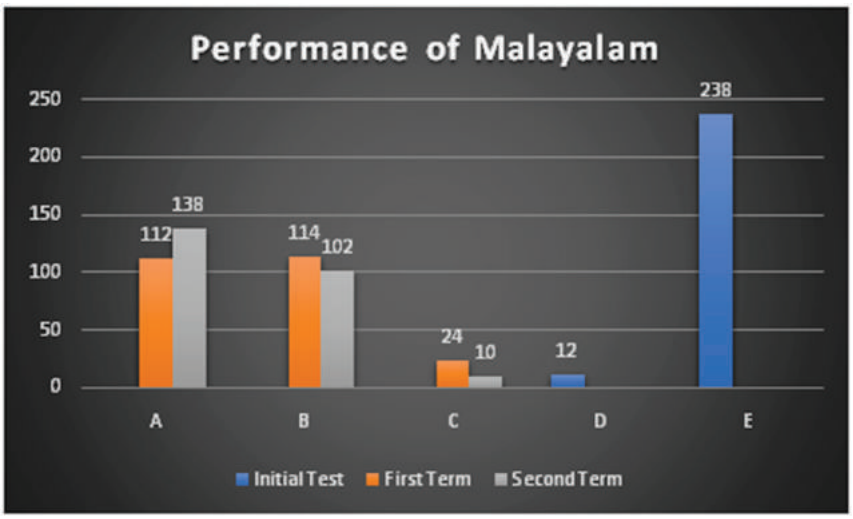
The introduction of the Project Roshni has on a large scale improved the conditions of the majority of schools and has also reduced the number of the dropouts from other schools. Children have benefited with considerable improvement in the performance in the subjects after the introduction of Project Roshni.

The data collected from the schools indicates the improvement of their proficiency in the languages and the subjects. An initial test was conducted at the beginning of Project Roshni and repeated during three different phases. There has been a widespread increase in the grades secured by the students in Mathematics, English, Environmental Studies and Malayalam. The data of the three phases are given below:

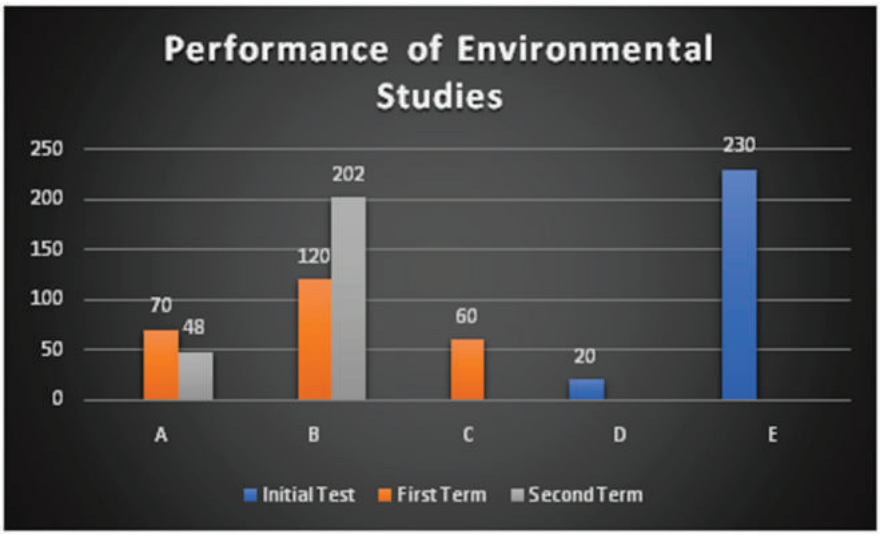
Sl. No	**English**	**Grade A**	**Grade B**	**Grade C**	**Grade D**	**Grade E**
1	Initial Test				48	242
2	First Term	158	92			
3	Second Term	216	34			



Sl. No	Malayalam	GradeA	GradeB	GradeC	GradeD	GradeE
1	Initial Test				12	238
2	First Term	112	124	14		
3	Second Term	138	102	10		



Sl. No	Environmental Studies	GradeA	GradeB	GradeC	GradeD	GradeE
1	Initial Test				20	230
2	First Term	70	120	60		
3	Second Term	48	202			



From the data analysis, it can be seen that the Project has improved the performance primary school students in various subjects, considerably. The data indicates the success in implementing the project as there is a proper assessment and implementation of the project. It is considered as the most successful project towards the accomplishment of inclusiveness among the migrant children.

Conclusion

The project Roshni is creating positive results within the migrant workers, which has on a large scale created a positive attitude towards the

concept of inclusiveness among the migrant population in the State of Kerala. Changing the migrant's perspective into believing that their children are a part of the school culture in Kerala and should be regular at school clearly indicates that the project was very much relatable to their daily lives. The data analysis indicates the success of the project and the improvement in the students in handling Malayalam in all aspects whether reading, writing, speaking and also in the understanding level. Thus the project has resulted in the creation of fairness and equal opportunities and resources for the individuals to participate and contribute as such.

The implementation of the welfare schemes like Project Roshni will help in the overall development of migrant workers and make them eligible for skilled and semi-skilled manual jobs. The migrant workers, though scattered in various industries, as a result of the project, were able to identify and do needful for their children. The involvement of criminal mafia in forcing children of migrant population to work for them has been a major challenge and has reduced the effectiveness of the Project to a certain extent.

The migrant population has to be given legal awareness and provided with legal aid so that they can avail the services and benefits available for their protection and be free from the exploitation of employers. They are to be legally protected and safeguarded in the host state. Though there are many laws, which are made for their protection, we can see that they are not much effective and useful for their protection mainly due to their lack of knowledge.

Migrant workers are indeed becoming an essential part of the Kerala's labour sector. Right from the household to industries, there is the presence of interstate migrant workers. Without the service of migrant labours, the Kerala society today is incomplete. However, there are also social issues that the migrant labours face in Kerala, including the problems from native employees, isolation, inadaptability to a new culture, communication barriers, family and educational issues and so on. These issues stand as the barriers in facilitating a satisfactory integration of migrant workers to the

state. Interstate migrant workers are an integral part of the working force in Kerala and steps must be taken to eradicate the vulnerability and exploitation that are cast upon such workers. On the other hand it is also necessary to keep watch and check on the migrants so that they do not indulge in crimes and malpractices and cause harm to any persons or state. . The government and the policymakers have to initiate strong steps to upgrade the life of the migrants. The Government must ensure that the private establishments also enforce the laws.

Dark Webs and Drug Trafficking: The Unregulated Legal Terrains

Dr Vani Kesari A*

Undoubtedly, our lives today are highly dependent on technology, be at work or in personal spaces. Amongst the same, the cyberspace plays a prominent role and therefore a constant examination of the cyber ecosystem is essential to maximise its benefits and minimise its potential harms. The technological advancement in cyberworld has not only translated into progress but had also accelerated crime rate.[1] Of late, there has been a spike in the rate of cybercrimes at the same rate of that of the pandemic both globally and nationally. It is reported that there is a cyber-attack once in every 39 seconds which means that a cybercrime is being committed on an average of 2,244 times per day, 30,000 websites are hacked every day[2] which would proportionately increase the spendings on cybersecurity in the budget of a country. Moreover it is reported that in 2020 alone, 330 million people across the world were victims of cybercrimes in one form or the other.[3] At the national level, the rate of cybercrimes was 50 lakhs in 2021 and state of Uttar Pradesh leading among the states[4].

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1 MARK GRABOWSKI, ERIC P. ROBINSON, CYBER LAW AND ETHICS: REGULATION OF THE CONNECTED WORLD,2 (Routledge, 2021)

2 https://www.broadbandsearch.net/blog/alarming-cybercrime-statistics (last visited Apr 29, 2022)

3 https://safeatlast.co/blog/cybercrime-statistics/#gref (last visited Apr 29,2022)

4 https://www.statista.com/topics/5054/cyber-crime-in-india/#dossierContents__outerWrapper(last visited Apr 29, 2022)

However, one needs to comprehend as to nature and forms of cybercrimes. The word *"cybercrimes*" may be understood in simple terms as a computer crime which means internet is the source through which a crime takes place.[5] This may be used for committing fraud, trafficking in child pornography and intellectual property, stealing identity or violating privacy , drug trafficking etc Most of the crimes today takes place through dark webs. The question is to what extent the existing legal framework is able to regulate the crimes taking place through dark webs.

Certain Understandings on dark webs:

In order to clearly understand dark webs, we need to necessarily understand what a website means. In simple sense, the website is nothing but a collection of webpages or a 'site' on the 'web' where you can put information about yourself, your business, or any other topic and users can access it by using the internet. Just like we have address based on our residence in the physical land your website will alsohave a web address wherein internet users access the information, video images etc There is a massive release of websites each day, therefore it is hard to say how many websites exist in total world web. However, as of March 2022, it is stated that there are about 2 billion websites[6] Search engines which are made of software programs enable people to find the information they are looking for online using keywords or phrases. The prominent among them are Google, yahoo, bing you tube, amazon etc Websites are usually made of a set of programming codes such as HTML, CSS, PHP etc In order to create a website a domain name is needed which is nothing but the name of your website. The website which one creates needs to be registered with a domain registration company in order to get a unique web address. The storage location where one's website files and content are stored is called web hosting or servers. The website usually consist of three layers such as surface

5 https://www.britannica.com/topic/cybercrime (last visited Apr 29,2022)

6 https://siteefy.com/how-many-websites-are-there/ (last visited May 6,2022)

web, deep web and dark web. Surface and deep web is used by most of us on a daily basis.It can be assessed through browsers such as Google chrome, safari, Firefox etc. Deep web on the otherhand consists of pages and databases that are only meant for a certain group of people **w**ithin an organization eg work based databases Now, one needs to understand what dark webs are.

As its name signifies, the dark web is a secret network that exists underground or not visible to outer world generally. Itis made up of a series of websites that are hidden from the general public[7]. They are part of deep web.[8]This means that they cannot be accessed through traditional search engines, such as google, bing, yahoo etc .They can be accessed only by using specific browsers, such as TOR browser and have websites which have hidden IP address.[9]It is estimated that darkwebs accounts for less than 0.01% of the sites on the internet and that there are around 45,000 Dark web sites.[10]It is an area which is unregulated and most of the illegal activities take place here. Anonymity is its obvious advantage.[11] Some of the risks associated with dark webs are botnets or an network of infected devices. The hacker in charge of the botnet can use the devices to spread viruses on the system, phish for personal and private information or facilitate DDos (Distributed denial of services) attacks.[12]Mostly botnets are used for financial thefts, information thefts, selling access to other criminals etc

7 https://www.investopedia.com/terms/d/dark-web.asp(last visited May 6 ,2022)

8 DARK WEB INVESTIGATION, 5 (Babak Akhgar, Mario Gercke et al eds Springer, 2021)

9 https://www.britannica.com/story/whats-the-difference-between-the-deep-web-and-the-dark-web(last visited May 6,2022)

10 Michael Chertoff, *A public policy perspective of the dark web*, J. CYBER POLICY https://www.tandfonline.com/doi/full/10.1080/23738871.2017.1298643 (last visited May 6,2022)

11 JONATHAN CLOUGH , PRINCIPLESOF CYBER CRIME, 7(Cambridge University Press,2nd edn.2015)

12 https://vpnoverview.com/privacy/anonymous-browsing/the-dark-web/(last visited May 6,2022)

Another challenge isthat most of the websites in the dark web have illegal porn or contain content such as bestiality, child pornography, rape, and extreme violence. Even accidentally watching or downloading these videos might lead one to criminal prosecution. It might also contain millions of pirated content, like movies, TV shows, books, software, games etc whose unauthorised use might lead to penal liability. Dark nets may not be regarded as often used by criminals as popularly conceived but it may also be used for military intelligence, by users in countries where internet use is strictly restricted etc[13]The origin of the dark web can be traced back to 1960 with the creation of ARPANET or the Advanced Research Projects Agency (ARPA), which is an arm of the U.S. Defense Department. It is a computer-based communications system which protected the secret communications of the US Spies which is not accessible by an ordinary internet surfer.[14]Interestingly, the trade of illicit drugs via the Internet dates back to a marijuana exchange between Stanford students and their counterparts at Massachusetts Institute of Technology (MIT) in 1971 or 1972 utilizing ARPANET (Advanced Research Projects Agency Network) accounts at their labs.[15] With the passage of time dark nets have become a most preferred way for drug trafficking apart from illegal activities such as child trafficking, pornography,organ trafficking etc.

Reasons for the use of Drug Trafficking using dark net

The sale and purchase of drugs and narcotic substances are not only confined to dark net but also is widely prevalent in open net. It is also done by various social media apps. However, the attracting feature of the dark web in relation to drug business is the" physical anonymity" for those who do the business as well as those who are the customers. The next important

13 https://history-computer.com/deep-web-vs-dark-web/ (last visited May 21,2022)

14 https://www.imf.org/Publications/fandd/issues/2019/09/the-truth-about-the-dark-web-kumar(last visited May 21,2022)

15 Hossein Akbarialiabad et al, *The Double Edged Sword of the Dark webs : Its Implications for medicine and Society* ,35 J GEN INTERN MED 3346-3347 (2020)

reason why the darknets are popular is that both the seller and buyer may be in different locations still the transaction can take place smoothly.[16]The customers benefit from the feedback given by the other customers on the drugs whereby they rely on the perceived reliability of the seller. The escrow account system is more used by the drug traffickers so that the client is required to pay immediately for the required goods but the finalization of the payment to the supplier is postponed until the goods have actually been received by the customer. The World Drug Report, 2018 reveals that 62 percent of active listings on a selection of darknet marketplaces were drug-related - 48 percent coming under illegal drugs category.[17] There exist reports that two third offers in the dark net relates to drug sales. The European Monitoring Centre For Drugs and Drug Addiction states that there are mirror sites on the surface web which provides hyperlinks for corresponding to dark webs.[18] Of late, cryptomarkets has emerged as a notable innovation in online drug trade. Along with the softwares enabling anonymity cryptocurrencies provide high level of protection to the criminals engaged in dug trafficking since drugs are delivered through posts whereby the direct contact between the seller and buyer can be avoided.[19] Crypto markets use advanced encryption to protect users and hence propose a wide array of illegal products predominantly drugs. Studies reveal that they share a lot of structural features which are more or less similar to popular market places like e bay, Amazon etc with searchable listings of products for sale and enable buyers to give their feedback.[20] These markets use untraceable

16 https://www.unodc.org/documents/Focus/WDR20_Booklet_4_Darknet_web.pdf(last visited may 22, 2022)

17 *Id*

18 https://www.biometrica.com/the-dark-side-of-the-web-drug-trafficking-on-the-darknet-grew-nearly-fourfold-recently/ (last visited May 22, 2022)

19 https://www.emcdda.europa.eu/system/files/publications/2155/TDXD16001ENN_FINAL.pdf(last visited May 22, 2022)

20 Broseus Julian et al, *Studying illicit drug trafficking on darknets markets : Structure and Origin from a Canadian Perspective*, FORENSIC SCIENCE INTERNATIONAL 264(2016)

cryptocurrency bitcoin. Thus the use of dark net and the consequent rise of drug trafficking have significantly affected the monitoring and detection abilities of law enforcement agencies. The first such instance was in 2011 wherein Silk Road an online black market for drugs in darknet came to light whereby the Federal Bureau of Investigation of US interfered and shut down the entire website apart from arresting its founder.[21]It is a notable aspect that the US Administration in 2021 through the Joint Criminal Opioid and Dark net Enforcement (JCODE) joined with EUROPOL undertook the Operation Dark HunTor which was a coordinated International effort of three continents namely US, Australia and Europe could succeed in arresting 150 drug traffickers.[22] However this move is appreciated it needs to be understood that lot of financial burden is part of uncovering this crime. India's first arrest on dark net drug trafficking took place in 2020.[23] Officials point out that it was difficult for the law enforcement agencies to track these traffickers due to several reasons such as the end to end encryptions, no specialised experts to uncover it, deals are mostly using crypto currencies, darknets are not easily accessible through normal search engines like google, safari etc Thus there is a need for demystifying this crime and also analysing the vacuum in existing laws whereby this menace can be curbed.

The International Legal Response on Drug Trafficking with special reference to darknets:

Drug trafficking affects the entire globe as either source, transit or destination regions.The major International drug control regime under the United Nations which primarily deals with drug trafficking are Single Convention on Narcotic Drugs ,1961,which was amended in 1972, Convention on Psychotropic Substances 1971, and the UN Convention

21 https://www.bbc.com/news/world-us-canada-32941060 (last visited May 22, 2022)

22 https://www.justice.gov/opa/pr/international-law-enforcement-operation-targeting-opioid-traffickers-darknet-results-15(last visited May 22, 2022)

23 https://www.indiatoday.in/mail-today/story/dark-net-crimes-rattle-cops-challenges-and-catch-1646638-2020-02-15(last visited May 22, 2022)

against illicit traffic in Narcotic Drugs and Psychotropic Substances , 1988. The Preamble of all the three conventions emphasize the fact that the fundamental driving force behind them are the concern for the health and welfare of mankind. However, the Conventions make it very clear that drugs may be made available for medical and scientific practices including for clinical trials but measures may be undertaken by the nations against their diversion and abuse.[24] The 1961 Single Convention defined a number of substances as narcotic drugs such as opiates, coco based products, cannabis etc It for the first time established a system by which drugs were ranked according to harm placed in one of the four schedules specifying the risks as well as the potential medical benefits. It established a regulated supply of drugs for medical or scientific purposes. Institutional agencies like the Commission on Narcotic Drugs (CND) and International Narcotics Control Board (INCB) was established by this Convention. CND was created as the body responsible for formulating global policies and deciding on future amendments to the treaties. The INCB was entrusted with the enforcement of treaties. Additionally, the World Health Organsation was given the responsibility in providing expert support on decions regarding scheduling of new drugs or reviewing and making recommendations for amending the drug scheduling. Due to the sporadic rise in the use and trafficking of synthetic drugs the Convention on Psychotropic Substances 1971 was signed under the auspices of UN . This Convention brought in a new set of drugs under the terminology," psychotropic substances" and set out specific drugs under it. Hence the narcotic drugs came under 1961 Convention.The UN Convention against illicit traffic in Narcotic Drugs and Psychotropic Substances , 1988 enhanced the enforcement led approach with drug trafficking as an organised crime. It required member states to adopt strong criminal sanctions for activities relating to production, supply, trafficking, use etc The countries were given the liberty to confiscate proceeds of drug

24 Chloe Carpeneter et al, *International drug convention continue to provide a flexible framework to address the drug problem* (2018) https://onlinelibrary.wiley.com/doi/full/10.1111/add.14112 (last visited May 24 ,2022)

related case, facilitating[25] extradition in drug related offences etc. It may be observed at this juncture that the above mentioned treaties do not require countries to 'prohibit' any of the classified substances in themselves. They only establish a system of strict legal control of the production and supply of all the controlled drugs for medical and scientific purposes, as well as introducing sanctions aimed at combating the illicit production and distribution of these same substances for other purpose [26]. Thus it can be inferred that there is much flexibility for the countries in regulating drug trafficking .Despite the fact that these conventions have been ratified by most of the nation states and hence could be treated as universal, the regime is often criticized as the product of a bygone era and out of step with contemporary norms and public health research.[27] It is criticised that by explicitly allowing Parties to adopt strict or severe policies based on the situation in their country it also allows imposition of death penalty for drug-related offences, the treaties have also been accused of catalyzing or facilitating systematic abuses of universal and treaty-based human rights.

The other institutional agencies engaged in controlling drug trafficking is the United Nations Office on Drugs and Crimes (UNODC) formed in 1997 which is responsible for advisinggovernments on effective enforcement of drug laws within their jurisdictions. Itfocusses on crime reduction, security and law enforcement rather than on maintenance of public health. Apart from this , the The Universal Postal Union (UPU) along with the United Nations Drug Control Program (UNDCP) undertake joint projects which aim at combating drug trafficking through the use of the postal service. The International Criminal Police Organization (INTERPOL) and

25 https://transforms.org/drug-policy/global-drug-policy(last visited May 24, 2022)

26 https://www.tni.org/en/publication/the-un-drug-control-conventions(last visited May 24, 2022)

27 Roojin Habibi et al*, Legalizing Cannabis violates the UN Drug Control Treaties but progressive countries like Canada have options*, Working Papers, OTTAWA L. REV 9 (2018) https://robobees.seas.harvard.edu/files/globalstrategylab/files/legalizing_cannabis_biolates_the_un_drug_control_treaties.pdf (last visited May 24, 2022)

the World Customs Organization (WCO) also play an active role in combating the menace.It needs to be mentioned that the global drug control regime is hardly equipped to effectively address the illicit drug trafficking through the existing legal structures. It might be seen that all the Conventions were conceived been before the internet came to be widely used.Given the projected growth of internet use beyond the current 2.8 billion and the widespread use of sophisticated encryption applications, and growing specialisation in online retail and distribution chains and the consequent emergence and expansion of hidden drug markets reinforce the fact that dramatic change is required in the way drug control is conceptualised and enforced, and a more practical way of law enforcement is required. It was in UNODC World Drug Report 2014 that for the first time the International attention on the use of dark nets for drug trafficking was mentioned. However the law enforcement agencies were was to respond to the emergence of internet based drug transactions, with the media initially playing an investigative role as with the exposure of Huson and the Hive operations by the 2001 NBC programme Dateline in its 'X Files' episode[28] The transnational nature of transaction in dark net requires more concrete legal initiative both at the national and international level. International drug control has evolved into a multi facet policy arena which requires thorough policy expertise. Along with the International institutions it also involves diplomacy, military intelligence, law enforcement etc of nations. Though the countries and International agencies have been conducting bilateral and multi lateral negotiations and agreements yet it has failed miserably. [29] Joint actions by different countries and agencies have been successful in unravelling drug traffickings for eg the famous operation "*Onymous"*, which was coordinated by Europol's European Cybercrime Centre (EC3) along with Federal Bureau of Investigation, the U.S. Immigration and Customs Enforcement's (ICE), Homeland Security

28 https://idhdp.com/media/400190/darknet-20markets.pdf(last visited May 26, 2022)

29 Behsat Ekici, *Why does the International Drug Control system fail,*5 ALL AZIMUTH: JOURNAL OF FOREIGN POLICYAND PEACE,63(2016)

Investigations (HSI) and Eurojust, resulted in 17 arrests of vendors and administrators running these online marketplaces and more than 410 hidden services were being taken down.[30] It is surprising to note that bitcoins worth approximately USD 1 million, EUR 180 000 euro in cash, drugs, gold and silver were seized during this operation. Currently international law governing the internet and its usage is non-existent. The regulation of internet is not that easy since countries hold vastly different political and social values. Freedom of speech is not necessarily a universally held fundamental right. Problems are bound to arise when a country such as Germany wishes to prosecute a United States citizen for placing pro-Nazi propaganda on the Internet.[31] Hence through International Cooperation and multinational agreements and consensus a common regulatory pattern needs to be evolved in this area.

Indian Regulatory Landscape and Drug Trafficking through Darknet

The Indian Constitution under Article 47 postulates the obligation of the state to protect the public health of its citizens and as a part of it is to endeavour to bring in prohibition of use of drugs except for medicinal purposes[32]. Having ratified the UN Conventions on the global dug control regime the Parliament passed the Narcotic Drugs and Psychotropic Substances Act, in the year 1985 The aim of the enactment was to prohibit both consumption and trafficking of drugs which includes cultivation, manufacture, distribution ,sale as well as purchase.Section 8 of the Act states that apart from producing, manufacturing, selling etc, import and export is prohibited and punishable under the enactment.Similarly, Section 12 lays down the restrictions over external dealings in narcotic drugs and

30 Pararidhi Saxena & Sudhanshu Latha, *The Darknet : An Enormous Black Box of Cyberspace,*BHARATHI LAW REVIEW 185(2016)

31 Steven M Hanley, *International Internet Regulation : A Multinational Approach*, J MARSHALL J COMPUTER& INF.L.997 (1998)

32 MP JAIN, INDIANCONSTITUTIONAL LAW ,1495-1496 (Lexis Nexis 2018)

psychotropic substances. Use of internet as a medium for drug trafficking has not been touched upon by the enactment. Investigations related to drug related crimes is a very challenging task for law enforcement agencies. It is often very difficult for the accused to be convicted in case of drug trafficking cases due to its transnational nature despite the existence of Section 24 of the Act wherein external dealings in contravention of Section 12 is punished .Collection of evidence and bringing the suspect before the court is often difficult in these type of cases.[33] Hence in the year 1988 the Parliament passed the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988(PITNDPS). Section 2(e) of the Act defines illicit transfer in relation to narcotic drugs and psychotropic substances .It says that cultivating any coca plant ,opium poppy or cannabis plant or gathering any portion of coca plant, opium poppy or cannabis plant or engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transhipment, of narcotic drugs or psychotropic substances includes illicit drug transfer. However clause 4 of Section 2 (e) is broader enough to say that any activities in narcotic drugs or psychotropic substances other than those aforesaid will also include illicit transfer. It may be interpreted broadly to include those who deal with illicit transfers using darknet.However , it needs to be accepted that the absence of liability for those hosting dark webs weaken the effectiveness of the legislation.

Illegal transactions using cryptocurrency in cases involving drug trafficking has been brought to the attention of the courts.[34]However the question is the extent to which the operators of the dark web have been booked so that such instances do not occur. The NDPS Act does not contain specific provisions dealing with illegal drug trafficking done using dark

33 Ketan Patil & Astha Pandey, *Drug Trafficking :A Growing Problem for India,*1 ASIAN J. FOREN.SCI.34-41 (2022)

34 Anish Kumar Dundoo v State of Telegana https://indiankanoon.org/doc/85847085/ (last visited May 26, 2022)

webs and the liability thereof. Though the Narcotics Control Bureau (NCB) which operates under the NDPS Act had launched "Operations Trance" in 2019 jointly with global partners which are a joint intelligence-gathering action on international postal, express mail and courier shipments containing psychotropic drugs yet it is not yielding much results.[35] The International Narcotics Control Board (INCB), headquartered at Vienna in its annual report in 2021 had pointed out that India is one among the most listed destination in South Asia for shipping drugs traded over darknet.[36]

Accessing darkweb is not per se an illegal activity in India. The Supreme Court of India in *Anuradha Bhasin* v *Union of India*[37]held that right to internet as a part of freedom of speech and expression under Article 19(1)(a) of the Constitution. The Information Technology Act 2000 is the primary legislation which deals with cyberoffences in India.[38]Cyber crimes have not been defined in India. It is criticised as an ill equipped piece of legislative endeavor.[39]The preamble of the Act makes it very clear that it is intended to facilitate e commerce. However, it is intended only for lawful transactions and puts restrictions on illegal transactions.The Act established a regulatory framework and specifies penalties for cybercrime and other offences.[40] However it fails to define illegal drug trafficking using dark webs or internet as such as a cyber crime. Interestingly Section 42 of the Act imposes an obligation on the subscriber of the electronic signature to maintain complete confidentiality of his or her private key and if the same

35 https://www.thehindu.com/news/cities/Delhi/co (last visited May 28, 2022)

36 https://economictimes.indiatimes.com/news/india/india-prime-destination-for-darknet-traded-drugs-in-s (last visited May 28, 2022)

37 https://indiankanoon.org/doc/82461587/ (last visited May 28, 2022)

38 https://iica.nic.in/images/FOIRNews/The-Dark-Web-Cyber-Terrorism-Arindam.pdf (last visited May 28, 2022)

39 GAURAV GUPTA, SARIKA GUPTA , INFORMATION SECURITYAND CYBER LAWS, 362 (Khanna Publishing Co,2011)

40 https://ksandk.com/regulatory/indian-e-commerce-law-under-cyber-law/ (last visited May 28, 2022)

is compromised, the subscriber is under an obligation to inform the certifying authority. [41]Hence over years India has become a hub for illicit drug trafficking through darknet using bitcoins. Though the Indian Penal Code contains numerous provisions dealing with cyber crimes its applicability with regard to drug trafficking using dark web or internet is limited.[42]

Conclusion

Prevention of illegal drug trafficking is not that easy task. Due to its transnational nature, the international laws and bilateral and multilateral agreements across nations will have to be strong. One nation should help another in case of both investigation orin matters of extradition of offenders. In order to enforce an effective legal arm against illicit drug trafficking through darknet, one nation's law is never going to be sufficient. The anonymity assured while accessing dark web not only encourages illegal activities, but also keeps many law enforcement agencies largely unaware of its existence, even while their jurisdictions are impacted by online transactional crimes.

Internet is inherently very international, which makes coordinating regulations challenging. Certain legal jurisdictions insist on self regulations, while others impose stringent regulations. Hence regulatory trends of internet keep varying. This becomes even more difficult when it is dark net. Certain laws in US may be made have been extended to dark web activity , though they are not specifically designed to meet the challenges it poses. For example, Dark Web provides an opportunity for hacking. Hackers may purchase malware from other hackers, or will use a Dark Web method of collecting ransom from ransomware attacks.[43] Hacking is regulated by the Computer Fraud and Abuse Act1986 (CFAA), which prohibits trespassing

41 https://tnnlu.ac.in/pdf/2019/Jonural%20Committee/8.%20Article%206%20-%20Sathia.pdf(last visited June 1,2022)

42 Section 379, Section 420, Section 463,Section 468 etc IPC

43 https://www.tandfonline.com/doi/full/10.1080/23738871.2017.1298643(last visited May 22, 2022)

on, unauthorised accessing of, and damaging computers in interstate or international commerce. The CFAA also bars trafficking, unauthorised computer access, and computer espionage.[44]These U.S. regulations are perfectly sufficient to handle hacking, but not the crimes due to dark webs. CFAA does not specifically tackle the challenge of anonymity online, and they are not necessarily effective beyond U.S. borders, especially drug trafficking using dark webs. Regulating cybercrime on the Dark Web therefore becomes exponentially more challenging when the international community is brought in.

Though cases of drug trafficking through dark nets are rising day by day the laws in India are not adequate enough to meet the challenge. The NDPS Act nor the PITNDPS Act has any provisions dealing with it. Similarly the IT Act does not contain any explicit provisions to deal with it.Crawling of darknet markets to identify drug traffickers on darknet based and the drugs they offer for sale as well as digital foot-printing of active drug traffickers on darknet based in India is the need of the hour. Artificial Intelligence may be used as a force multiplier, helping investigators overcome the various challenges of conducting online investigations of drug trafficking. AI, along with the web intelligence (WEBINT)will be able to support investigators in executing searches across dark web forums that promote narcotic marketplaces[45].AI also can speed up the investigation process in these type of cases. Apart from this, the police should be aware of the new forms of synthetic drugs traded by the drug mafia.[46] The public should also be sensitized about the existence of this mafia and how they operate. Strategies to control drug trafficking through dark web should be developed at the international level through exchange of knowledge and expertise. Illicit drug trafficking has a connection with other cybercrimes,

44 https://www.nacdl.org/Landing/ComputerFraudandAbuseAct (last visited June 1, 2022)

45 https://www.police1.com/police-products/investigation/drug-enforceme (last visited June 12, 2022)

46 https://www.interpol.int/en/Crimes/Drug-trafficking (last visited June 21, 2022)

hence counter measures needed to be undertaken through international consensus due to the trans national character of the crime. The state police and central agencies work in distinct manner which had made the enforcement of the Anti drug regime weak in our country.The punishments prescribed under the NDPS Act as well as other laws should be commensurate with the quantity of contraband recovered. Law should define clearly medium through which the trafficking takes place and prescribe strict punishment for trafficking through dark net. Drug trafficking is an offence which has ramifications both present and future. Living in an digitalised era, the legal regime should be modelled in such a way that cyber crimes in the nature of drug trafficking are dealt with out most seriousness lest the future of humanity will be affected.

Mobilization of Financial Institutions for Better Environmental Governance and Sustainable Development

Dr. Rosmy Joan*

Introduction

A new combination of environmental regulation and financial services law can be applied to create a new market dynamic, which can promote environmental protection. The failure in counting the sanctity of environment as part of a developmental model for economic growth in extreme conditions of poverty in developing states as well as the thought of profit over sanctity in developed states pertain to the significance of sustainable development. Due to the increased industrial activities, environmental quality is deteriorating. At the same time the cost of achieving environmental gains is too costly and politically difficult. The governments may regulate to integrate environmental policy into the financial services sector as it is holding a very important position in shaping the economy at par with development activity. This paper explores a framework for reform of environmental regulation through financial organizations, driven by three themes. First, the prevailing administrative governance is weak in framing an environmental policy and therefore a change of approach is necessary.

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Second, reflexive based ecological modernization regulation can be used to frame a better environmental policy with help of financial organizations. Liability rules, economic instruments and information tools can be important in providing a proper setting for the involvement of the financial sector in environmental matters. Thirdly, specific regulatory reforms are necessary with respect to the governance of financial organizations themselves for enlarging the role of financial organizations in environmental governance.[1]

Environmental law is not a discrete field of regulation and it runs counter to the traditional classification of law. It is increasingly recognized, yet usually not acted on, that the establishment and operation of environmental rules is conditional upon support from non-state organizations and state organizations outside of the traditional environmental agency portfolio.[2] Effective environmental regulation uses economic and financial institutions to control the environmental behavior. Financial sector has a very important impact upon the environmental activities of the economy in addition to its own direct resource consumption and pollution. Financial organizations are essentially playing the role of gatekeepers within the economy and are strategically well placed to efficiently act as surrogate environmental regulators in respect of some environmental policy functions. Financial organizations are gatekeepers, enabling business through access to credit, insurance and other financial resources to participate in the market. The features like relatively low cost to monitor environmental activities, ready access to information regarding corporate performance, and financial leverage and resources helps financial institutions to promote environmental protection. Financial organizations can also generate funds to pay for environmental damage.[3]

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1 Benjamin Richardson, Environmental Regulation Through Financial Organizations 379 (2002).

2 R. A. W. Rhodes, *The New Governance: Governing Without Government*, 44 (4) Political Studies 652 (1996); Peter N. Grabosky, *Using Non Governmental Resources to Foster Regulatory Compliance*, 8 (4) Governance 527 (1995).

3 Richardson, *supra* note 1, at 380.

The government can mobilize financial organizations into a change of regulatory controls through a combination of incentive, discursive and authoritative mechanisms. In this mechanism of governance, government is empowering and supervising the financial organizations for better environmental protection. Governance through financial organizations are very much important for todays' academic and policy discourses due to the concerns that the present system of governance seem to be reaching the boundaries of their capabilities. The quality of environment is declining worldwide and the cost for rectifying environmental damage and acquiring further environmental gains are very costly as well as politically difficult. Richardson analyzes, "A core problem is that our economic and commercial institutions, which shape access to investment resources and influence overall patterns of development, have remained largely beyond the reach of conventional environmental law controls".[4]

I. Financial Sector and Environmental Governance

Environmental policy, of course, has invariably always been driven by economic concerns.[5] A central feature of sustainability is the principle of integrating environmental and economic issues in decision-making, embedding ecological concerns in both government and market decision processes.[6] One of the popular views of environmental regulation is that the regulation techniques should be realigned with the imperatives of a deregulated economy so that environmental policy is achieved more efficiently.[7] Bressers and O' Toole observe, "Legal instruments are often

4 *Id*.

5 Robert W. Hahn, *The Impact of Economics on Environmental Policy*, 39 (3) Journal of Environmental Economics and Management 375 (2000).

6 Richardson, *supra* note 1, at 4.

7 *See generally* Frederick R. Anderson, Environmental Improvement Through Economic Incentives (1977); Stephen G. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Approaches and Reform*, 92 Harv. Law Rev. 547 (1972); Richard B. Stewart, *Models For Environmental Regulation: Central Planning Versus Market Based Approaches*, 19 (3) B C. Envtl. Aff. L. ReV. 547 (1992).

accompanied by financial sanctions, while economic instruments are anchored in legal regulations. So rather than making a strict distinction, it is more realistic to refer to a continuum in which a wide range of concrete instruments occupy intermediate positions".[8] A report by the Lisbon Group, entitled 'The Limits of Competitiveness, argued that economic liberalization and deregulation, both based on the rules of conflict, are unlikely to provide a suitable framework for achieving sustainable development. As an alternative, the report advocated cooperation between governments, business and other entities for the achievement of a sustainable world.[9]

According to Young, "Governance is a social function….it centers on the management of complex interdependencies among actors….who are engaged in interactive decision-making and, therefore, taking actions that affect each other's welfare".[10] The Organization for Economic Cooperation and Development report notes that, "Regulation includes the full range of instruments by which governing institutions, at all levels of government, impose obligations of constraints on private sector behavior".[11] A number of scholars have advanced arguments regarding 'multilevel' governance and regulatory partnerships. The shift from government to governance is intertwined, argues Rosenau, with the trend towards more internationalized patterns of policy-making involving international organizations and other super national actors.[12] Thus, effective environmental governance may involve a combination of rules, incentives and discursive processes by which

8 Hans Th A Bressers & Laurence J O'Toole Jr, *The Selection of Policy Instruments: A Network Based Perspective*, 18 (3) J. Public Policy 213-224 (1998).

9 Riccardo Petrella, The Limits of Competitiveness (1995).

10 Oran R. Young, *The Effectiveness Of International Governance Systems*, *in* Global Environmental Change And International Governance 2 (1996).

11 OECD, Reforming Environmental Regulation in OECD Countries (1996).

12 James N. Rosenau, *Global Environmental Governance: Delicate Balances, Subtle Nuances and Multiple Challenges*, *in* International Governance on Environmental Issues 19-56 (Mats Rolen et al., eds., 1997).

the state seeks to steer and coordinate the non-government sector.[13] Fitzpatrick, for instance, theorizes the notion of 'integral plurality' to describe the reciprocal influences of state law and private orderings of civil society.[14] According to Freeman, there is no purely public realm in modern society, that governance is shared through a process of 'negotiated relationships' between actors in both realms.[15] Freeman argues that in reality governance tends to be 'dynamic, non-hierarchical, and decentralized, envisioning and give and take among public and private actors'.[16] Salamon argues that the defining feature of the emerging approaches to 'third party government' is the 'massive proliferation….in the tools of public action', such as tax, insurance, loans, contracts and regulation.[17] He suggests, "Such an approach is necessary because problems have become too complex for government to handle on its own, because disagreements exist about the proper ends of public action, and because government increasingly lacks the authority to enforce its will on other crucial actors without giving them a meaningful seat at the table".[18] Rhodes identifies in governance a series of inter-organizational policy networks and linkages involving an array of market and nongovernmental entities.[19] Effective governance, therefore, is widely portrayed as involving a reconfiguration and blurring of the traditional demarcation between the public and private sectors.[20]

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13 *See generally* Gerry Stocker, *Governance as Theory*, 50 (155) Int. Soc. Sci. J. 17 (1998); Rhodes, *supra* note 2, at 652.

14 *See* Petya Fitzpatrick, *Law and Strikes*, 22 Osgoode Hall Law J. 115 (1984).

15 *See* Jody Freeman, *The Private Role in Public Governance*, 75 (101) New York University Law Review 543 (2000).

16 *Id* at 571.

17 *See* Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 Fordham Urban Law Journal 1611-1613 (2001).

18 *Id* at 1623.

19 *See* R. A. W. Rhodes, Understanding Governance: Policy Networks, Governance, Reflexivity And Accountability 46-59 (1997).

20 Richardson, *supra* note 1, at 10.

The processes by which governance may be modulated through private institutions are diverse.[21] Government can ask banks to submit report about suspicious transactions and obligations on businesses to undertake revenue collection for the state. Also, governments may compel firms to ensure that their environmental performance assessed and certified by private institutions say auditors. This is part of carrying out firms' obligations towards environmental liability insurance. The auditors, accountants and other professionals can develop suitable standards as part of their regulatory roles to undertake effective supervision on behalf of the state. Financial institutions are required to collect information as and corporations are required to disclose information as to environmental performance. The information regarding nature and effect of corporate operations will facilitate governance. Again incentives can facilitate the public private regulatory partnership in addition to information techniques. Richardson analyzes, "Taxation benefits and the prospect of reduced regulatory oversight can be offered to enterprises that agree to adopt approved environmental management systems and participate in alternative compliance programmes".[22]

II. Mobilization of Financial Organizations for Sustainable Development

For reasons of cost efficiency and political feasibility, environmental law scholarship however increasing agrees that the appropriate role is for government to use the least interventionist approach.[23] Literature in the field of governance studies also draws attention to the growing importance of regulatory partnerships between the state and the private sector.[24] Legal reform is unlikely to be successful if there do not already exist societal

21 Grabosky, *supra* note 2, at 530-536.

22 Richardson, *supra* note 1, at 11.

23 Neil Gunningham & Peter Grabosky, Smart Regulation: Designing Environmental Policy 376-379 (1998).

24 Rhodes, *supra* note 2, at 652; Grabosky, *supra* note 2, at 527.

norms capable of supporting the legal regulation, although there are usually different norms asserting themselves, which creates opportunities for reformers.[25] Black argues that rules aimed at promoting high quality conduct should be supplemented by processes that can build 'shared understanding as to the meaning and application of the rules'.[26]

The mobilization of the financial services sector as a means of environmental regulation requires governance reforms at two levels. First, ecological modernization style reforms are required to create a general supportive framework for diffusing environmental concern in the market and enhancing linkages between economic and environmental issues in business decision-making. In market economies, business normally make their economic decisions on the basis of market prices. Where market prices do not reflect environmental harm, liability and economic instruments should be used to internalize environmental costs into business operations. The nature of liability rules has been debated extensively and there is widespread support for strict-based liability standards. Economic instruments such as eco-taxes and tradable emission permits are also essential for conveying environmental costs and benefits into market transactions and promoting environmental damage internalization among developers. If pollution damage and resource consumption are not accurately priced in market activity, it is difficult to see how financial organizations can be expected to incorporate environmental considerations into their own financial analyses and decisions.[27]

In addition to environmental pricing instruments, the state must mandate comprehensive environmental auditing, disclosure and reporting among companies and, crucially, financial organizations themselves.

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25 Hakan Hyden, *The Dependency Of Laws Upon Norms*, *in* Land Use And Nature Protection: Emerging Legal Aspects 351-355 (Helle Tegner Anker & Ellem Margrethe Basse eds., 2000).

26 Julia Black, Rules and Regulators 221 (1997).

27 Richardson, *supra* note 1, at 385.

Incorporating environmental costs, liabilities and policies into corporate reporting systems is essential to promote proper reflection on environmental performance and ensure adequate communication of environmental information to financial markets and institutions. Crucially, environmental appraisal through financial organizations can ensure that proper reflection on environmental costs and benefits occurs at the very beginning of the project cycle before costly investment and design commitments have been made. One of the reasons why conventional environment impact assessment regulations have not promoted sufficient environmental reflection among developers is that the assessments can often occur too late in the development cycle.[28] For financial markets, environmental appraisal and disclosure mechanisms can facilitate credit and insurance risk assessments, as well as corporate valuation in stock markets. The environmental reporting rules of the Securities and Exchange Commission (USA) and EMAS (EU) are very good examples on this point.[29]

Internationally, guidelines and coordination mechanisms are needed to promote the dissemination and national convergence of environmental policy standards for the financial services sector. With harmonization of international standards, enterprises threatened by higher charges and controls from the local banking or insurance sector may simply flee to jurisdictions with less onerous controls. International governance is underdeveloped in respect of environmental regulation of global financial markets. There exist a wide range of intergovernmental and transnational industry and financial associations that could provide a starting point for formulating and articulating such standards and guidelines.[30]

28 Christopher Wood, Environmental Impact Assessment: A Comparative Review (1995).

29 Richardson, *supra* note 1, at 385.

30 David Zaring, *International Law by Other Means: The Twilight Existence Of International Financial Regulatory Organizations*, 33 Texas International Law Journal 281 (1998).

The second level at which environmental governance reforms need to be undertaken is within the financial services sector itself. The important challenge is the redesign of regulatory systems to facilitate the role of banks, insurers and investors as environmental regulators. Lenders and investors obviously are concerned that the extension of pollution liability or other environmental controls to the financial services sector is unreasonable and would lead to the retraction of financing from sectors of risk, thereby causing economic problems that outweigh any environmental protection advantages. Yet, incorporating environmental considerations into lending and insurance decision-making can be to the benefit of these financial sectors by reducing their credit and insurance risk.[31]

Specific reforms are also required within each arm of the financial services sector. Institutional investors display a number of environmental policy-relevant functions. In principle, they can channel investment resources into businesses with strong environmental performance, and be stakeholders in corporate environmental management, through shareholder proposals, voting and share selling tactics. The growth of state contingent markets points to an additional role for capital market players in managing large, collective environmental performance, rather than specific projects or facilities, and reflecting their knowledge through adjustments to corporate valuation. Because of limited monitoring capacity and political obstacles, environmental liability arguably should not extend to investors except perhaps in circumstances where they are dominant shareholders and have a capacity to materially influence corporate environmental performance. Reforms in this sector need to focus on: expanding corporate environmental reporting requirements; environmental disclosure requirements for investors themselves; and reorientation of fiduciary rules to enable due attention to be given to environmental choices in investment decision-making.[32]

31 Richardson, *supra* note 1, at 386.

32 *Id*. at 387.

III. Financial Organizations as Co-Regulators for Sustainable Development

The financial services sector has generic relevance to the achievement of sustainability in a variety of guises: as investors, supplying the resources for environmental initiatives; as valuers, pricing risks and estimating returns for companies; and as stakeholders, such as shareholders and lenders, exercising influence over corporate management.[33] To illustrate, financial organization may demand environmental appraisal of borrowers, projects or use pollution insurance to price the environmental risks of development.[34] Financial organizations and markets have always, and in many ways increasingly so, been subject to detailed regulation and close monitoring to ensure transparency, accountability and prevent unfair dealings in pursuit of certain public policy objectives.[35] The challenge today is to graft onto the financial services regulatory systems an additional stratum of environmental controls to steer agents towards sustainable development. But rather than government attempting to regulate in minute detail company environmental practices, government bodies could mostly confine themselves to regulating at the 'wholesale' level, setting the broad regulatory parameters and standards for the financial services sector.[36] This would concede to industry and financial institutions responsibility to shape and supervise environmental behavior at the 'retail' level, with state involvement reserved for the most serious cases or environmental management tasks

33 Delphi International and Ecologic GMBH, The Role of Financial Institutions in Achieving Sustainable Development (1997).

34 Richardson, *supra* note 1, at 20.

35 *See generally* George J. Benston, *Consumer Protection as Justification for Regulating Financial Services Firms and Products*, 17 (3) Journal of Financial Services Research 277 (2000); Chris Ford & John Kay, *Why Regulate Financial Services?* in The Future For The Global Securities Market: Legal And Regulatory Aspects 145 (Fidelis Oditah ed., 1996).

36 Richardson, *supra* note 1, at 20.

such as biodiversity conservation, which may be less amenable to private control.[37]

The banking sector has investment functions as well, but is most important in terms of provision of debt finance, especially for SMEs that lack access to equity markets. In addition to the effects of environmental reporting and financial incentive mechanisms, banks can be induced to be environmentally responsible lenders through liability rules, tax incentives, and prudential regulatory standards that encourage proactive environmental lending and support. But for economic efficiency, information and political reasons, governments cannot be expected to actually dictate lending strategies to banks. Banks have a relatively strong ability to monitor individual projects financed for environmental risks and are able to price environmental price through the cost of capital. They can also encourage borrowers to adopt environmental safety measures, especially SMEs. However as secured creditors banks incentives to monitor borrower's environmental effects may be bounded, with limited reason to take account of the interests of potentially harmed third parties unless of course banks are exposed to their borrower's liabilities, or third party claims that affect borrower's capacity to service loans.[38]

The insurance sector has in some ways a greater potential to be mobilized as an environmental regulator. Banks are increasingly requiring borrowers to take out environmental liability insurance and banks are also insuring themselves against lender liability. Insurance is a market mechanism for spreading risk and pricing companies' involvement in environmentally problematic activities. In addition to its traditional economic functions, insurance offers a reflexive style of regulation, communicating to economic actors the nature and cost of environmental risks, and offering incentives

37 E. Donald Elliot, *Toward Ecological Law And Policy*, *in* THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 170-176 (Marian Chertow & Daniel C. Esty eds., 1997).

38 Richardson, *supra* note 1, at 387.

for businesses to operate more carefully. The insurance industry has more experience than other financial organizations in environmental risk management, is able to facilitate the environmental assessment of enterprises and auditing of project facilities, and to price risks through variable insurance premiums and coverage conditions. Insurance also provides a means of supplying funds for compensation to victims and repairing environmental damage. By means of its premium income, insurers have also become major investors in equity markets, in principle allowing them to reinforce their environmental preferences by directing investment away from hazardous industries. Governments can strengthen the contribution of insurance by setting clear and appropriate liability rules for environmental damage and mandating insurance for certain environmentally hazardous operations where judgment-proof firms may otherwise under-insure. Governments could also establish compensation funds financed through environmental taxes for historic pollution problems for which there are no existing responsible parties.[39]

In addition to the discrete roles of individual financial sectors, the inter-relationships between banks, investors and insurers must also be understood and structured appropriately to advance environmental policy. Liberalization of financial markets has blurred the traditional distinctions between financial entities; banks for example, are increasingly involved in the provision of investment and insurance services, whilst insurers are actively investing in the equity markets. As the demarcation between financial organizations fades, it will be more appropriate to focus on financial services and products rather than their sponsoring organizations. In the current climate, institutional investors would appear to have greater relevance to large corporations that rely on financing through the equity market for business expansion. Through provisions of debt finance and business advisory services, banks are better placed to influence SMEs. In terms of environmental risk management, banks and insurers through credit

39 *Id.* at 388.

and premium assessment are best placed to undertake this environmental regulatory task. Banks and insurers are also both well placed to support environmental audits of business facilities and projects and to advise on environmental safety. However, insurance markets would appear to offer greater scope for monitoring and controlling environmental risks, given that banks often focus on a discrete funded project and protecting their loan security, whereas insurers may be covering a wide range of risks for an entire enterprise.[40]

IV. Barriers to Enrolling Financial Organizations in Environmental Policy

The shift towards shared governance is not without a number of challenges and potential problems for the state. Because of the risk that shared governance may generate confusion among regulatees and the broader community as to where final authority and policy responsibility lies, it is essential that chains of regulatory control are readily traceable back to the primary government authorities. Careful design of monitoring and oversight mechanisms is needed to ensure the state is able to track and verify implementation of policy goals and ensure governance systems are democratically nourished.[41] Grabosky sees the challenge as one of 'meta-monitoring', by which government agencies focus on 'strategic surveillance' and 'monitoring the overall regulatory system' but engage in 'authoritative intervention' where third party resources are lacking.[42] Even without proactive intervention, regulatory partnerships with the private sector may disguise strong state control over the policy process. Bennet argues that if power is understood as the capacity to convince others to adjust their behavior in accordance with the principal's wishes, then enlistment of others

40 *Id.*

41 *Id.* at 12.

42 *See* Grabosky, *supra* note 2, at 544.

by the state can be understood as an aspect of the exercise of power.[43] Moreover, power may also accrue from the process of enlistment; it is by enlisting other institutions that the state can become powerful and achieve its policy objectives. Notwithstanding this, the participation of market institutions in the design of regulatory processes is important for it helps ensure that regulation is tailored to the institutional contexts to which it is intended to apply and, secondly, that nongovernment interests have a stake in the success of regulation.[44]

Enrolling financial organizations as a means of environmental governance might seem anathema to sustainable development. The incentives for financial institutions to better address the environment may be lacking beyond the desire to avoid the traditional kinds of environmental liabilities. The main conceptual obstacle to connecting financial markets and the environment is the rival incentive systems of private capital and environmental policy. The incentive systems for private investment and environmental protection differ markedly. Investors generally aim to externalize environmental costs, whilst environmentalists wish to internalize such costs. Investors and other financial institutions tend to seek to short-term gains, whereas environmentalists seek sustainable benefits. Participants in financial markets often seek minimal and reducing government regulation, in contrast to the higher levels of intervention often demanded by environmentalists.[45]

Financial markets to date have mostly recognized negative environmental performance and have yet to systematically appreciate that a company's environmental management can be a reliable indicator of good business

43 Paul Bennet, *Environmental Governance and Private Actors: Enrolling Insurers in International Maritime Regulation*, 19 Political Geography 875-878 (2000).

44 *Id.* at 896.

45 Richardson, *supra* note 1, at 382.

management. Banks and insurers tend to be concerned about the downside risk created by environmental factors and are less worried about their upside potential. Market uncertainty can exist as to the relationship between environmental performance and business performance and there can be difficulties in obtaining good quality information in ways that the sector can rapidly understand and efficiently use. There are also barriers to making the environment sufficiently important to merit the attention of some financial institutions when faced with challenges ranging from monetary union, market competition and consumer service concerns.[46]

There also exist institutional barriers to enrolling financial organizations in environmental policy. The most substantial such barriers exist within the state itself. Central banks, treasuries and other strategic arms of the state have yet to articulate their responsibilities through the lens of sustainable development. Environmental policy can be undermined by inadequate inter-agency cooperation and the lack of a shared environmental framework to guide decision-making. Bureaucratic self-interest and rivalry exacerbate inter-agency coordination failures. Government financial and economic authorities commonly operate in isolation from environmental authorities and short-term economic interests frequently prevail over long-term environmental concerns in decision processes.[47]

Thus, for financial services sector to become environmentally sustainable, a whole raft of policy and legal changes are required. Such transformations in operations are needed in both public sector authorities involved in economic policy and public finance, and in the private commercial sector. In some instances, therefore, there will be a case for direct regulatory involvement to require financial institutions to consider environmental matters. Financial markets are already highly regulated in pursuance of various public policy objectives and there is scope to graft environmental policy into existing legislation. In this respect, government

46 *Id.*

47 *Id.* at 383.

incentive measures rather than regulatory commands may be more readily acceptable and efficiently implemented.[48]

Reflexive law provides a structure to overcome some of the barriers to financial organizational action. Reflexive legal requirements such as environmental auditing and reporting that generate information and encourage its meaningful consideration can help direct corporations and financial organizations towards sustainable development in their decision-making. Through environmental liability laws, mandatory insurance and corporate environmental reporting requirements, the state can retain a regulatory backdrop, steering and facilitating environmental management in the market-place, and reducing the regulatory overload problem that comes with hands-on controls. In turn, each financial organization has capacities to be instruments of reflexive environmental regulation. The environmental appraisal systems used in bank credit risk processes and insurance risk assessments can encourage participating enterprises to better reflect on, understand and modify their environmental activities accordingly. Through the conditions attached to loans and insurance services, environmental policy can be embedded and diffused into economic decision-making in a way that would be difficult for external government regulators. The overall aim should be for the state to mobilize financial organizations as part of regulatory chain where, banks, investors and insurers are induced to facilitate sustainable development and discipline poorly performing companies on behalf of the state.[49]

V. Conclusion

The principle of sustainability is founded on the integration of environment and developmental policies. It seems that the prevailing systems of government tend to fragment and disconnect relevant issues and

48 *Id.*

49 *Id.*

actors.[50] The nature of environmental problems, in particular the scientific uncertainty and extraterritorial effects of environmental pollution requires a change in established systems of law and administration. The ideal of a wholly discrete system of environmental law is anachronistic, given the need to diffuse and embed ecological considerations throughout aspects of social and economic governance that influence environmental conditions.[51] A transformation from a system of environmental law to a 'law of the environment' is necessary to integrate ecological imperatives into social and economic decision-making. The challenge is for environmental controls to infiltrate throughout systems of social and economic governance.[52] The environmental law diaspora, whilst retaining core planning, impact assessment and conservation management functions, is one that should extend to and inhabit our financial and economic regulatory regimes, in which the environment is an issue recognized and accounted for among government agencies and private businesses.[53]

Sustainable development will not be achievable unless markets place greater emphasis on long-term investment and appropriately value the environmental costs and benefits of corporate decisions. Such changes could lead to firms whose activities facilitate sustainability being viewed as more valuable by markets and acquiring preferential access to finance, insurance and investment resources from relevant market institutions.[54] Role of financial institutions as co-regulators will provide financial markets experience and expertise in environmental risk management. We need to ensure that all relevant parties are doing their role well regarding the reduction of environmental impacts. If the concerned parties are not taking

50 OECD, Integrating Environment and Economy: Progress in the 1990s (1996).

51 Tim Jewell & Jenny Steele, *Law in Environmental Decision Making*, *in* Law in Environmental Decision Making: National, European and International Perspectives 7-9 (1998).

52 Richardson, *supra* note 1, at 14.

53 *Id.* at15.

54 *Id.* at 17.

care of their environmental responsibilities, then the environmental cost will be high in the future. It would be better to prevent environmental problems rather than paying a huge environmental cost in the future and this would be cost effective too.

Effective environmental governance also depends on the state acting as more than a mere regulatory backdrop. Governments must retain responsibility for making meta-rules that create strategic frameworks for action and reflection, including mechanisms to steer market institutions towards positive environmental roles.[55] Sustainable development strategies and green plans are the ultimate key mechanisms for setting environmental objectives within which the state and market can function. In particular, overall ecological limits and environmental quality objectives must be developed socially because, whilst the market may facilitate resource allocation, it contains no mechanism governing scale- that is, the market has no intrinsic tendency to contain growth up to the scale of aggregate resource use within biosphere limits.[56] Decentralized financial markets and economic instruments cannot effectively coordinate society towards certain environmental goals without some government direction. Tradable emission permits, for example, depend first on government setting a given environmental standard or 'cap' within which trading may occur.[57] Similarly, development lending by banks will not promote sustainable patterns of investment without a regulatory umbrella setting environmental goals and standards.[58]

Harnessing financial organizations as co-regulators for environmental policy does not involve privatizing environmental law but rather extending

55 *Id.* at 23.

56 Herman E. Daly, *Allocation, Distribution and Scale: Towards an Economics that is Efficient, Just and Sustainable*, 6 Ecological Economics 185 (1992).

57 OECD, Implementing Domestic Tradable Permits for Environmental Protection (1999).

58 Richardson, *supra* note 1, at 24.

environmental law into previously untapped market sectors to provide an additional layer of regulatory controls alongside the more familiar administrative ones.[59] The expertise and the financial resources of lenders help the financial organizations to fund eco-friendly projects and environmental governance will become more straightforward. Inserting environmental standards within the financial service sector can improve the effectiveness of environmental protection. The environmental goal of sustainable development should be given importance in environmental decision making rather than deference to the sanctity of public regulation. The enrolment of financial institutions as co-regulators of environmental governance will better realize sustainable development within the untouched areas of environmental protection.

59 *Id. at* 25.

Creator – Entrepreneur Relationship: COVID-19 and Beyond

Arathi Ashok *

Though the legal mechanism of copyright evolved only after the invention of the printing press, men have been engaged in creativity activity much longer than that. It is the absence of techniques to copy and reproduce the creative works that delayed the invention of the copyright system. The possibility of unauthorized copies and the consequential loss in revenue led to the creation of the Stationer's Company and later the Statute of Anne in 1710. The Statute of Anne states that the purpose of its enactment is for the protection of authors, but the only subject matter that is protected is books. With course of time the scope of protection of copyright increased but it has always been a mechanism for the protection of creative artists.

Through the course of this paper the author will examine the authors protected under the copyright regime and various justifications for their protection. The paper will then examine the inbuilt statutory provisions dealing with creator – entrepreneur relation and how the covid situation has changed it.

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The Creator

The creator under the copyright law is called the 'author'. Author in common English means the writer of a work or the originator or creator of something.[1] The Berne Convention for the Protection of Literary and Artistic Work (hereinafter Berne Convention), 1886 expressly states that it was constituted for the protection of rights of author[2] and for their benefit.[3] In spite of this, the Convention had not defined the term author. The reason for this is attributed to the fact the national laws were too divergent on the issue of whether only natural persons could be authors or not.[4] In spite of this we can see that the inclination of the Convention is towards a human author which can be deduced from certain provisions like that which specifically provides that the protection of the Convention shall apply only to authors who are nationals of one of the countries of the Berne Union[5] and that the term of protection shall be for the life of the author and fifty years after his death.[6] This inference has been slightly tilted by the term of protection provided under the TRIPS agreement which delinked the term of protection from the life of the author[7] thereby providing no mandate under international law as to who an author has to be. Consequently, countries had the freedom to determine authorship to suit their domestic needs.

Exercising the freedom provided under the Berne Convention, India through the 1955 Copyright Bill defined author in relation to literary or

1 https://www.merriam-webster.com/dictionary/author

2 The Berne Convention, 886, art 1

3 The Berne Convention, 886, art 2(6)

4 Guide to the Berne Convention for the Protection of Literary and Artistic Work (Paris Act, 1971)11(WIPO 1978)

5 The Berne Convention, 1886, art 3

6 The Berne Convention,1 886, art 7

7 The TRIPs Agreement, 1995, art 12

dramatic work as the author of the work itself,[8] thereby giving no clarity as to what it actually means. The same language is available in the 1957 Act too which is carried to this date.[9] The Act has taken an approach of specifying who the authors for the different kinds of works are but no means of understanding what is the rationale of explaining who the author is in case of new factual situations. It is also interesting to note that the notion of authorship is not linked to any kind of creativity. So, whether only a creative person would fall under the definition of 'author' is also not clear.

The Act merely says that in relation to literary and dramatic works the 'author' is the author of the work itself. The approach of the Act is cyclic and in essence provides no guidelines in identifying such 'author'. Though the Act is not very clear in this regard the jurisprudence developed under English law is reflected under the Indian law too. The English law had unambiguously laid down that the author is the person who actually writes, compiles, composes or draws the work in question, although the idea of the work may have been suggested by somebody else.[10] A mere copyist or a person to whom words are dictated for the purpose of being written down is not an author.[11] This approach has been adopted by the Indian judiciary and it has held on multiple occasions that in relation to question papers the author is the person who set the question paper.[12]In *Academy of General Education* v. *Smt. B. Malini Mallya*,[13] it was held that the author of the dramatic work is Dr. Karnath who evolved a new distinctive dance by bringing in changes in the traditional form of Yakshagana on all those aspects

8 Copyright Bill, 1955, §2(c)(i), No. 15, Bill of Parliament, 1957 (India)

9 Copyright Act, 1957, § 2(d)(i), No. 14, Act of Parliament, 1957 (India)

10 Kenrick & Co. v. Lawrence & Co. (1890) 25QBD 99

11 9 LORD HAILSHAM., HALSBURY'S LAWS OF ENGLAND 548 (Butterworths 1974)

12 Rupendra Kashyap v. Jiwan Publishing House, 1996 (38) DRJ 81; Agarwala Publishing House v. Board of Higher Secondary & Intermediate Education & Ors., AIR 1967 All 91

13 Academy of General Education v. Smt. B. Malini Mallya, MIPR 2008 (1) 373

viz., raga, tala, scenic arrangement and costumes. Here again the notion of creator is attached with the legal notion of author. It must also note that literary works also comprise compilations, collections and databases too. Where the compiler of a directory or work of reference collects written material from a large number of individuals and arranges and publishes the result, the compiler, and not the individuals supplying the information, is the author of the work.[14] The same logic has been followed by the Indian court where it was recognised that when a person develops a compilation of addresses by devoting time, money, labour and skill, then such compilation would belong to him.[15] What is interesting to note here is that the law does not require such a compiler to provide any kind of creative contribution to the work other than the intellectual capacity for the arrangement of such work.[16] Such diminished notion of creativity is also seen with the recognition of copyright for derivative works too; for example a copy-edited judgement would be eligible for copyright created by the author by his own skill, labour and investment of capital.[17] Thus we can see that the creativity expected out of an author is near zero.

The notion of author, though with minimal creative capacity, in literary and dramatic works is seen reflected in the notion of authorship of artistic works too. The law had made it clear that the author in relation to photographs is the person who takes such photographs as creativity vests on such person.[18] The law initially was that authorship of photograph was vested on the person who owned the negative or he devise going in line with the understanding that photography has its emphasis more on the mechanical activity. The approach probably changed with the understanding that photography is a creative art and the photographer exhibits creativity

14 A &C Black Ltd v. Claude Stacey Ltd. [1929] 1 Ch 201

15 Burlington Home Shopping Pvt Ltd v. Rajnish Chibber, 61 (1995) DLT 6

16 Macmillan and Another v. Suresh Chandra Deb, ILR 17 Cal 952

17 Eastern Book Company & others v. D.B. Modak and Another, AIR 2008 SC 809

18 Fairmount Hotels Pvt. Ltd. v. Bhupender Singh, CS(COMM) 111 of 2018

through selection and arrangement of the various subject matter of photography, pose, camera angle, etc.[19]It is more interesting to note that artistic works also include maps, charts and plans[20] which are mostly derivative in nature and captures existing facts and yet authors of these works are conferred with copyright, reflecting the minimal creative capacity required for copyright protection.

The author in relation to musical works is the 'composer.'[21] The law as initially enacted had not clarified who is the 'compose' but via Copyright (Amendment) Act, 1994 this was clarified by introducing definition to the term 'composer' as the person who composes the music.[22] Here again the legal notion of author is akin to that of creator

In relation to cinematograph film and sound recording authorship has been conferred on 'producer'. It is interesting to note that the Indian law treats cinematograph film and sound recording together, for the reason the under international intellectual property law sound recording is not understood as a subject matter of copyright but only a right neighbouring to that of copyright. It is also interesting to note that the Berne Convention does not make any indication as to the authorship of cinematographic films and on the contrary, it has specifically provided that each country, through its legislation, can determine who has to be the owner of such cinematograph film.[23] Under the Indian law,the term producer has been defined as a person who takes the initiative and responsibility for making the work.[24] To examine whether there has been a change in the notion of authorship, it is pertinent to undertint the meaning of 'person who takes initiative and responsibility.'

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19 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)

20 Copyright Act, 1957, § 2(d)(i), No. 14, Act of Parliament, 1957 (India)

21 Copyright Bill, 1955, § 2(c)(ii), No. 15, Bill of Parliament, 1957 (India), Copyright Act, 1957, § 2(d)(ii), No. 14, Act of Parliament, 1957 (India)

22 Copyright Act, 1957, § 2(ffa), No. 14, Act of Parliament, 1957 (India)

23 The Berne Convention, 1886, Article 14*bis*

24 Copyright Act, 1957, § 2(uu), No. 14, Act of Parliament, 1957 (India)

In *Ramesh Sippy* v. *Shaan Ranjeet Uttam Singh*[25] the contention of the plaintiff was that he was the director of the film and very closely involved at every stage of the film, the finalizing of the script, the screenplay, finalizing the star cast, the location for shoot, getting the film shot at location, dubbing and editing after the shooting was over[26] and hence needs to be recognised as the author of the film. Rejecting the argument, the court held that

> "An owner is therefore a person who has spent towards the production of the film and who has not merely arranged for the funds but in fact has taken the risk of commercial failure, i.e., one who will lose money if the film flops and who will reap the fruit of commercial success if the film is a hit."[27]

In other words, 'taking initiative and responsibility' is viewed in terms of financial responsibility and risk that is tied to the success of the film and authorship of the film has nothing to do with the creative contribution that has gone into the making of the film. Moreover, there is no legal requirement that the authorship of films needs to be vested on a natural human person as the entity that takes the initiative and responsibility can very well be a non-human legal entity. This also leads to the situation that the author of cinematographic work need not e creative as creativity is not something that can be attributed to the a non-human legal entity.

To remedy this situation the Copyright (Amendment) Bill 2010 introduced a change to the definition of 'author' to include principal director along with producer as the author of cinematograph film. This introduction was taking into account the flexibility the Berne Convention norm[28] which permits the countries to determine who can be the author of cinematograph films. The proposed amendment was vehemently opposed by the Film and

25 Ramesh Sippy v. Shaan Ranjeet Uttam Singh, MIPR 2014 (1) 32

26 Ramesh Sippy v. Shaan Ranjeet Uttam Singh, MIPR 2014 (1) 32 at para. 41

27 Ramesh Sippy v. Shaan Ranjeet Uttam Singh, MIPR 2014 (1) 32 at para. 42

28 Berne Convention for the Protection of Literary and Artistic Works, 1886, art. 14

Television Producers Guild of India, Indian Motion Picture Producers Association, South Indian Film Chamber of Commerce and Indian Broadcasting Foundation. It is interesting to note that there was no organisation or individual to support the claims of directors. It was not the least surprising that the amendment was dropped and never made it into enforceable law. Thus, the authorship of films remains with producers itself.

With the statutory regime remaining the same, it would not be fair to expect that the judicial approach would change in any manner. The decision *in Ramesh Sippy* v. *Shaan Ranjeet Uttam Singh*[29] was reiterated by the judiciary in *Kabir Singh Chowdhry* v. *Sapna Moti Bhavnani*[30] when the court held that

> … contribution as a camera person, as a creative director, as an editor are one deserving of special thanks. (But this) does not in and of itself translate into him being one who could be said to have taken the initiative and responsibility for making the work…… taking the initiative in conceptualising the work and bringing it into existence, and also accompanied by the risk-taking element of responsibility, then and only then does one become a co- producer entitled to protection under the Copyright Act for the purposes of a cinema film.

In short, no creativity is required from the person recognized as 'producer' and we see a total de-linking with the notion of creative author with that of the legal notion of author of cinematograph films. The same seems to be the understanding in relation to sound recordings too.

The 1994 Amendment Act also introduced a new works and its author. The new authorship recognised was in relation to literary, dramatic, musical or artistic work which is computer-generated and states that it will be vested on the person who causes the work to be created.[31] It is interesting to note

29 Ramesh Sippy v. Shaan Ranjeet Uttam Singh, MIPR 2014 (1) 32

30 Kabir Singh Chowdhry v. Sapna Moti Bhavnani, Feb, 2021 para 78

31 Copyright Act, 1957, § 2(d)(vi), No. 14, Act of Parliament, 1957 (India)

that there are no judicial pronouncements as to who would constitute 'the person who causes the work to be created.' As in the case of cinematograph films and sound recordings, computer generated works also require substantial investments and in all probabilities the interpretation of the producer might be followed here too. If "person who causes the work to be created" is equated with "initiative and responsibility" financial responsibility will be given more weightage than creativity and yet another variety of authorship which is delinked with the nation of creative authorship would be part of the legal regime.

This is extremely relevant in the modern context where creativity often is collaborative activity between software and humans. There are umpteen numbers of software which will help one write articles, blog posts and even write poems and make art works. Some of such commonly used software are Jasper, INK Editor, Grammarly, etc.[32] These collaborations can be seen in everyday life, particularly with large copyright intrinsic industries. For example, organisations like The New York Times, Reuters and Washington Post use AI for the generation of their content.[33] Who would be treated as the author of these works is a question that has to be taken care of the legal system at the earliest.

Entrepreneurs under the copyright system

Copyright confers a bundle of rights on its owner. These rights are basically classified into economic rights and moral rights. While moral rights help to retain the emotionally link between the creator and his creation, it is the economic rights which help the content creator to generate revenue from the created work. What has to be noted is that right from the beginning

32 Adam Enfroy,*7 Best AI Writing Software of 2022* (Ranked), https://www.adamenfroy.com/ai-writing-software (last visited Feb.18,2022)

33 Bernard Marr, *Artificial Intelligence Can Now Write Amazing Content -- What Does That Mean For Humans?*(Mar 29, 2019), https://www.forbes.com/sites/bernardmarr/2019/03/29/artificial-intelligence-can-now-write-amazing-content-what-does-that-mean-for-humans/?sh=69b2128150ab (last visited Feb.18,2022)

of the copyright system it is evident that the content creators are not in a position to exploit the work and has always depended on the certain entrepreneurs.

The first and, even today probably the, most significant of such is the publisher. It is interesting to note that from day of copyright, the role played by printers in taking the copyright system forward is undeniable. This is evident from cases like *Daniel Midwinter & other booksellers in London* v. *Gavin Hamilton*,[34]*Tonson* v. *Collins*[35] and *Millar* v. *Taylor*[36] where both parties are publishers and the author is totally absent from the scene of litigation. All the other entrepreneurs which help to exploit copyright work is linked to the entertainment and media industry. These are people who take the investment, in terms of money and technology, and risks in ensuring that the works reaches its intended audience. These entrepreneurs include producers of cinematograph film, producers of sound recordings and broadcasting organisations. What is interesting to note is that the first two categories of entrepreneurs are classified under the term 'author' itself under the Indian copyright regime.

The only intermediary that is recognised under the Indian copyright regime is the Broadcasting Organisation which holds the broadcast reproduction right[37] and does the activity of broadcast which involves communicating the copyrighted work to the public by wireless diffusion or by wire.[38]The rationale for protection of these intermediaries is the investment they made to ensure that the copyrighted work is communicated to the public.

When we look into the contribution of the publishing industry and the entertainment and media industry to the economy of India, we understand

34 Daniel Midwinter & other booksellers in London v. Gavin Hamilton, [1748] Mor. 8295 (7 June 1748)

35 Tonson v. Collins, (1761) 1 Black W. 301

36 Millar v. Taylor, [1769] Eng. R. 44; (1769) 4 Burr 2303.

37 Copyright Act, 1957, § 37, No. 14, Act of Parliament, 1957 (India)

38 Copyright Act, 1957, § 2(dd), No. 14, Act of Parliament, 1957 (India)

the colossal role of copyright. Between the years 2015 and 2019 the contribution of the publishing industry was 0.25% of our GDP and possessing a value of INR 0.5 trillion.[39]Looking into the entertainment and media industry ,it can be seen that in the year 2019 it grew over 9% with a total valuation of INR 1.82 trillion.[40] To understand the extent of the copyright dependency of the entertainment and media industry, it is essential to understand the components of this umbrella term. Apart from the print media, it comprises of content broadcasted through television including advertising, digital media, music and radio, filmed entertainment, online games and animation. If we try to look at this using copyright language, the entertainment and media industry thrives on literary, dramatic, musical, artistic works, cinematograph films and sound recordings.

Creator – Entrepreneurs Relationship

It is interesting to note that due to the non-rivalrous nature of copyrighted works, it can be simultaneously enjoyed by multiple persons and consequently it is possible to transfer the different rights attached to the same work to different persons. Hence the ownership of a work can be transferred by divesting all or some of the rights; for the whole term of copyright or for any specified term; throughout the whole of the territory of India or any particular region in relation to existing works of future works.[41] No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorized agent.[42]This

39 THE VALUE PROPOSITION OF INDIAN PUBLISHING: TRENDS, CHALLENGES, AND FUTURE OF THE INDUSTRY, https://assets.ey.com › topics › strategy › 2021/08 (last visited Oct. 21, 2021)

40 MEDIA AND ENTERTAINMENT INDUSTRY IN 2019 GREW BY ALMOST 9% TO REACH INR 1.82 TRILLION: EY- FICCI REPORT 2020, https://www.ey.com/en_in/news/2020/03/media-and-entertainment-industry-in-2019-grew-by-almost-9-percent-to-reach-inr-1-82-trillion(last visited Oct. 21, 2021)

41 Copyright Act, 1957, § 18(1), No. 14, Act of Parliament, 1957 (India)

42 Copyright Act, 1957, § 19(1), No. 14, Act of Parliament, 1957 (India)

was the only provision in the initial enactment dealing with the terms and conditions of the assignment of rights. Subsequently, when it was realised that this non- inference from the part of the State was not acting in favour of the authors and in effect acting detrimental to them, more conditions governing assignment was introduced via the Copyright Amendment Act of 1994. The newly introduced conditions imposed that such assignment contract shall identify the work on which the rights are being transferred; specify the rights assigned, duration, territorial extent of such assignment,[43] amount of royalty and other considerations payable to the author.[44] If the period of assignment is not stated it shall be deemed to be five years from the date of assignment[45] and if the territorial extend is not prescribed in the contract it is presumed to extend within India.[46]

If the assignee does not exercise such rights within one year from the date of such assignment it shall be deemed to have lapsed unless otherwise specified in the assignment.[47] The assignor can file a complaint to the Commercial Court if the assignee fails to make sufficient exercise of the rights assigned, failure not attributable to the act or omission and then after such enquiry as it deems necessary the Court may revoke the assignment,[48] or order for recovery of any royalty payable.[49] But no order for revocation shall be made within a period of five years from the date of such assignment.[50]

The Act initially provided that transfer of right can be only in relation to technologies known at the time of entering into such agreement.[51] But when scope of the right granted expands due to technological developments

43 Copyright Act, 1957, § 19(2), No. 14, Act of Parliament, 1957 (India)

44 Copyright Act, 1957, § 19(3), No. 14, Act of Parliament, 1957 (India)

45 Copyright Act, 1957, § 19(5), No. 14, Act of Parliament, 1957 (India)

46 Copyright Act, 1957, § 19(6), No. 14, Act of Parliament, 1957 (India)

47 Copyright Act, 1957, § 19(4), No. 14, Act of Parliament, 1957 (India)

48 Copyright Act, 1957, § 19A(1), No. 14, Act of Parliament, 1957 (India)

49 Copyright Act, 1957, § 19A(2), No. 14, Act of Parliament, 1957 (India)

50 Copyright Act, 1957, § 19A(2), No. 14, Act of Parliament, 1957 (India)

51 Copyright Act, 1957, § 18(1), No. 14, Act of Parliament, 1957 (India)

and consequently new rights gets created, problem arises as to the ownership of these new rights regarding whether the assignor who assigned already all the existing rights on the work or the assignee shall be the owner of these new rights. This question came before the court in *Raj Video Vision* v. *K. Mohanakrishnan*,[52] where the producer of a film 'Pasamalar' assigned all rights to the defendant in 1988. But later the producer entered into agreement with plaintiff and assigned video right of same film in India and Sri Lanka. The defendants sent a notice to the plaintiff alleging infringement of copyright and the plaintiff filed a suit for declaration of the assignment between them and the film producer as valid in law and to restrain the defendant from interfering with their video rights. After going through the agreement, the court held that as per section 14(1)(ii) and Sec.2(d)(v) of copyright at the producer as the original owner and had all rights before entering into agreement with the defendant. At that point of time the technology of video cassettes were not there and consequently the video rights were also absent. Consequently, on the date of assignment in favour of defendant when the producers themselves were not aware of their future rights that would accrue due to scientific advancement, it cannot be said that they have already transferred those rights by way of assignment. Hence the subsequent assignment in favour the plaintiff was held valid. The same view was taken by the Madras high Court in its earlier decision of *Raj Video Vision* v. *M/s. Sun T.V*.[53]

But in *Maganlal Savany* v. *Rupam Pictures*[54] the plaintiff was given wide rights for exploitation of the film' Chupke Chupke' by the producer and the agreement read that "the assignor hereby agrees and undertaks that the said picture shall not be exploited or distributed or exhibited commercially, non-commercially or in any other manner what so ever in the contracted territory." At the time when the assignment was executed,

52 BM Piros v State of Kerala ,AIR 1998 Mad 294

53 Raj Video Vision v. M/s. Sun T.V., (1994) 2 LW 158

54 Maganlal Savany v. Rupam Pictures, 2000 PTC 556 (Bom).

the technology of satellite transmission was not available. Subsequently the Producer assigned satellite rights to the defendant. The plaintiff wants to restraint the defendants by injunction. Here the Bombay High Court held that the term "exploitation" has to be given a wider meaning and such exploitation of a film takes into account all the scientific and technological device that may be invented in future. Consequently, the right over satellite transmission also belongs to the plaintiff. This view was repeated by the Bombay High Court in *Maganlal Shivani* v. *Uttam Chitra*.[55]

When a similar matter came before the Delhi High Court in *A.A. Associates* v. *Prem Goel &Ors*,[56] it took the same view as that of the Bombay High Court. This was repeated again by the Delhi High Court in *M/s International Film Distributors* v. *Shri Rishi Raj*.[57] This confusion created by conflicting decisions from different jurisdictions with co-equal powers have been put to an end by the 2012 amendment.

The problem of conflicting judgements from various High Courts regarding recognition of new rights as a consequence of up gradation of technology was overcome by introducing amendments to sections 18 and 19. The newly introduced provision clearly states that assignment will be applicable only in relation to medium and mode of exploitation which exist and is in commercial use at the time such assignment is being made.[58] The amendment also provides an exception whereby the parties can specifically state that the assignment shall apply to medium and mode of exploitation which does not exist at that point of time.[59]

It is interesting to note that how the term and conditions were initially left to be determined by the free will of the parties, which is the creator and entrepreneur, and the market and how when found not to be in line with the

55 Maganlal Shivani v. Uttam Chitra, 2008 (Vol. 110) B.L.R. 925

56 A.A. Associates v. Prem Goel &Ors., AIR 2002 Delhi 142

57 M/s International Film Distributors v. Shri Rishi Raj, MIPR 2009 (2) 108

58 Copyright Act, 1957, § 18(1), No. 14, Act of Parliament, 1957 (India)

59 Copyright Act, 1957, § 18(1), No. 14, Act of Parliament, 1957 (India)

protection of the authorial interest, to control the work to the best advantage of the authors, the legislature interfered by enacting provisions that would help authors better enforce their right. Thus, we can see that the legislative attempt was always to fall in line with authorial interest. In stark contrast to this, we can see the judiciary, at least in most situations, taking a stand where by the ability of the authors to control their work in relation to when newer technologies evolve has been deprived and the same being vested on the entrepreneur. It must also be noted that the legislative interference has been minimal and there is much left to the parties to negotiation based on their bargaining capacity. The key element here is the disproportionate bargaining capacity between the creators and entrepreneurs which was made evident during the Parliamentary Standing Committee on the Copyright Amendment Bill in relation to recognition of director as creator of cinematograph film along with its producer.

Relook into the Creator – Entrepreneurs Relationship

It is this imbalanced market that was hit hard by the COVID-19 pandemic. It brought new consumption habits and modes of exploitation of copyright based works not just in India but globally. Some of the changed industry patterns include decline in pay TV but increase in digital access, average mobile data consumption increased by 15%, leading to overall increase in TV consumption.[60] The lockdown which followed the pandemic increased the app based video streaming to 40%.[61] The printing market fell 36% in 2020 when compared to 2019 and this also includes magazines and newspapers. Only 441 films were released in 2020 as opposed to 1833 films

60 PLAYING BY NEW RULES: MEDIA AND ENTERTAINMENT INDUSTRY TRENDS 2020, https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2021/ey-india-media-and-entertainment-sector-reboots.pdf, 48(last visited Oct. 21, 2021)

61 PLAYING BY NEW RULES: MEDIA AND ENTERTAINMENT INDUSTRY TRENDS 2020, https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2021/ey-india-media-and-entertainment-sector-reboots.pdf, 102 (last visited Oct. 21, 2021)

in 2019 and 80% of this reached the intended audience through OTT platform.[62] More investment into animation particularly children consuming content.

What we see for this is creation of work but its exploitation through different medium, precisely the digital medium. Though the Copyright Act was amended in 2012, not much had been added to regulate the exploitation of copyrighted work on the digital platform. The 2012 Amendment was lobbied by lyrists and composers that work in the film industry to the extent that whenever their work is exploited outside the cinema theatre, the lyricist and composers would get co equal share. This was done with the understanding that releasing the movie in the theatre was the major source of revenue, which has changed drastically with the onset of the pandemic and probably here to stay. The new kinds of works like gaming apps and animations are being created more as part of start-ups and by young creators who do not have much knowledge of the copyright law and the inbuilt limitation regarding transfer of copyright.

Though with the change in the COVID situation, things might change back but the OTT platforms are here to stay. We also see quiet a lot of content being created solely with the intention if being communicated to the public over the OTT platforms. But what needs to be noted is that the act of transmitting over the internet will not fall under the definition of broadcasting and consequently entities like Netflix and Hotstar will not fall under the category of broadcasting organisations. Hence there is a legal vacuum as to how they are protected within the current copyright regime.

Moreover, the authorship of cinematograph films is still vested with the producer of the work and there is a de-link between creativity and authorship of cinematograph films. This needs to be corrected by

62 PLAYING BY NEW RULES: MEDIA AND ENTERTAINMENT INDUSTRY TRENDS 2020, https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2021/ey-india-media-and-entertainment-sector-reboots.pdf, 144 (last visited Oct. 21, 2021)

reintroducing the notion of joint authorship in cinematograph films between the producer and the principal director. Similarly, the law is pretty bleak when it comes to works created collaboratively by the human author and software, particularly in the context of artificial intelligence generated works. All these goes to show that the copyright law needs further change based on these changed circumstances, keeping in mind the fundamental that copyright is a system to protect actual creators of various works.

Rights of De notified and Nomadic Tribes: A Farce of the Constitution?

Jean Vinitha Peter*

I. Introduction

De notified and Nomadic tribes (hereinafter referred to as DNT/NT) as they are often referred to is a group of people not much heard of among the academic debates and discussions. They live scattered throughout the territory of India. On the one hand, the Constitutional provisions and the various legislations guarantee rights and privileges and in strong words speak about the enforcement of these rights and privileges of the citizens. On the other hand, the government is relentlessly involved in devising welfare schemes, policies and programmes for the welfare and betterment of the citizens especially the marginalised and the underprivileged. Despite all this exercise, the question that remains to be answered is whether all these rights, privileges, policies, programmes and welfare measures are literally enjoyed by the people for whose betterment it is aimed at. The Preamble of the Constitution resolves to secure to all its citizens social, economic and political justice. The Directive Principles of State Policy strives to bring about a socialistic pattern of society. With all this being done, the De notified and Nomadic communities are an underprivileged lot

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who have not been benefitted and continue to be the worst marginalised among the various sections.

Ironically, one has to admit that apart from the fact that these privileges, rights and welfare measures are beyond the reach of these underprivileged and marginalised communities, the existence of these rights, privileges and welfare measures are even unheard of, by these communities.

Despite the lapse of more than seventy years since the coming into force of the Indian Constitution, the fact remains that the so called De-notified and Nomadic tribes remain more disadvantaged, more marginalised, more underprivileged and more neglected. More so, it would not be out of place to say that, even the state agencies are deliberately denying the rights, privileges and benefits that are due to the DNTs for strange reasons.

In this paper, an attempt is made to portray the legal, social, economic and political hurdles that obstruct the realisation of the rights of the De notified and Nomadic Tribe communities and to suggest ways and means by which the rights guaranteed by the Constitution can be realised by these underprivileged communities and thereby bring these historically wronged and deprived communities at par with the historically favoured and privileged.

II. Historical Background of the De notified and Nomadic Tribes

i) Legislative History

After the Sepoy Mutiny or the First War of Indian Independence, the British administration in a paranoid mood, saw 'crime' everywhere. Their inability to understand the lifestyle of the wandering communities compounded by the suspicion that some of the members of these communities had aligned with the Mutineers, led them to take a very harsh view of these people. The British attended to understand these communities through the rationale of caste system and interpreted crime as a caste based feature in India. This culminated in the enactment of the first Criminal Tribes

Act in 1871.[1] The main aim of the 1871 Act was to keep an eye on the activities of the criminal tribes. A constant surveillance over and vigilance about their activity was planned, but it was not the intention or object of this Act to check the nomadism of these people as nomadism or moving from one place to another was not regarded in any way objectionable and harmful by the Society. [2]

The Criminal Tribes Act, 1871 gave wide ranging powers to the provincial governments. The provincial governments were authorised to declare any group of people who were incorrigible criminals as criminal tribe. These groups included nomadic cattle grazers, wandering singers, traders, acrobats etc. They predominantly lived in forests and, according to the British, only criminals would do so.[3] The new legislations introduced by the British created new 'criminals' all the time. These were either people ignorant of the new laws or those wilfully defiant of the ones which encroached on their traditional rights-for instance forest laws. There were a number of communities who did not know the newly imposed forest laws under which they were forbidden to collect honey, bamboo leaves or medicinal herbs which they used to barter with the villagers. They continued to do so partly in ignorance, partly thinking it to be their hereditary right. The new laws on common pastures for grazing of cattle turned the whole communities into criminal tribes by the British administration because they

1 Gayatri Chakravorty, *The denotified and nomadic tribes of India, Appeal for Justice and Struggle for Rights* (March11, 2019, 6.45 PM), https://www.tandfonline.com/loi/riij20 (last visited June 15,2022)

2 M. Subba Rao, *Understanding Denotified and Nomadic Tribes through Resolutions, Recommendations & Representations* (April 15, 2020, 6.15 AM) https://www.academia.edu/4145063/Understanding_Denotified_and_Nomadic_Tribes. ((last visited June 15,2022)

3 Vijay Korra ,*Status of Denotified Tribes Empirical Evidence from Undivided Andhra Pradesh*, EPW, (January 28,2019, 7 PM), https://www.epw.in/journal/2017/36/special-articles/status-denotified-tribes.html. (last visited Mar 18,2022)

continued to graze their cattle.[4] The Criminal Tribes Act, 1871 enumerated a Province wise list of criminal Tribes and restricted their movement making elaborate arrangements for their surveillance.[5]

The Criminal Tribes Act, 1871 defined a Criminal tribe as any tribe, gang or class of persons addicted to the systematic commission of non-bailable offences. The Act gave unguided discretionary power to the Governor-general in Council to declare any Criminal tribe, gang or Class of Persons without any fixed place of residence following a lawful occupation peculiar to that tribe, gang or class.[6] The Act mandated that whenever, the criminal tribes came to villages or cities in search of livelihood, they had to compulsorily register their names and could not leave the place without prior permission.[7] The Criminal Tribes Act, 1871 underwent several amendments. All the amendments were consolidated in the Criminal Tribes Act, 1924.

The Criminal Tribes Act, 1924 empowered the provincial governments to declare criminal tribes and prepare a list of their members having identification mark and thumb impression of each member. Besides, a check was put on the migratory instinct of the tribals. They were not to leave their place without prior permission of the Police. The most significant feature of the 1924 Act was the provision for reform and rehabilitation of the criminals. The provincial governments were issued express instruction to

4 Meena Radhakrishna, *Criminal Tribes and the Debates on Criminal Law Criminal Tribes Act, 1871: The Construction of an Indian Criminal*, EPW (January 28, 2019, 7.20 PM) https://www.epw.in/journal/2007/51/special-articles/urban-denotified-tribes-competing-identities-contested-citizenship. (last visited June 15,2022)

5 Anna R Jay, *Beyond the Margins Stigma and Discrimination against India's Nomadic and De notified Tribes*, New York University, HRLN, (January 29, 2019, 7.45 PM), https://hrln.org/reporting_publications/beyond-the-margins-stigma-and-discrimination-against-indias-nomadic-and-denotified-tribes/.(last visited Mar 18,2022)

6 Criminal Tribes Act 1871 § 2, 3 & 4

7 Criminal Tribes Act, 1871 § 18

draw up elaborate plans to provide relief and rehabilitation to the tribals.[8]

Thereafter, the Report of the Criminal Tribes Act Enquiry Committee under the Chairmanship of Ayyangar Ananthasayanam recommended for the repeal of the Criminal Tribes Act on the ground that section 3 of the Criminal Tribes Act was against the spirit of the Constitution. The Committee strongly recommended that the Criminal Tribes Act, 1924 be replaced by a Central legislation applicable to all habitual offenders irrespective of any distinction based on caste, creed or birth and the newly formed states included in parts B and C of the First Schedule to the Constitution, which have local laws for the surveillance of the Criminal Tribes to be advised to replace their laws in this respect by the Central Legislation for habitual offenders, when passed.[9]

ii) Habitual Offenders Act, 1952 – Old Wine in New Bottle

Post-Independence, the Indian Government replaced this almost a century old Colonial legislation with the Habitual Offenders Act, 1952. As a result, the tribes which were notified as criminal earlier under the Act was declared de notified communities or Vimukta Jati and the name de notified tribes has been in use for them.[10] However, the individual states in independent India implemented versions of the Habitual Offenders Act, carrying the same provisions as the Criminal Tribes Act which has the effect of old wine in new bottle. Despite, de notifying these tribes, instead of uplifting their lives, the legislations have served to stigmatise and deprive these disadvantaged and neglected marginalised tribes. The Police and vested interests have kept them engaged in criminal activities alone. Both the National and State Governments have completely ignored their rights

8 M. Subba Rao, *Understanding Denotified and Nomadic Tribes through Resolutions, Recommendations & Representations,(*April 15, 2020, 4 PM) https://www.academia.edu/4145063/Understanding_Denotified_and_Nomadic_Tribes. (last visited Mar 18,2022)

9 *Id*.at. 15

10 *Supra* note.8

to live decently. Being unorganised and not easily identifiable, they do not attract the attention of political parties. Though the repugnant Act has been repealed the perception of the Police towards the denotified communities has not changed. Both in training and practice, they continue to hold on to the concept of branding the whole communities as born criminals.[11] Moreover, the amended Act made no provisions for their livelihood even as they continued to face historical isolation, dishonour and social neglect.[12]

III. Social, Economic and Political Challenges faced by the DNT/ NT

Some of the so called 'criminal tribes' who were denotified with the enactment of 'Habitual Offenders Act' in 1952 were nomadic in nature earning their livelihood through various traditional occupations distinct to their tribe. These tribes mainly earned their livelihood through long distance trading and various forms of performance and entertainment.[13] Over the years, the livelihoods of denotified communities were hit by the advent of railways and mechanisation which surpassed their handmade products. Some groups were alienated from their landholdings, forcing them to live in deprived conditions. In addition, they remain isolated and excluded from the development process. The incidence of human rights violations against them is pervasive as they continue to face discrimination and social exclusion. This has resulted http://www.slic.org.in/uploads/2018/08/Beyond-the-Margin.pdfhave been facing persecution since the time of the British continue to be oppressed and deprived of their fundamental rights. They continue to remain out of reach of the affirmative state action and are stripped of the fundamental right to justice, equality and freedom. Despite

11 *Supra* note.1

12 *Id.*

13 Milind Bokil, *De-Notified and Nomadic Tribes: A Perspective*, EPW (Jan.29, 2019,) as cited in Anna R Jay, *Beyond the Margins Stigma and Discrimination against India's Nomadic and De notified Tribes,* HRLN, http://www.slic.org.in/uploads/2018/08/Beyond-the-Margin.pdfs.(last visited Mar 18,2022)

the passing of the Habitual Offenders Act, 1952 de notifying these tribes, they continue to carry the stigma of branded criminals and are treated as habitual offenders by the state and become easy replacements for criminals whom the police fail to apprehend.

The denotified and nomadic tribes are one of the most subjugated sections of Indian Society who have been the victims of the historical dislocation of a colonial legacy and the social stigma of their unconventional occupations. There may not be any other case in social history where cultural singularities of a set of communities has proven to be such a bane to their existence.[14] The emergence of modern secular institutions including democracy and judiciary has not been beneficial to these people either. This is a classic case of mismatch between tradition and modernity which has proven very costly in terms of social justice and equality.[15] The modern process of development has also failed to include them in its orbit. As a result the denotified and nomadic tribes continue to remain poor, marginalized and powerless communities. Unfortunately, their case has not been attended to by our democratic polity and civil society. Their vulnerable and marginalized cultures have also found to be an obstacle to the kind of change that our development imposes.[16]

i) Kaka Kalekar Commission

Kaka Kalekar Commission was the First Backward Classes Commission set up under the chairmanship of Kaka Kalekar by a Presidential Order on 29 January 1953 under Article 340 of the Constitution of India for identifying the

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14 Rudolph C. Heredia, *Denotified and Nomadic Tribes: The challenge of Free and Equal Citizenship* Occasional Paper Series, (April.28,2020,8.15 PM) http://www.unipune.ac.in/snc/cssh/historysociology/A%20DOCUMENTS%20ON%20HISTORY%20OF%20SOCIOLOGY%20IN%20INDIA/A%207%20Documents%20on%20Department%20of%20Sociology%20_%20University%20of%20Pune/A%207%2017.pdf (last visited Apr 20,2022)

15 *Id*

16 *Id*

socially and educationally backward classes. The Kalekar Commission classified the ex criminal or De notified groups as those owing to long neglect have been driven as community to crime and those nomads who do not enjoy any social respect and who have no appreciation of a fixed habitat and are given to mimicry, begging, jugglery, dancing etc. [17]

In its Report, the Commission attempted to define Backward People as those who do not command adequate and sufficient representation in government service, those who do not command large amount of natural resources like land, money and industrial undertakings, those who are nomadic, those who live by begging and other unwholesome mean, those who on account of poverty, ignorance and other social disabilities are unable to educate themselves or produce sufficient leadership.[18]

The Commission recommended certain additions and deletions to the existing list of Scheduled Castes and Scheduled Tribes. The recommendations of the Commission were partially accepted by the Government which led to the passing of the Scheduled castes and Scheduled Tribes Orders (Amendment) Act, 1956.[19]

ii) National Commission for the Denotified, Nomadic and Semi Nomadic Tribes (NCDNSNT)

The National Commission for the Denotified, Nomadic and Semi-nomadic Tribes was constituted by the Ministry of Social Justice and Empowerment under the Chairmanship of Sri. Balkrishna Renke to identify the castes belonging to the Denotified and Nomadic Tribes which have not been included in the lists of Scheduled Castes and to study the socio-economic conditions of these tribes and to suggest measures to improve the lot of the Nomadic Tribes to facilitate their assimilation into the national mainstream.

The Renke Commission submitted its report in 2008 wherein it stated that the Constitution did not specifically mention Denotified or Nomadic

17 *Supra* note.8 at.22

18 *Supra* note.8 at 26

19 *Supra* note.8 at 27

Tribes and confines itself to the Scheduled Castes, Scheduled Tribes and the Backward Classes. The Commission observed that even though a large number of these tribes and communities are in the lists of SCs, STs and BCs/OBCs, they have not been able to take advantage of the affirmative action programmes launched by the Union and the States from time to time due to illiteracy and ignorance. As a result, these Communities continue to be the most disadvantaged and the most vulnerable section of the Indian society.[20]

The Commission pointed out that many of these tribes have strong ecological connections. Many of them are dependent upon various types of natural resources and carve out intricate ecological niches for their survival. The changes in ecology and environment seriously affect their livelihood options.[21] For instance, Criminal Tribes Act (subsequently repealed in 1952 but replaced by Habitual Offenders Act), Indian Forest Act (its subsequent versions), Wildlife Protection Act of 1972, Land Acquisition Act of 1984, Prevention of Beggary Acts (States) adopting antiquated Bombay Prevention of Begging Act, 1959, The Drugs and Magic Remedies (Objectionable advertisements) Act 1954, Excise Act of 1944, Environment Protection and Biodiversity Conservation Act of 1999, Prevention of Cruelty to Animals Act, 1960, etc, have affected the Denotified, Nomadic and Semi-Nomadic communities by denying them access to the resources, to which they had traditional rights, and deprived them of their livelihoods.[22] The lifestyle of these tribes are so closely intertwined with nature that many of the

20 National Commission for Denotified, Nomadic and Semi-Nomadic Tribes (Com No.9/4/2006, 2008) (April.22, 2020,9.15 AM) http://socialjustice.nic.in/writereaddata/UploadFile/NCDNT2008-v1%20(1).pdf. (last visited Mar 18,2022)

21 Renke Commission Report, Annexure 5, Rapid Community Based Survey of Denotified, Nomadic and Semi-Nomadic Tribes in India, p. 26 as cited in Anna R Jay, *Beyond the Margins Stigma and Discrimination against India's Nomadic and De notified Tribes,* New York University, HRLN (Jan.29,2019,10.30 PM) https://hrln.org/reporting_publications/beyond-the-margins-stigma-and-discrimination-against-indias-nomadic-and-denotified-tribes/ (last visited Apr 28,2022)

22 *Supra* note.21

legislations which were enacted for the conservation and protection of the Forests, Wild Life and animals had a detrimental impact on these de notified and nomadic tribes that they suffered the worst displacement from their natural habitat.

Mostly, all DNT/NT have the common characteristic of nomadism and encompasses a wide range of culturally, ethnically and linguistic diverse tribes. As of now, there are several variants of 'criminal' tribes such as the Pardhis, Kanjars, Ramoshis, and Vanjaris who continue to remain aloof from the reach of affirmative State action.[23]

Legislations intended to protect land and resources had a detrimental impact on the livelihood of the DNT/NT. The Renke Commission has pointed out that the nomadic communities are denied of their customary rights to graze their livestock in common lands, agricultural land during post harvest seasons and forests. The restrictive Forest laws, eroding relationship with land owning communities, urbanisation and adopting sedentary form of life, proportion of families owning livestock as well as number of livestock owned have been declining.[24]

The mechanisation of production processes, advances in transportation technology and the rise of mass entertainment media have rendered these traditional occupations obsolete. A significant population of De-notified tribes in our country are deprived and denied of their basic rights to shelter, food, education, health, right to live with dignity etc even today. They are subject to stigma and discrimination not only in the hands of polity, society, state machinery etc. but also in the hands of other dominant sections of the society.

The spread of modern entertainment media, especially television, and also due to the laws that restrict them from performing with animals has affected the nomadic communities involved in traditional entertaining avocation. As a

23 Debayan Roy, *Habitual Offenders Act to be Repealed Soon? Govt Favours Idea* (Jan.29, 2019, 10.50 PM) https://www.news18.com/byline/debayan-roy.html (last visited Mar 18,2022)

24 *Supra* note.22 at 34

result, most of them are pushed out of their traditional livelihoods and without any alternative means of livelihood they either resort to petty trade, wage labour, or even to prostitution.[25] Apart from the state sanctioned discrimination, these tribes are also subject to hostility from the general public which prevents them from integrating with the mainstream of the society.

Some of the important recommendations of the Renke Commission include framing and implementing separate welfare schemes for the DNTs as a separate target group irrespective of the fact whether they belong to SC/STs or OBCs in order to enable the DNTs to take the benefit of various developmental schemes being implemented for the poor.[26] To issue Caste certificates expeditiously and in a time bound manner by the District Administration to enable the members of DNTs to avail the benefits of various welfare schemes. Observing that the DNT communities are deprived of the benefits of the Public Distribution system due to non possession of Ration cards, the Commission strongly recommended the States/UTs to undertake the exercise of issuing ration cards to DNT families by organising a special campaign for both urban and rural areas.[27] The Commission strongly taking note of the fact that the Denotified and Nomadic tribes are unable to exercise their right to vote either because they are ignorant or are on move from one place to another with the result of the exclusion of their names from the Voters List. The Commission therefore, strongly recommended that steps be taken by the Union Government, Election Commission of India and the State governments to undertake a special campaign for inclusion of their names in the Voters' List.[28]

Considering the fact that Housing is a basic need and also considering the fact that the nomadic tribes are generally on the move in pursuit of their traditional occupations for livelihood, in view of the changing economic scenario and the age old traditional occupations losing relevance in

25 *Supra* note. 21 at 91

26 *Supra* note 21 at 108

27 *Supra* note.21 at.109

28 *Id*.

providing the desired livelihood support, the nomadic tribes are slowly adapting to the idea of settling at one place and taking to alternate professions. In this background, the Commission strongly recommended that the Central governmentt earmark at least 50% of the outlay for building houses only for the DNTs.[29]

Acknowledging the fact that education is a basic agent of change in the process of socio economic development of the disadvantaged groups, the Commission recommended the opening of primary schools in areas predominantly inhabited by the DNTs and provide free education to the students of these communities. [30] Taking note of the fact that a large number of persons belonging to the denotified and nomadic tribes are proven artisans possessing the skill to make variety of handicrafts from materials such as clay, plaster of paris, glass, stone, marble, bamboo etc., the commission recommended the Central Cottage Industries Corporation of India to extend the benefits of their schemes to the artisans belonging to the Denotified and Nomadic tribes.[31]

IV. Adverse Impact of Environmental and other Legislations

To appreciate the cultural identities of the denotified and nomadic tribes, it is pertinent to understand the cultural occupation of the denotified tribes. The enactment of laws relating to Wildlife Protection, Environment Protection and Prevention of Cruelty to animals such as the Forests Conservation Act, 1980, the Wild Life Protection Act, 1972, the Anti Begging Legislations adopted by different states, the Prevention of Cruelty to Animals Act, 1960 and the Excise Act, 1944 has had detrimental effects on these de notified and nomadic tribe communities. As a result of the enactment of these legislations lakhs and lakhs of snake charmers, monkey players, kalandars, bird catchers and people using plants for herbal medicines etc., have not only lost their professions in the middle

29 *Id.* at.111

30 *Id*. at.113

31 *Id*.at.116

of their lives but are also facing police action and harassment by the NGOs and government agencies. After having lost their professions being the only source of livelihood, they are on the verge of starvation with there being no possibility of changing their professions for want of education or technical skill and know-how.[32]

The Wildlife (Protection) Act, 1972 (WPA) prohibits Hunting. Until 1991, hunting of animals, except Schedule-I animals, was permitted and hunting licenses have been issued by Chief Wildlife Warden for certain purposes including game hunting and wildlife trapping. However, it was completely prohibited afterwards except under certain specified circumstances and special purpose with prior approval of the Chief Wildlife Warden and Government respectively.[33] The Scheduled Tribes and other Forest Dwellers (Recognition of Forest Rights) Act 2006 recognizes the cultural and economic rights of Scheduled Tribes and forest dwellers except hunting rights. However, the scope of this law is confined to the communities who have settled in the forests such as scheduled tribes and other traditional forest dwellers and to the non-hunting traditional occupations. However, there is a complete legal vacuum so far as the recognition and protection of cultural and economic rights of traditional and nomadic and semi-nomadic communities are concerned.[34] Their livelihood has depended on their traditional occupation. e.g. animal playing on the street, snake charmer, an acrobat, musicians, begging in the name of God etc. However, in developing country like India, even the process of globalization has made development scenario much more complex in terms of NT-DNT‟s social-economic, cultural life and livelihood resources and is strongly leading to poverty, unemployment, and lack of access to resources. People are losing their traditional livelihood resources and besides due to the stigma and lack of

32 *Supra* note.8 at 72

33 Meenu Sharma, *Effects of Laws Enacted By the Government of India On the Livelihood of Denotified, Nomadic and Semi-Nomadic Communities*, AIRJ (April.29, 2020, 3.30 PM) https://www.airo.co.in/paper/admin/upload/international_volume/8691Meenu%20Sharma%20International_vol%2015.pdf (last visited May 18,2022)

34 *Id* at 13

required skills they are not getting a new job.[35] . This occupational displacement has not been addressed with the provision of alternative means of subsistence or livelihood.

The Wild life Protection Act, 1972 prevents snake charmers from pursuing their traditional occupation as a result of which they have lost their livelihood. The traditional salt producers inside the Little Rann of Kutch were expelled from their area as the area was declared as a sanctuary for wild Ass. The rehabilitation and compensation of these communities were not recognised as their dependency on the natural resources such as land, forest, sanctuary areas were not recognised as legal rights. One of the main reasons being they lacked documentary evidence to claim their rights.[36]

The so called Progressive Legislations have thus deprived the right to livelihood of the NTs and DNTs which in effect violates their right to life guaranteed under Article 21 of the Constitution. From a Human Rights Perspective, it can be argued that animal rights are given priority over the human rights of these nomadic tribes. It is the obligation of the government to direct its law making and policy making in such a way as to give the humans and the Wild Life their due without compromising each other's rights.

V. International Legal Framework on Rights of Nomadic Tribes

i) Declaration on Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on 13 September 2007. It is the most comprehensive international instrument on the rights of Indigenous peoples. It establishes a Universal framework of minimum standards for the

35 Uttam Madane, *Social Exclusion and Inclusion of De-Notified, Nomadic and Semi-Nomadic Tribes in India*, Asian Journal of Research in Social Sciences and Humanities(April 24,2020, 6 PM) https://www.researchgate.net/publication/307627135. (last visited May 18,2022)

36 Mittal Patel, A Report from the VSSM, as cited in Anna R Jay, *Beyond the Margins Stigma and Discrimination against India's Nomadic and De notified Tribes,* HRLN (Jan.29, 2019,7 PM) https://hrln.org/reporting_publications/beyond-the-margins-stigma-and-discrimination-against-indias-nomadic-and-denotified-tribes/ (last visited May 18,2022)

survival, dignity and well-being of the Indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to specific situation of Indigenous People.[37]

Article 3 of the Declaration provides that the Indigenous People have the right to self-determination by which they can freely determine their political status and freely pursue their economic, social and cultural development.[38]

Article 5 declares the right of the Indigenous peoples to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while re-taining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[39]

Article 9 provides that the indigenous peoples and individuals have the right to belong to an indigenous community or nation in accordance with the traditions and customs of the community concerned without any kind of discrimination.[40]

Article 24 states that indigenous individuals have the right to enjoyment of the highest attainable standards of physical and mental health. It further provides that the state shall take necessary steps to achieve the full realization of this right.[41]

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37 United Nations Declaration on the Rights of Indigenous Peoples (2007) (Jan.30, 2019 5.45 AM) https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited May 18,2022)

38 United Nations Declaration on the Rights of Indigenous Peoples (2007) (Jan.30, 2019 5.45 AM) https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited June 28,2022)

39 United Nations Declaration on the Rights of Indigenous Peoples (2007) (Jan.30, 2019 5.45 AM) https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited June 28,2022)

40 United Nations Declaration on the Rights of Indigenous Peoples (2007) (Jan.30, 2019 5.45 AM) https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited June 18,2022)

41 United Nations Declaration on the Rights of Indigenous Peoples (2007) (Jan.30, 2019 5.45 AM) https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited June 18,2022)

Article 7 states that Indigenous Individuals have the right to life, physical and mental integrity, liberty and security of person.[42]

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
   (d) Any form of forced assimilation or integration;
   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 15 mandates that the state shall take effective measures in consultation and co-operation with the indigenous people concerned to eliminate discrimination, promote tolerance and good relations among the indigenous people and other segments of the society.[43]

Article 21 further provides that indigenous people have the right to improvement of their economic and social conditions in the areas of

42 United Nations Declaration on the Rights of Indigenous Peoples (2007) (Jan.30, 2019 5.45 AM) https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited Feb 22,2022)

43 *Id*. United Nations Declaration on the Rights of Indigenous Peoples (2007) (Jan.30, 2019 5.45 AM) https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited Mar 18,2022)

education, employment, vocational training, housing, sanitation, health and social security.[44]

Thus, we see that the UNDRIP guarantees a number of social, cultural, economic and political rights. It expects the state to specifically provide effective mechanisms to redress by means of restitution of their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent and legal recognition and protection to lands, territories and resources. Further, the UNDRIP ensures a bundle of cultural rights and other associated socio economic rights to indigenous communities including right to practice and revive their cultural traditions and customs inclusive of maintenance, protection and development of the past, present and future manifestations of their cultures such as visual and performing arts. The Declaration enables the ownership and control over land and resources, which are traditionally owned, occupied or used or acquired maintenance, control, protection and development of their cultural heritage, traditional knowledge and traditional cultural expressions, as well as manifestations such as medicines, visual and performing arts etc. This is further strengthened by recognition of intellectual property rights over such cultural heritage, traditional knowledge and traditional cultural expressions. Very importantly, it guarantees them the right to maintain and develop their political, economic and social systems or institutions, security in the enjoyment of their own means of subsistence and development and to engage freely in all their traditional and other economic activities. Furthermore, the indigenous people are entitled to just and fair redress where they are deprived of their means of subsistence and development.[45]

In this context, it becomes necessary to examine how far India has succeeded in fulfilling its obligation under the Declaration in ensuring that

44 United Nations Declaration on the Rights of Indigenous Peoples (2007) (Jan.30, 2019 5.45 AM) https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html(last visited June 20,2022)

45 *Supra* note.34. at.13.

these rights are within the reach of the Denotified and Nomadic tribal communities. The deplorable conditions of these NTs/DNTs obviously leads to the conclusion that India has to travel a long way to fulfilling its obligations under the Declaration.

ii) Convention on the Elimination of All Forms of Discrimination (CERD)

Convention for the Elimination of All Forms of Discrimination was adopted by the General Assembly on 21 December, 1965. Irrespective of whether the DNT/NT are recognised as Indigenous Peoples, the Provisions of the Convention for the Elimination of all Forms of Racial Discrimination (CERD) apply to discrimination against them. India ratified CERD in 1968.

Article 1 (1) of the CERD defines the term "racial discrimination" as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[46]

Article 2 (1) (c) states that each State Party shall take effective measures to review governmental, national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.[47]

Article 2 (2) states that States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a con

46 International Convention on the Elimination of All Forms of Racial Discrimination (1965) 2106(XX) (April 23, 2020, 8.20 PM) https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx(last visited Jan 24,2022)

47 *Id*.

sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.[48]

Article 5 states In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law notably in the enjoyment inter alia of the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;[49]

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-onthe basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State; (iii) The right to nationality;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;[50]

48 *Id*.

49 *Id*.

50 *Id*

The Committee on the Elimination of All Forms of Racial Discrimination has noted that despite the passage of Constitutional provisions and legal provisions in India, "widespread discrimination" continues that "points to the limited effect of these measures". It emphasized that the perpetuation of the caste system contributes to the violation of human rights in India and urged the state and national governments to adopt urgent measures to combat the continued discrimination of vulnerable groups. In 2002, the Committee issued General Recommendation XXIX, stating that caste and descent-based discrimination are in direct violation of CERD obligations.[51]

VI. Rights under the Constitution of India

Article 14 of the Constitution of India guarantees the Right to Equality. It provides that the state shall not deny any person equality before law or equal protection of laws.[52]

Article 15 prohibits discrimination of citizens on the ground of religion, race, sex, place of birth or any of them.[53]

Article 19(1) (d) guarantees the freedom to move freely throughout the territory of India. Article 19 (1) (g) guarantees the right to freedom to carry on any occupation, trade or business.[54]

Art. 21 guarantees the right to life and personal liberty.[55] Right to life takes within its ambit the manifold facets of the right to life which includes the right to live with human dignity as was held in *Maneka Gandhi* v. *Union of India*[56]. The Supreme Court has also held that the right to life includes the right to livelihood as was held in *Olga Tellis* v. *Bombay Municipal Corporation.*[57]

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51 *Supra*. note.8 at.58

52 INDIAN CONST.art.14

53 INDIAN CONST.art.15

54 INDIAN CONST.art.19 (1) cl. d; cl.g

55 INDIAN CONST. art. 21

56 A.I.R 1978 SC 597

57 A.I.R 1986 SC 150

Article 29 of the Constitution guarantees the rights of the minorities having distinct language, script or culture to conserve the same.[58]

Apart from the fundamental rights we have the Directive Principles of State Policy which enjoins upon the state the duty to apply certain fundamental principles in the governance of the country. It provides that the state shall promote the welfare of the Citizens by securing and protecting social, economic and political justice.[59] The State should strive to minimise the inequalities in status, facilities and opportunities among people.[60] The state should direct its policy towards securing adequate means of livelihood among men and women equally.[61]

Art. 41 provides the state to make provision for right to work, right to education and to public assistance especially in cases of underserved want.[62] Article 42 provides that the State has to make provision for just and humane conditions of work.[63] The State has also the duty to promote the educational and economic interests of the scheduled castes/ Scheduled tribes and other weaker sections and to protect them from social injustice and all forms of exploitation.[64]

All said about the Fundamental Rights and principles of legislative policy gloriously enshrined in the Indian Constitution, the de notified and Nomadic tribes are far away from the realisation of their right to freedom and right to justice social, economic and political. They are deprived of their livelihood resource which is largely dependent on their traditional occupation and the stigma of criminality attached to them does not permit them to continue in a particular place for a long period of time.

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58 INDIAN CONST.art.29

59 INDIAN CONST.art.38

60 INDIAN CONST. art.38

61 INDIAN CONST. art.39

62 INDIAN CONST.art.41

63 INDIAN CONST. art.42

64 INDIAN CONST.art.46

The deprivation of political justice is another major impediment which obstructs the realisation of various rights of the denotified and nomadic tribes. Political rights connote the right to wield political power and to participate in the governance of the country. However, the De-notified, Nomadic and Semi Nomadic tribes being bereft of a permanent residence and citizenship documents such as Voters ID, Aadhar, Ration card etc. are far from the realization of their political rights. Consequently, they remain excluded from the governmental welfare schemes and facilities which make their deprivation of economic justice complete.

i) Justice Venkatachaliah Commission

The National Commission to Review the Working of the Constitution under the Chairmanship of Justice M.N. Venkatachaliah, submitted its Report to the Government of India on 31 March 2002, wherein it stated that the denotified tribes/communities have been wrongly stigmatized as crime prone and subjected to high handed treatment as well as exploitation by the representatives of law and order as well as by the general society.[65] In its Report, the Commission further stated that although the special approach to their development has been delineated and emphasized in the Reports of the Working Groups for the Development of Scheduled Tribes, Scheduled Castes and Backward Classes in successive Plans and also in the Annual Reports of the Commissioners for Scheduled Castes and Scheduled Tribes, National Commission for Scheduled Castes and Scheduled Tribes and the National Commission for Backward Classes, their recommendations have not received attention.[66]

The Commission recommended that the Ministry of Social Justice and Empowerment and the Ministry of Tribal Welfare should collate all these materials and recommendations contained in the reports of the working groups and the reports of the National Commissions and other reports

65 *Supra*. note.21

66 *Id*

referred to and strengthen the programmes for the economic development, educational development, generation of employment opportunities, social liberation and full rehabilitation of denotified tribes.[67]

The above observations and recommendations of the Commission would amply illustrate the deplorable conditions of the denotified, nomadic and semi-nomadic communities which calls for a special treatment for their upliftment and welfare. Given the values of equality, justice and fraternity that lie embedded in the Constitution, it is highly imperative that the large masses of the marginalised and downtrodden section of the Society be brought within the ambit of development and to confer on them the dignity of citizenship along with its concomitant social, cultural, economic and political rights at par with others failing which the 'Constitution' and Citizenship would become hollow and irrelevant concepts to them.

VII Conclusions

The British may have labelled the DNTs as criminals. But how different has independent India been in dealing with these communities by simply de-notifying them on paper and not giving them their due. One of the major challenges faced in recommending for a separate legislation for the De notified and Nomadic Tribes is regarding the question of their identity. Recommending to include them in the scheduled Tribe list may amount to forced assimilation and depriving the de notified and nomadic tribes of their unique identity and challenges.

Even while admitting that the Environment Protection Laws, Wildlife Protections laws and Prevention of Cruelty to Animals have been enacted in the interests of the ecological and environment security of the country, the government cannot shirk its responsibility of ensuring that the persons affected by such laws are satisfactorily rehabilitated. India, being a country blessed with abundant bio-diversity, flora and fauna, allowing these nomadic tribes to pursue their traditional occupation is not going to tilt the ecological balance. Having

67 *Id*

lived a life close to nature by tradition and being able to sense the pulse of the environment, it is unlikely that they will engage in activities which will adversely impact the ecology. Therefore, the government can consider amending the laws giving due weightage to these aspects.

Considering the extent of harassment and violence meted out to these persons, they require more legal protection than what is afforded under the SC/ST Atrocities Act, 2018. There is also the lack of legal framework to address the human rights violations against the DNTs. The stigma of criminality and consequent harassment of Denotified and Nomadic tribes continue to haunt them despite the lapse of so many years since the repealing of the Criminal Tribes Act. Despite government attention being drawn to the deplorable and marginalised experience of the DNT/NT, through independent research conducted by NGOs, government commissions and International bodies, no concrete steps have been taken by the state and Union governments to improve the socio economic status of the DNT/NT and to overcome the decades of criminal stigma associated with the tribes. The state needs to take comprehensive measures uniquely suited to the DNT/NT to have equal access to state and societal institutions so as to enable them to participate in the life of the Nation as full citizens.

VIII The Way Ahead

- The lack of a permanent residence is one of the main impediments for the DNT/NT to have access to justice, therefore, there is the need to establish residence and identity requirements tailored to meet the needs of the DNT/NT.
- There is the need to conduct a comprehensive census nationwide and standardise the list of DNT/ NT across and within the states.
- The state should create awareness among the DNT/NT the need to have official identity documents and ensure that all of them do possess the Official identity documents.

- The DNT/NT should be provided specific legal protection against discrimination based on their tribal identity. Legal aid clinics in Colleges and Universities can play a great role in providing them legal protection.
- The Human Rights Commission both at the National level and the State level need to take stringent action against those offenders who perpetrate violence against the members of the Denotified and Nomadic tribe communities.
- Government has to take appropriate measures to make available the benefits of the Public Distribution System by issuing Ration cards to the members of the DNT communities by organising special campaigns. Undertake special measures for their protection and development and develop packages for their education, housing and other facilities to bring them to the mainstream of the society.
- Specific Legislation akin to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 2018 should be enacted to protect the DNT/NT from atrocities.
- The Police Force in every State should be educated about the history of DNT/NT and the challenges being faced by this community and appropriate steps be taken for deletion of explicit or implicit reference in the Police Manual regarding the criminal nature of DNT/NT.
- Allocate funds at the Central/State levels to NGOs who address the socio economic needs of the DNT/NT.
- Strengthen community representation.

It is the need of the hour that the government realise that unless the welfare measures, legislative and other policies are directed towards the advancement and upliftment of all the marginalised and down trodden, India's image before the International community as regards fulfilment of its international obligations and the Constitutional ideals and values cherished by the founding fathers will become a mere farce.

International War Crimes in Ukraine and Jurisdiction of the International Criminal Court (ICC)

Asha Asokan*

The Chief Prosecutor of the International Criminal Court (ICC), Karim Khan, opened a formal inquiry into war crimes, genocide, and crimes against humanity committed by Russia in Ukraine after its invasion in March 2022.[1] Unprecedented support has been shown to ICC by 43 member states since the Russian invasion of Ukraine. However, neither Russia nor Ukraine are parties to the Rome Statute, which is the founding Treaty that establishes and governs the authority of the ICC. This paper will examine the alleged war crimes by Russian President Vladimir Putin and International Criminal Court's jurisdiction to try Putin and other perpetrators for alleged war crimes committed in Ukraine.

1. Introduction

On February 24, 2022, the Russian government launched a full-scale military invasion of Ukraine, violating the Charter of the United Nations and Ukraine's territorial integrity and sovereignty. Article 2(3) of the UN

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1 International Criminal Court, https://www.icc-cpi.int/ukraine (last visited July 13, 2022)

Charter states that all Member States to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".[2] Similarly, the invasion violates Article 2(4), which requires all UN member states to refrain "from the threat or use of force against any state's territorial integrity or political independence."[3]

The 2022 Russian invasion of Ukraine is a war of conquest. A powerful country invading a less powerful one. The war can also be considered a two-level war, with a traditional devastating war being fought between Russia and Ukraine on Ukrainian territory. And a proxy war between Russia and the U.S/ The North Atlantic Treaty Organization (NATO) for geopolitical and security reasons. The armed conflict has already displaced approximately 6 million Ukrainians to other countries and 7 million internally.[4] Furthermore, as per the UN reports, many of the means and methods of warfare have breached international humanitarian law (IHL) rules governing the conduct of hostilities. The UN report documents violations of International Humanitarian Law and international human rights law, to varying degrees, by both parties concerning their treatment of prisoners of war and persons hors de combat, namely cases of extrajudicial execution, torture and ill-treatment, denial of medical assistance, exposure to public curiosity, and violations about the conditions of their internment. [5]

This paper will examine three major questions (i) Crimes within the jurisdiction of the ICC, (ii) What are the alleged international crimes committed by Russia during the Ukraine -Russia conflict (iii) Can International Criminal Court prosecute Putin for war crimes in Ukraine? (iv) ICC's challenges ahead.

2 United Nations Charter, art. 2(3)

3 *Id,* art. 2(4)

4 UNHCR, https://www.unhcr.org/ukraine-emergency.html, (last visited Apr 20, 2022)

5 United Nations, https://ukraine.un.org/en/188268-new-report-un-human-rights-shows-shocking-toll-war-ukraine, (last visited July 14, 2022).

2. International Criminal Court and Rome Statute

The International Criminal Court (ICC) marked 20 years on July 1st, 2022, and has been at the forefront of the global fight to end impunity and to hold individuals accountable for grave crimes, including genocide, war crimes, crimes against humanity, and the crime of aggression. The Court has 17 ongoing investigations into some of the world's most violent conflicts, such as the Democratic Republic of the Congo, Central African Republic, Sudan, Georgia, and Ukraine.[6]

There are 123 countries party to the Rome Statute. Out of them, 33 are the African States, 19 are the Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and the Caribbean States, and 25 are from Western European and other States. But countries that are not members include the United States, China, India, Iraq, Libya, Yemen, Qatar, and Israel. [7]

2.1 *Road to the ICC*

In the aftermath of World War II, the Allied powers launched the first international war crimes tribunal, known as the Nuremberg Trials, to prosecute top Nazi officials[8]. These tribunals were the first *Ad hoc* international criminal tribunals to prosecute high-level political officials and military authorities for war crimes and other wartime atrocities of World War II. Later in 1998, over sixty countries in the UN General Assembly adopted the Rome Statute at a conference in Rome, paving the way for establishing the permanent Court – International Criminal Court.

6 UN News, https://news.un.org/en/story/2022/06/1121282, (last visited July 15, 20222).

7 International Criminal Court, https://asp.icc-cpi.int/states-parties, (last visited July 17, 2022.

8 Claire Felter, The Role of the International Criminal Court, Council on Foreign Relations, March 28, 2022 2:00 pm (EST), https://www.cfr.org/backgrounder/role-international-criminal-court. .(last visited July 15, 2022)

2.2 *Court's jurisdiction*

ICC operates based on a restricted jurisdiction and not one of universal jurisdiction. According to the Rome Statute, the Court may automatically exercise jurisdiction in a situation where genocide, crimes against humanity, war crimes, or the crime of aggression were committed on or after 1 July 2002 on the territory of a State Party or by a State Party national[9]. In case the alleged crime is committed in a place on the territory of a state not a party to the Statute, ICC may exercise jurisdiction only if, (a) the crimes were referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under Chapter VII of the UN charter[10]. UN Charter requires a minimum of 9 positive votes of Security Council members and "no objection" from all 5 Permanent Members[11] to pass a resolution. This means if any one of the permanent members of the UN Security Council states casts a negative vote in a pending UNSC decision, the resolution cannot be approved. (b) if a State not party to the Statute makes a declaration accepting the jurisdiction of the Court[12].

The third possibility is that the Prosecutor may initiate investigations *proprio motu* based on information on crimes or upon request from a State Party within the jurisdiction of the Court. In this case, the Pre-trial Chamber of the ICC, composed of three independent judges, must approve any investigation initiated by the Prosecutor by finding a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the ICC[13]. For instance, in the case of Myanmar, ICC authorized the Court's Prosecutor to investigate alleged international crimes occurring during a wave of violence in Myanmar in 2016 and 2017.

9 Rome Statute, art 5, 12 & 13.

10 *Id,* art 13

11 United Nations, https://www.un.org/securitycouncil/content/voting-system, (last visited July 16, 2022

12 *Id*

13 Rome Statute, art 15

Myanmar is not a party to the Statute. Even though UN security council has the power to refer the case to the ICC, but because of the opposition from Russia and China (Veto power) UN Security Council was not even able to adopt a draft resolution. However, ICC's pre-trial chamber ruled on September 6, 2018, that Court may exercise jurisdiction over the crime against humanity of alleged deportation of the Rohingyas from Myanmar to Bangladesh. The reason is that an element of this crime (the crossing of a border) took place on the territory of a State party to the Statute (Bangladesh) and interpreted that Article 12(2)(a) of the Statute may be interpreted to cover such multi-territory criminal cases.[14]

ICC's jurisdiction is based on the "principle of complementarity," which means the authority of ICC is complementary to national jurisdictions.[15] The primary responsibility and duty to prosecute the alleged perpetrators is on the state while allowing the ICC to step in only as a last resort if the states are unable or genuinely unwilling to do so. "Inability" and "Unwillingness" are key concepts in the determination of the admissibility of a case before the ICC. A state may be determined to be "unwilling" when it is shielding someone from its responsibility for ICC crimes. Likewise, a state may be "unable" when its legal system has collapsed.[16].

3. What crimes are within the jurisdiction of the ICC?

The Court's jurisdiction covers four main crimes.

(i) ***Genocide*** - The specific intent to destroy in whole or in part a national, ethnic, racial, or religious group by killing its members or by other means: causing serious bodily or mental harm to members

14 International Criminal Court, https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-rules-court-may-exercise-jurisdiction-over-alleged-deportation, (last visited July 17, 2022).

15 *Id,* art 17

16 Olympia Bekou, Complementarity Principle, Oxford Bibliographies, 25 JUNE 2013, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0071.xml(last visited July 17, 2022)

of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group.[17]

(ii) ***Crimes against humanity*** - are serious violations committed as part of a large-scale attack against any civilian population. Crimes against humanity listed in the Rome Statute include offenses such as murder, extermination, torture, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid and deportation, and any other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health. [18]

(iii) ***War crimes*** – Crimes which are grave breaches of the Geneva conventions in the context of armed conflict and include, for instance, the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historical monuments, or buildings dedicated to religion, education, art, science or charitable purposes; willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; Intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping mission.[19]

(iv) ***Crimes of aggression*** - the use of armed force by a state against another state's territorial integrity, sovereignty, political independence, or violations of the UN Charter. In essence, three elements are required to constitute this crime. First, the perpetrator must be a political or military leader, i.e., a "person in a position

17 Rome Statute, art 6

18 *Id*, art 7

19 *Id,* art 8

> effectively to exercise control over or to direct the political or military action of a State." Secondly, the Court must prove that the perpetrator was involved in the planning, preparation, initiation, or execution of such a state's act of aggression. Third, the State's act amounts to the UN charter violation as provided in General Assembly Resolution 3314[20]. Furthermore, cases of lawful individual or collective self-defense and action authorized by the Security Council are thus clearly excluded.[21]

Three main principles that decide whether an individual or a military has committed an international criminal law are distinction, proportionality, and precaution. Proportionality prohibits armies from responding to an attack with excessive violence. It is illegal to target objectives "expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objectives, which would be excessive about the concrete and direct military advantage anticipated."[22] The principle of proportionality seeks to limit the damage caused by military operations by requiring that the effects of the means and methods of warfare must not be disproportionate to the military advantage sought. The principle of distinction requires distinguishing between combatants and civilians. The principle criminalizes direct and intentional attacks against civilians in armed conflict situations. Finally, precaution requires parties to a conflict to avoid or minimize the harm done to the civilian population.[23]

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20 United Nations Audiovisual Library of International Law, https://legal.un.org/avl/pdf/ha/da/da_ph_e.pdf, (last visited July 18, 2022)

21 Rome Statute, art 8 bis

22 Emanuela-Chiara Gillard, Proportionality in the Conduct of Hostilities The Incidental Harm Side of the Assessment, Chathamhouse, https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf, (last visited July 19, 2022).

23 The Practical Guide to Humanitarian Law, https://guide-humanitarian-law.org/content/article/3/civilians/, (last visited July 19, 2022).

4. Ukraine - Russia conflict and alleged international crimes

4.1 *Conflict History*[24]

Drift between Russia and Ukraine's relations started in Ukraine's 2004 Orange Revolution, a bloodless revolt overturning the fraudulent election of Russia-backed Viktor Yanukovych as president. However, Yanukovych was elected in 2010. In November 2013, Yanukovych withdrew from a deal for greater integration with the European Union, which resulted in the "Revolution of Dignity, "a mass protests in Ukraine. The protestors also opposed widespread abuse of power, government corruption, and violation of human rights in Ukraine. By February 2014, protesters overthrew Yanukovych, and an interim government was installed. Immediately after, the interim government, by signing a trade agreement with the EU, committed to orient Ukraine toward the European Union. This was much displeasure to Putin and Moscow, and two months later, Russia invaded Ukraine. And in March 2014, Russia took control Ukraine's Crimea region citing the need to protect the rights of Russian citizens and Russian speakers. Crimea is home to a majority of ethnic Russians, who registered the lowest support for independence. After a disputed referendum, Russia annexed Crimea. Since then, there has been a war between Russian-backed forces and the Ukrainian military along the Russian-Ukrainian border regions in the east, killing more than 13,000 people. Just before the 2022 invasion, Russian President Putin unilaterally recognized the Ukrainian regions of Donetsk and Luhansk as independent, setting the stage for what he called a peacekeeping military intervention. Shortly after that, in February 2022, the Russian forces invaded Ukraine.

Ukraine sits at the crossroads between Russia and the European Union and NATO not only geographically but also concerning the economic,

24 Reuters, Timeline: The events leading up to Russia's invasion of Ukraine, https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine- 2022-02-28/, (last visited on July 18, 2022)

military, and political alignment with the larger blocs. Russia and the U.S. want Ukraine in their sphere of influence. Ukraine withdrew from the Soviet Union in 1991 and has recently aspired to join NATO since 2014. The blame for the invasion/aggression and the Russian war against Ukraine lies solely with President Putin. However, the U.S. and NATO are partially responsible for creating the conflict context.

The security situation in Ukraine deteriorated rapidly following the launch of a Russian Federation military offensive on February 24, 2022. Since then, hostilities have been concentrated in all major cities, including Kyiv, Donetsk, Luhansk, Kherson, Kharkiv, Melitopol, Mariupol, and Chernihiv region, as Russia has been focusing on its stated objective of controlling the entire eastern Donbas region and establishing a land corridor from Crimea to Russia.

4.2 Alleged crimes committed by Russia under the Rome Statute

4.2.1 *Aggression* - By invading Ukraine, the Russian Federation has broken Article 1(1), Article 2(1), Article 2(2), and Article 2 (4) of the U.N. charter. Article 2(4) of the UN Charter prohibits the threat or use of force. The only two Charter exceptions to this prohibition are self-defense and action mandated by the U.N. Security Council. Responding to the invasion, the U.N. Security Council voted on a binding resolution submitted by the United States and Albania, determining Russia's invasion to be an illegal act of aggression and "deciding" that Russia should immediately cease its use of force against Ukraine and withdraw. But Russia, as a permanent member of the Security Council, vetoed the resolution[25]. Later on March 3, the U.N. General Assembly adopted a "Uniting for Peace" Resolution to affirm the Assembly's commitment to Ukraine's sovereignty and independence. And condemns in the strongest terms the aggression by Russia against Ukraine in violation of Article 2(4) of the U.N. Charter and demands that Russia

25 United Nations, https://press.un.org/en/2022/sc14808.doc.htm, (last visited July 19, 2022).

immediately cease its use of force against Ukraine. Unlike the security council resolution, General Assembly resolutions only have recommendary status and are not binding on member states.

4.2.2 *War crimes, genocide and crime against humanity* - As per the UN Human Rights Commission as of May 15, 2022, 8,368 civilian casualties were in the country - 3,924 (including 193 children) killed and 4,444 injured (including 230 children). Furthermore, there are reports of sexual violence against women by the Russian military. Furthermore, there are reports of 108 allegations of acts of Conflict Related Sexual Violence (CRSV) against women, girls, men and boys that reportedly occurred. However, actual casualty numbers could be much higher, since these figures only include the cases that OHCHR has been able to fully verify[26].

Explosive weapons caused most civilian casualties with a wide impact area, including shelling from heavy artillery, multiple launch rocket systems, and missile and airstrikes. There has been verified reports of unlawful targeting of medical facilities, for instance In Mariupol on March 9, 2022, the Russian military bombed a maternity hospital in Mariupol, unlawfully killing at least three civilians and injuring at least 17 civilians. Also, there are reports of indiscriminate use of cluster munitions, bombing of evacuation and humanitarian routes, forced deportation of Ukrainian citizens and attack on nuclear plants in Zaporizhzhia.[27]

26 United Nations high Commissioner for Human Rights , Situations of human Rights in Ukraine in the context of Armed Conflict by the Russian Federation, 29 June 2022, https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf(last visited July 19, 2022)

27 The Global Accountability Network, Russian War Crimes Against Ukraine – the Breach of International Humanitarian Law by the Russian Federation, April 2022, https://2022.uba.ua/wp-content/uploads/2022/06/russian-federations-war-crimes-white-paper_gan.pdf(last visited July 19, 2022)

5. Can International Criminal Court prosecute Putin for war crimes in Ukraine?

The ICC, on 2 March opened an investigation into the situation in Ukraine; however, the main question is whether ICC has jurisdiction to try Putin and other perpetrators as Ukraine and Russia are not parties to the Rome Statute. As per the Rome Statute, ICC has jurisdiction over international crimes only if they were committed in the territory of a State Party or by one of its nationals. However, if a situation is referred to the ICC's Prosecutor by the United Nations Security Council, or if a state makes a declaration accepting the jurisdiction of the Court, the ICC may hear cases not relating to State Parties. Also, the prosecutor may initiate investigations proprio motu based on information on crimes or upon request from a State Party within the jurisdiction of the Court. Since the Russian Federation is a permanent member of the Security Council, a referral by the Security Council is unlikely to proceed due to Russia's right to veto any resolutions against it.

Even though Ukraine nor Russia is a State Party to the Rome Statute, ICC has jurisdiction as Ukraine made declarations accepting the jurisdiction of the Court. Initially, on 17 April 2014 Ukrainian Parliament accepted the Court's jurisdiction over alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014. Later, on 8 September 2015, after the annexation of Crimea by Russia, the Ukrainian government lodged a second declaration accepting the ad hoc jurisdiction of the ICC, which covered alleged crimes associated with the occupation of Crimea and the fighting in eastern Ukraine.[28] Based on Ukraine's acceptance, ICC has jurisdiction to investigate cases of "war crimes," "crimes against humanity," and "genocide." However, ICC does not have justification for trying "aggression" as Russia is not a state part. Moreover, in the case of

28 Mark Kersten, After all this time, why has Ukraine not ratified the Rome Statute of the International Criminal Court?, Justice in Conflict, March 14, 2022, https://justiceinconflict.org/2022/03/14/after-all-this-time-why-has-ukraine-not-ratified-the-rome-statute-of-the-international-criminal-court/(last visited July 19, 2022)

non-state parties, referral by UN Security Council is required, and, in this case, it is unlikely due to Russia's veto power.

Even though Russia is the aggressor in this case, the ICC is mandated to investigate crimes committed by all parties to the conflict. During the ongoing hostilities, the alleged crimes appear to have been predominantly committed by Russian forces, with some isolated reports emerging of Ukrainian armed forces mistreating Russian prisoners of war. For instance, there are reports of Russian soldiers being shot took place in a dairy plant in Malaya Rohan, to the south-east of Kharkiv[29].

6. ICC's challenges ahead in holding Putin and other perpetrators including generals, other Russian leaders be accountable for international crimes

In May 2022, ICC sent its "largest-ever" team of experts to Ukraine to investigate alleged war crimes since the Russian invasion. Both UN human rights Commission and ICC have been documenting incidents and collecting evidence to strengthen the court proceedings. Previous cases in ICC have proved that it takes many years to complete the investigations. Compared to previous cases, new technologies and quick deployment of investigators will make it easier to gather evidence, such as images and recordings of events, along with testimonies of victims and witnesses. Once enough evidence is found to establish reasonable grounds that atrocity crimes were committed, the prosecutor may request an ICC chamber to issue an arrest warrant for the person allegedly responsible. But the main question will the ICC succeed in arresting Putin even if there is ample evidence to prosecute Putin? Can ICC try Putin and others in absentia?

29 Daniel Boffey, UN official concerned over videos showing apparent abuse of PoWs in Ukraine, THE GUARDIAN, 29 March 2022, https://www.theguardian.com/world/2022/mar/29/un-official-concerned-over-videos-showing-apparent-abuse-of-pows-in-ukraine (last visited July 19, 2022)

***Trial in absentia*:** To date, the ICC has never conducted a trial in absentia. Article 63 of the Rome Statute states, "the accused shall be present during the trial ." So the ICC doesn't try defendants in absentia or if they're not present at the court. [30] And because the court doesn't have a mechanism like a police force to enforce its arrest warrants, Putin could evade arrest as long as he stays in Russia or other friendly nations and in power. The only like hood is to arrest him if there is a regime change in Russia; otherwise, if any of the 123 ICC members state arrest Putin while visiting those countries.

The other main challenge is to prove the command responsibility of Putin. Even if ICC has reasonable grounds to prosecute, an arrest warrant is not a guarantee of conviction. Many cases have demonstrated that it is difficult to link a sitting head of state directly to offenses committed by armed forces on the ground. For instance, Laurent Gbagbo, former president of the Ivory Coast, was acquitted for lack of evidence to prove his "command responsibility." [31]

***Command responsibility*:** Even if Putin has not directly committed the crime, ICC could still prosecute him by proving command responsibility. Through a concept called 'command responsibility, senior leaders may be held criminally responsible for the actions of their subordinates if they knew or should have known that crimes were being committed. Article 28 of the Rome Statute states that military commanders could be held criminally responsible for crimes committed by armed forces under their effective command and control. The two essence of command responsibility are (i) That military commander or person either knew or

30 Ryan Parry, *The Absconding Accused and the ICC: An examination on the legitimacy and capacity of the International Criminal Court to hold in absentia trials,* November 2, 2021, https://globaljustice.queenslaw.ca/news/the-absconding-accused-and-the-icc-an-examination-on-the-legitimacy-and-capacity-of-the-international-criminal-court-to-hold-in-absentia-trials, (last visited June 15,2022)

31 The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé (Case Information Sheet ICC-02/11-01/15 (July 2021)

owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[32]

7. Conclusion

The Ukraine crisis shows the world how to proactively respond in the event of an emergency. Unprecedently the world came together to support civilians and communities affected by the Russian invasion either through humanitarian aid or by opening borders. Similarly, representatives from 40 nations agreed to coordinate efforts to bring perpetrators of war crimes in Ukraine to justice, including 20 state parties that agreed to commit financial resources to carry out ICC's mandate of providing justice to Ukrainians. However, this also has raised concerns about selective justice, although the ICC Prosecutor later sought to dispel such fears by assuring that the resources and funds will be used to provide justice in other country situations. Similarly, ICC's actions to bring perpetrators to justice might renew Global Commitments to the International Criminal Court.

Despite the obstacles, the ICC investigation in Ukraine promises that nationals of powerful states such as Russia cannot escape justice. Moreover, it sends a powerful message to current and possible rights abusers worldwide. Unfortunately, as long as Putin is in power, the ICC will unlikely bring lasting justice to Ukraine. Still, ICC could help by documenting and adducing evidence to support many other legal avenues like the domestic justice system or a special international tribunal to punish the crime of aggression committed against Ukraine, for which the International Criminal Court (ICC) has no jurisdiction.

32 International Criminal Law Guidelines – Command Responsibility, Case Matrix Network, (January 2016), https://www.legal-tools.org/doc/7441a2/pdf/(last visited June 15,2022)

Climate Change and International Law: A Contemporary Analysis

Naveen S*

International climate change law has its origin in international environmental law and rules of general international law. The need to address potential harm to global commons caused by climate change impacts is relatively new to international law. It provides limited recourse to individuals or groups suffering from transboundary harms. This paper lays down the premise for understanding the emergence and evolution of international climate change law, its interaction, and interdependence with international law principles.[1] For that purpose, the paper analyses the development of international legal norms and the relevant rules and principles of international environmental law applicable to climate change. The impact of lately developed norms such as the conduct of environmental impact assessments (EIA), the notion of common concern of humankind, the principle of common but differentiated responsibilities, the precautionary principle, and the concept of sustainable development in international environmental law are analysed.

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1 OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, 550(Bodansky,D.,*et.al*eds.Oxford University Press 2007)

Sources of International Law

The main sources of international law include treaties, customary law, and general principles of law.[2] Later certain 'soft law' norms that are not legally binding got evolved. Both the conventional and the modern sources of international norms have played a significant role in crafting the global climate change law. According to Article 38 (1) (d) of International Court of Justice (ICJ) Statute, judicial decisions are not a 'source' of law but a 'subsidiary means for the determination of international law.'Though dynamic, customary international law has been slow and incremental in its growth as the States tend to maintain the existing rules. Thus, customary rules act as only general background principles for interaction rather than specific rules of behaviour.

The ICJ has emphasised that for a given norm to be binding as custom, it must pass the test of State practice and *opinio juris*.[3] It is difficult to establish a consistent and widespread State practice to create a customary rule, especially when there is inconsistency in what States convey and their actual practice.[4]Many observers believe that the best option is to infer *opinio juris*, with all due caution, from the practice of States, but this inference has also been controversial.[5]It is more challenging to establish that State

2 Statute of the International Court of Justice 1945, art. 38

3 North Sea Continental Shelf CasesFederal Republic of Germany v. Denmark*;* Federal Republic of Germany v. Netherlands , I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969, available at: https://www.refworld.org/cases,ICJ,50645e9d2.html (last visited May 15th ,2018); Nicaragua v. United States [1986] ICJ Rep 14, 108–9 ,para 107; and Germany v. Italy: Greece Intervening) [2012] ICJ Rep 99, 123 ,para 55

4 Bodansky, D., *Customary (and Not So Customary) International Environmental Law*, 3 (1) IJGLS 105,113 (1995)

5 HenckaertsJ.*Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 85 (857) INT. REV. RED CROSS 175, 181–182 (2005)

practice accompanied by the requisite *opinio juris* creates a customary rule as they are not often expressed directly by the States.[6]

The general principles of law recognized by civilized nations as laid down in Article 38 (1) (c) of the ICJ Statute also form the basis for State interaction in international law. As a source of law, the general principles are subject to various challenges, primarily due to the protracted conflicting views on what constitutes general principles. While some find its base in the natural law,[7] others refer it to the principles of domestic law found in all major legal systems. Some emphasise that for a general principle to be a part of customary international law, it must be derived directly from international law.[8]

Both customary law and general principles give rise to general international lawand form a credible source for the basic norms of international environmental law.[9]The international climate change law consists of different rules and principles of general international law. Even though 'soft law' concept has gained significance in many areas of international law,[10] they appear in different forms that converse or overlap with other traditional 'sources' of law, thus making it more contentious.[11] The distinctions between 'hard' and 'soft' law in content and effects are

6 *Id*

7 Judge CançadoTrinidade, *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Separate Opinion)", [2010] ICJ Rep 135, 142 ,para 17, 151, para 39, 207 paras 191–3

8 THIRLWAY H., THE SOURCES OF INTERNATIONAL LAW,94-96(Oxford University Press 2014)

9 DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 199–203(Harvard University Press,2010).

10 Dupuy P., *Soft Law and the International law of the Environment*, 12 (2) MICH.J.INTL.L 420 (1991)

11 Alan Boyle, *Soft Law in International Law-Making*, in *International law*, Oxford University Press, 122–124 at 118 (Malcolm D. Evans ed., 3d ed., 2010)

difficult to draw.[12]It is much more difficult when 'hard' law is found in combination with 'soft' dispute settlement processes or 'soft' sanctions.[13]

The 'soft' norms are referred to by the courts, States, and other international actors in practical legal reasoning, but they rarely find a place in a cause of action in international adjudication.[14] There is also instance where 'soft' norms contain mandatory and extremely detailed terms.[15]The international climate change law has almost all the characteristics of a 'soft law' with an array of 'soft' norm-setting processes. This feature can be observed mainly in the UN climate regimewith an alternate 'soft' content in the otherwise 'hard' Paris Agreement.

The reflexive capacity of the climate regime to oversee global climate change has improved gradually, but without a sustained move towards harder or softer norms. The novel act of merging procedural commitments with softer substantive provisions adopted by the Paris Agreement has the capacity to promote amenablesolutions to shiftingscenarios within the longstanding arrangement. But in terms of compliance, there is little hope that the softer, transparency-based compliance provisionscan do much to ensure that countries will deliver ambitious commitments.[16]Thelegal institutions are required todevelop the capacity to respond spontaneously to the changing global environmental concerns. This is largely possible by monitoring the ecological changes and redesigning their strategies. However,

12 *Supra* note 9, at 96-107

13 CHRISTINE CHINKIN, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 40(Dinah Shelton ed., Oxford University Press 2000), p. 40

14 Committee on the Legal Principles relating to Climate Change, *Legal Principles Relating to Climate Change* (International Law Association 2014) Art. 2 and Commentary

15 Jutta Brunnee, *Coping with Consent: Lawmaking under Multilateral Environmental Agreements*, 15 (1)LJIL1-52 (2002)

16 Jonathan Pickering *et.al., Global Climate Governance Between Hard and Soft Law: Can the Paris Agreement's 'Creme Brulee' Approach Enhance Ecological Reflexivity?*,31(1)J. ENVIRON. LAW 1–28,2019,

there is still no clarity as to whether harder or softer legal norms would be more productive in this effort.

International LawPrinciples and Climate Change

No-harm rule

International environmental law is based on the principles that balance competing sovereign interests. The no-harm rulehas its early expression in the 1941 *Trail Smelter Arbitration*, where air pollution from a smelter located in the Canadian province of British Columbia caused damage to livestock and farmland in the US State of Washington.[17]It was held that no State hasthe 'right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another.' It also specified that the injury had to be 'of serious consequence' and 'established by clear and convincing evidence.'[18]Besides compensating for the transboundary harm caused, Canada was also required to institute control measures to prevent future damage.[19]Since then, several ICJ decisions and international instruments have asserted state responsibility for transboundary harm.

States have the 'sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.[20] Accordingly, no-harm rule applies to global commons, including the high seas or Antarctica and, by extension, the earth's atmosphere as well.[21]This was reiterated in the 1992 Rio Declaration, but

17 Trail Smelter Arbitration (United States v. Canada), Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941)

18 *Id*

19 *Id*

20 Principle 21, UN Conference on the Human Environment, 'Declaration of the United Nations Conference on the Human Environment', 16th June 1972, UN Doc A/CONF.48/14/Rev 1, 3, reprinted in 11 ILM 1416 (1972) (Stockholm Declaration).

21 *Id*., Principle 21

allowing the States to exploit their resources in accordance with their environmental and 'developmental' policies.[22] Though this balancing approach of the Rio is reflected in the preamble to the FCCC, in reality, it only highlighted the sovereign rights.[23]

For the first time in 1996, the ICJ confirmed that 'the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.' But it did not specify whether such obligation was customary or was a general principle of law.[24]This position was later reiterated in the *Gabcikovo-Nagymaros*case.[25]But, general obligation as a customarylaw was positively laid downonly in the Pulp Mills case in 2010.[26]

Prevention principle and due diligence

The principle of prevention and due diligence was held by the ICJ in the *Pulp Mills* case as two important features of no-harm rule. The prevention of harm principle was earlier laid down by the ICJ in the *Trail Smelter* case. It suggested the obligation to take appropriate measures to prevent harm to the environment of other States or to the global commons. On the principle of due diligence, the ICJ in *Pulp Mill* case stated that 'the principle of prevention, as a customary rule, has its origins in the due diligence that is

22 Principle 2, UN Conference on Environment and Development, 'Rio Declaration on Environment and Development', 14thJune 1992, UN Doc A/CONF.151/26/Rev 1 vol I, 3, reprinted in 31 ILM 874 (1992) (Rio Declaration).

23 Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary* 18 (2), *Yale Journal of International law*,451, 504–505 (1993) (on the negotiating history of the principle in the UNFCCC).

24 Legality of the Threat or Use of nuclear weapons, *Advisory Opinion, I.C.J. Reports* 1996,226 ICJ 8 ,July 1996

25 Gabcikovo-Nagymaros Project (Hungary v. Slovakia), [1997] ICJ Rep 7at 41

26 Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), [2010] ICJ Rep 14, 55 (para 101)

required of a State in its territory'.[27]The due diligence obligation necessitates 'not only the adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators'.[28]

The International Tribunal for the Law of the Sea (ITLOS) further expanded the due diligence approach. But it also held that the approach might change in the due course as those diligent approaches considered adequateat a specific moment may become inadequate later in the light of new scientific knowledge. The standard may also change depending on the risks associated with the activity.[29] Apart from that, the due diligence standard may also differ in light of the capacity of the State concerned.[30] The UNFCCC provides flexibility in the due diligence standard for developing countries based on the principle of common but differentiated responsibilities. Nevertheless, it is imperative to note that the differential treatment for developed and developing countries is available only when the basic international legal obligations provide for it.

Procedural obligations

The no-harm rule provides for various procedural obligations. It includes the obligation to notify or warn potentially affected States, exchange information, consult, negotiate, and prevent transboundary environmental harm through cooperation.[31] Under customary international

27 *Id*

28 *Id*

29 Responsibilities and Obligations of States Sponsoring Person and Entities with Respect to Activities in the Area (Advisory Opinion,Order of 1 February 2011)ITLOS Reports 2011 at. 10 (Responsibilities in the Area) paras 115, 117.

30 Committee on the Legal Principles relating to Climate Change, *Legal Principles Relating to Climate Change*(International law Association 2014), art. 7A (3) and Commentary

31 Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), (Merits) [1949] ICJ Rep 4, 22; Lake Lanoux Arbitration (Spain v. France) (1957) 12 RIAA 281; Case concerning Pulp Mills on the River Uruguay (Argentina v.Uruguay) (Judgment), [2010] ICJ Rep 14, 55(para 145)

law, the procedural obligations of a Stateinclude the obligation to conduct an Environment Impact Assessment when activities within their jurisdiction or control may have a significant adverse effect beyond their borders.[32] Though these procedural obligations exist as independent customary norms, the due diligence standard reinforces them to prevent environmental harm.[33]Thus a State must assess potential transboundary environmental impacts of activitiesin its jurisdiction to discharge its obligation of due diligence.

Prevention and precaution principle

The due diligence approach is a combined outcome of the duty to prevent environmental harm and the adoption of precautionary principle based on the States' capabilities.[34] Unlike the no-harm rule, the precautionary principle, does not require 'full scientific certainty' where there are 'threats of serious or irreversible damage'. Though imprecise and lacks foreseeability, its lower evidentiary requirement can enhance the protective approach of international environmental law. Even though the precautionary principle, as articulated in Principle 15 of the Rio Declaration, is invoked frequently,[35] its persistent contents and status under the customary law are still contested.[36]

The international courts and tribunals have tried to exempt themselves from declaring the legal status of the precautionary principle. Instead, they have been cautious that a growing number of international treaties and other

32 Case concerning Pulp Mills on the River Uruguay (Argentina v.Uruguay) (Judgment), [2010] ICJ Rep 14, 67 (para 145)

33 Jutta Brunnee, *ESIL Reflection Procedure and Substance in International Environmental Law Confused at a Higher Level?*, 5 (6)ESIL ,https://esil-sedi.eu/post_name-123/>(last visited on Apr 5th,2021)

34 Rio Declaration 1992, Principle 15

35 United Nations Framework Convention on Climate Change 1992, Art. 3.3, UNFCCC, has adopted a modified version of Principle 15 of Rio Declaration

36 DANIEL BODANSKY, *Deconstructing the Precautionary Principle*, in BRINGING NEW LAW TO OCEAN WATERS, 382 (David D. Caron and Harry N. Scheiber eds 2004)

instruments are inclined towards making precautionary principle a part of customary international law.[37] Conversely, they also observed that precautionary approach is an integral part of general obligation of due diligence by establishing the link between prevention and precaution.[38] Though the standard of diligence may vary with the risks involved, the States must take appropriate measures even to prevent damage where there are plausible indications of potential risks.

State responsibility and no-harm rule

When a State violates its duty to use due diligence to prevent significant transboundary harm, the 'secondary' rules of the law of State responsibility can be triggered. Thus an injured State can invoke the responsibility of another State for violations of international law and demand cessation of the breach and claim reparation from the responsible State.[39] In case of non-compliance, injured State would be entitled to take measures against the responsible State based on violations of international law.[40]The law of State responsibility also permits an injured State to take certain 'self-help' measures if the responsible State does not cease its wrongful activities. But whether such an adversarial stance of the law of State responsibility can effectively deal with global environmental challenges like climate change is yet to know.

In the case of climate-related injuries or threats, the injured State would have to show that the other State had breached the no-harm rule or its related procedural duties. Therefore to challenge the conduct of the responsible State, it has to be established that the activities under the jurisdiction or

37 Responsibilities and Obligations of States Sponsoring Person and Entities with Respect to Activities in the Area (Advisory Opinion),[2011] ITLOS Rep 10 para.135

38 *Id*., para.131

39 II ILC, TEXT OF THE DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, Art. 30, 31 and 42, 88-94, 117-119 (Yearbook of the International Law Commission 2001).

40 *Id*., art. 30, 31.

control of the responsible State have caused, or entailed a quantifiable risk of causing, significant harm to the injured State. The significant harm factor can be established based on displacements, deaths, or destruction caused by sea level rise, floods, droughts, or heat waves. But with the existing know-how, it is difficult to establish with sufficient probability that a particular weather event or impact was caused by human activity and that such action could be attributed to the conduct of a specific State.Even if the effect could be attributed to human-induced climate change, it would still be difficult to establish its causal link with the State.

Usually, in climate change regime, the States are required to exercise only due diligence in the prevention of climate change.The injured State will have to establish that the State responsible has failed to take reasonable and appropriate regulatory and enforcement measures to curb greenhouse gas emissions under its jurisdiction and control. Moreover, the customary international law does not prescribe any standard for due diligence giving rise to several questions on the capacity of a country to meet its climate change-related diligence. Now with the advent of the Paris Agreement, a State that complies with its nationally determined contributionscannot be said to be not exercising due diligence.[41] In addition, there is a consensus that global warming must be kept 'well below 2° C' and pursue efforts to limit it to '1.5° C above pre-industrial levels.'[42]Andthose targets are still

41 Christina Voigt, *The Paris Agreement: What is the Standard of Conduct for Parties,*QIL 17-28, 24 March 2016 <http://www.qil-qdi.org/paris-agreement-standard-conduct-parties/> (last visited Mar 5th ,2019) (exploring the relationship between the Paris Agreement and the due diligence standard). However, since the Paris Agreement stipulates that each party's nationally determined contribution 'will … reflect its highest possible ambition' (Art 4.3), it has been argued that the agreement establishes a due diligence standard whereby each party is to 'do as well as it can'. See Christina Voigt, *On the Paris Agreement's Imminent Entry into Force(Part II of II)*, EJIL:TALK!,12 October 2016 <http://www.ejiltalk.org/on-the-paris-agreements-imminent-entering-into-force-what-are-the-consequences-of-the-paris-agreements-entering-into-force-part-ii/>(last visited Mar 5th ,2019)

42 Paris Agreement to the United Nations Framework Convention on Climate Change 2015, art 2.1(a)

achievable with timely and assertive emission reductions.[43]

Climate harm and climate action

No State has yet invoked the law of State responsibility for climate change-related injuries. But there is an increase in the number of environmental issues being raised before international courts giving rise to important clarifications of its core principles.[44]Much of these environmental issues have been raised by the small island States. They were proactive in ratifying the FCCC, the Kyoto Protocol, and the Paris Agreement. In fact, some of the island States even declared that such ratification does not imply relinquishing their rights under international law vis-à-vis State responsibility for climate change risks. They also emphasised that no provision in the Protocol can be readas diminishingthe principles of general international law.[45]

Tuvalu, one of the Island States even contemplated about taking the US and Australia for their contributions to climate change before the ICJ in 2002.[46]However, it did not pursue a contentious case before the ICJ and

43 CLIMATE CHANGE 2014: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE,81-89(Intergovernmental Panel on Climate Change ,2015) https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf.(last visited Mar 15, 2018)

44 TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION, 16-18(Cambridge University Press, 2009)

45 UNFCCC, 'Declarations by Parties - United Nations Framework Convention on Climate Change', Declarations by Fiji, Kiribati, Nauru, Papa New Guinea, Solomon Islands and Tuvalu <http://unfccc.int/essential_background/convention/items/5410.php>; FCCC, 'Declarations by Parties - Kyoto Protocol', Declarations by Cook Islands, Kiribati, Nauru and Niue <http://unfccc.int/kyoto_protocol/status_of_ratification/items/5424.php>; and FCCC, 'Paris Agreement - Status of Ratification', Declarations by Cook Islands, Marshall Islands, Micronesia, Nauru, Solomon Islands, Tuvalu and Vanuatu <http://unfccc.int/paris_agreement/items/9444.php> (last visited Mar 15 ,2018)

46 Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States In the International Court of Justice*,14 (1) PAC. RIM L. & POLICY J 103(2005)

moreover, the consent of the US was required for its ICJ's jurisdiction. Similarly in 2011, Palauattempted to seek an advisory opinion from the ICJ on the legal responsibility of a State to ensure that activities that emit greenhouse gases on their territory do not harm other States.This attempt was supported only by few parties as others feared its interference with the FCCC process[47]. The advisory opinion of the ICJ can be sought without the consent of individual States, but in accordance with the UN Charter.[48] In accordance with Article 96 of the UN Charter, a request by the General Assembly would require a two-thirds majority vote, but Palau did not pursue its initiative.

The most interesting application of harm prevention principles can be seen in the interference made by the Federated States of Micronesia in the environmental assessment of the plan to modernize Prunerov II plant in the Czech Republic. The Czech law provides for participation in its EIA process by any State whose territory could suffer significant environmental impacts from a project proposed in the Czech Republic. Micronesia claimed that the project's climate change impacts could affect its territory as the proposed modernizations failed to meet the best available technology (BAT) standard set by the European Union and Czech law.[49]

It requested the Czech Republic to conduct a transboundary EIA.[50]Even though a third-party assessment reported that the project failed BAT standard and would emit an additional 205,082 tons of CO2, the Czech approved the

47 UN Department of Public Information, *Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change*(3 February 2012) <http://www.un.org/News/briefings/docs/2012/120203_ICJ.doc.htm> (last visited Jan 12 ,2019)

48 The governing provision for the Court's advisory jurisdiction is Art. 65 (1) of the ICJ Statute which states that '[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request' ; See also Charter of the United Nations (entered into force 24 October 1945) 1 UNTS xvi.

49 RENE LEFEBER, *Climate Change and State Responsibility*, in, INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE, 321, 336 (Rosemary Rayfuse and Shirley Scott eds. Edward Elgar Publishing Cheltenham, 2012)

50 Paulo A. Lopes ,*FSM v. Czech: A New "Standing" for Climate Change*, 10 (2) CLIMATE LAW REPORTER 24, 25 (2010)

project without requiring the BAT standard. Rather, it only directed the project proponent to take compensatory measures at its other plants to offset the excess emissions.[51]ThusCzech authorities failed to acknowledge their legal obligation to offset the project's climate impact, especially when Prunerov II was considered the largest individual source of CO2 emissions in the Czech Republic and one of the largest in Europe.

According to the ICJ, States' procedural obligations would have an independent existence even though it is related to substantive harm prevention duty.[52]Therefore failure to abide by BAT or other applicable national standards should amount to a lack of due diligence even without clear evidence of present or future harm. The Czech Republic failed to comply its obligation of due diligence or its obligation under the EIA. The violations of procedural obligations can be of use when substantive arguments fail to convince or the attribution of environmental harm to a particular State fails to succeed. Therefore when violations of procedural obligations are established, it could prompt the States to take preventive and corrective measures reinforcing the no-harm rule principle.

State responsibility and the global commons

Unlike the transboundary harm caused by one State to another, which fits within the traditional 'bilateral' structure of international law, there also exists certain obligation of a State towards the international community as a whole.[53] This obligation arises from the *erga omnes* principle, wherein only a directly injured State can invoke the responsibility of another for violations.[54]It has become increasingly accepted through the ICJ decisions that these obligations are a States concern and that each State has a legal

51 *Supra* note.49

52 Case concerning Pulp Mills on the River Uruguay (Argentinav.Uruguay), [2010] ICJ Rep 14,para.78–9

53 Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), [1970] ICJ Rep 3, p. 32, para.33

54 Text of the Draft articles on Responsibility of States for Internationally Wrongful Acts 2001, Art. 42

interest in upholding them.[55]The ICJ has not explicitly held that environmental obligations can be attributed to *erga omnes* principle. But still various courts and tribunals have reiterated that the no-harm rule and related procedures apply to transboundary environmental harm.

Even though many believe that each State's right to invoke responsibility for violations is entailed in the *erga omnes*principle, no State or the ICJ has confirmed this point.[56] The concept of *action popularis,*having its origin in Roman law with scope for a sound legal argument and a fitting issue of litigation, has been a matter of controversy in international law.[57]In practice, options for judicial settlement of disputes about the commons have always remained limited and would probably continue if States fail to accept ICJ's jurisdiction based on mutual understanding.[58]

The International law Commission (ILC), a UN body composed of legal experts nominated by States parties and tasked with the codification and progressive development of international law has endorsed the idea of collective interest standing in its Draft Articles on State Responsibility. Accordingly, any State may invoke the responsibility of another for breaches of obligations owed to the international community but with limitations on remedies and countermeasures.[59]Also, any party can demand compliance based on treaty obligations owed to a group of States.[60] But, unless 'specially

55 Barcelona Traction, Light and Power Company, Ltd. (Belgium v.Spain), [1970] ICJ Rep 3, p. 47 para 91

56 Brunnée, Jutta, *International Legal Accountability Through the Lens of the Law of State Responsibility*, 36 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 3-38 (2005).

57 Nuclear Tests (Australia v. France) ,[1974] ICJ Rep 253, p.370, para 117

58 Gabcikovo-Nagymaros Project (Hungary v. Slovakia) Separate Opinion of Vice-President Weeramantry, [1997] ICJ Rep 7, p.88, para. 117 (pointing to the additional problems that flow from the fact that the Court's procedures, focused as they are upon disputes between specific state parties, are ill-suited to doing 'justice to rights and obligations of an erga omnes character')

59 *Supra* note.54, art. 48.1 (b)

60 *Supra* note.54, art .48.1 (a)

affected,' a State can only claim cessation of the violation and not reparations or countermeasuresas in the case of injury.[61]

Though few states have contemplated legal action for climate change-related damage to their territories, none have raised such claimsbased on harm to the global commons. Apart from binging a successful challenge, an injured State would find it difficult even toestablish a legal action to protect the global climate. Since the law of state responsibility adopts an adversarial mode, collective action, and close cooperation would not be possible even though it is inevitable to deal with a common concern like climate change.[62]Thus there is little or no scope for an individual States to pursue a public interest action to promote climate protection. However, a request for an advisory opinion before the ICJ to review the challenges and opportunities of bringing climate change action before an international court or tribunal may throw some light on the matter.[63]

Linking common concerns and CBDR-RC

The preamble of the Framework Convention on Climate Change clearly states thatthe 'change in the Earth's climate and its adverse effects are a common concern of humankind.'It is crucial to trace the importance of the concept of common concern in international law and its implications on climate change law. According to the ICJ, *erga omnes* obligations are owed by all State, and they all have a legal interest in upholding it.[64]

The concept of common concern as a practice has been applied both

61 *Supra* note.54, arts. 30,31, 42 and 49

62 Patrick Hamilton, *Counter(measure)ing Climate Change: The ILC, Third State Counter measures and Climate Change*,4(2) INT. J. SUSTAIN. DEV AND POLICY 83 (2008)

63 Philippe Sands, *Climate Change and International Law: Adjudicating the Future in International law*, 28 (1) JEL19 (2016)

64 Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), [1970] ICJ Rep 3

to the environmental concerns that arise within and beyond the jurisdiction of States.[65]It is based on the understanding that certain environmental processes or protective actions raise common concerns.[66] Thus the changes in climate and their adverse effects are the concern of all States under the UNFCCC. The notion of 'common concern' has gained prominence in the light of the immediate need for cooperation among States, but it does not entail specific rules governing the conduct of States. Moreover, no practice among the States establishes that common concern assumes legal obligations that are owed *erga omnes*.[67]The concept of common concern has no legal effect in the absence of a treaty.

Though the States are to partner globally for conserving, protecting, and restoring the health and integrity of the earth's ecosystem,[68]treaties are adopted for specific common concerns such as climate change. Some observe the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) as the concept of common concern.[69] The UNFCCC does not establish this link. Instead, it talks about the broadest possible cooperation by all countries in its preamble.[70]At the same time, the prelude to Paris Agreement accepts climate change as a common concern. It links it to other aspects like human rights, rights of various groups, the right to development, and intergenerational equity.[71]

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65 BIRNIE et al., INTERNATIONAL LAW AND THE ENVIRONMENT 128-129 (Oxford University Press,3rded. 2009)

66 BRUNNEE, *Common Areas, Common Heritage, and Common Concern*, in, OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW134(Bodansky*et. al.*eds.) Oxford University Press 2007)

67 *Supra* note. 65 at.130

68 Rio Declaration 1992, Principle 7.

69 *Supra* note.14 ,art 2 and Commentary

70 *Supra* note.14 ,art 5(2) and Commentary

71 Paris Agreement to the United Nations Framework Convention on Climate Change 2015, Preamble.

The CBDR principle purports to acknowledge the profoundinequalities and divergent priorities of developed and developing countries.[72]Despite the importance of CBDR principle in international environmental law, it has failed to gain acceptance as customary international law.[73]The CBDR principle on sharing responsibilities that remained contentious from the beginning of the climate change framework negotiations got further strengthened with the evolving nature of the capabilities of the respective countries during the post-Kyoto negotiations.

Evolving International Climate Change Law

International environmental law has evolved from the original narrow focus of the no-harm rule to areas beyond the jurisdiction of States. The emerging principles of international environmental law oblige the States to co-operate to address common environmental concerns. It has developed gradually, highlighting that States' actions have impacts not only in the present but also in the future. However, the long-term, uncertain, but potentially irreversible consequences of today's actions on the global climate remain to be addressed. Even though the basic duty to prevent environmental harm involves future harm, its ambit is further expanded using the precautionary principle. The precautionary principle enhances the standard of due diligence in the face of threats of serious or irreversible damage and is evident from its approach in individual treaty regimes.

The precautionary principle is vital in framing the overall climate regime, especiallythe latter part of the UNFCCC provisions, which guide the actions of its parties.[74] Rio requires the States to take precautionary measures 'to protect the environment.'[75]While the UNFCCC requires its

72 LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW (Oxford University Press 2006).

73 Thomas Deleuil, *The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties*, 21 (3) RECIEL 271 (2012).

74 United Nations Framework Convention on Climate Change 1992, art. 3.3

75 Rio Declaration 1992, Principle 15

parties to 'take precautionary measures to anticipate, prevent or minimize the cause of climate change and mitigate its adverse effects.' This difference makes UNFCCC more dynamic than Principle 15 of the Rio Declaration. On the other hand, regarding precautionary measures, the FCCC appears less assertive as parties 'should' take such actions and 'should' not postpone them for lack of full scientific certainty.[76]In contrast, Rio stipulates that 'precautionary approach shall be widely applied' and that lack of full scientific certainty 'shall' not be a reason for postponing them.

Sustainable development is another essential principle that enhances the scope of international environmental law. Similar to the concept of CBDRRC, the sustainable development principle also deals with the relationship between environmental and developmental aspects. But, while the idea of CBDRRC contains responsibilities based on intragenerational equity, the Sustainable development principle has both intragenerational equity and intergenerational equity.[77]According to the Brundtland Report, the concept of sustainable development is defined as the development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[78]This definition created anxiety in the minds of the developing countries as they feared that the principle might impede their developmental priorities. The apprehension of the developing countries got reflected later in the Rio Declaration. Accordingly, 'the right to development must be fulfilled to equitably meet the developmental and environmental needs of present and future generations.'[79]

Though the term sustainable development is used in several places in the Rio Declaration, there is no clarity regarding its scope and application. Sustainable development includes within its ambit various substantive and

76 United Nations Framework Convention on Climate Change 1992, art. 3.3

77 Stockholm Declaration 1972, Principle 1

78 WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43(United Nations, 1987), https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (last visited Sept 17th,2017)

79 Rio Declaration 1992, Principle 3

procedural elements. The substantive features include sustainable utilization of natural resources, the right to development, integration of environment and development, intragenerational equity and intergenerational equity. The procedural element comprises cooperation, public participation in environmental decision-making, and EIA.[80]The need for integration of environmental, economic, and social matters in all aspects is inevitable. Development, though essential, must be within the global environment's carrying capacity in the long run.[81]

Occupying the status of an 'interstitial norm,' the sustainable development principle, without being legally binding or clearly defined, has significantly contributed to shaping the treaty norms on different occasions.[82] The ICJ, in the case of *Gabcikovo-Nagymaros*, observed that new norms and standards that have evolved based on new scientific insights and awareness are to be considered.[83]It is also observed that the need to reconcile economic development with environment protection is explicit in the sustainable development principle. The sustainable development principle also finds a significant space in the climate regime. It is one of the guiding principles of the UNFCCC. According to Article 3.4, the parties to the UNFCCC have a right to and should promote sustainable development. But it is important to note that there has been no consensus so far among the world nations on the criteria for reconciling environment and development.

Treating climate change through treaties

The capacity of customary international environmental law to address

80 *Supra* note, at 116–123

81 *Supra* note.14, art 3(4–5) and Commentary

82 VAUGHN LOWE, *Sustainable Development and Unsustainable Arguments*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 19,31(Alan Boyle and David Freestone eds., Oxford University Press 1999)

83 Gabcikovo-Nagymaros Project (Hungary v. Slovakia), [1997] ICJ Rep 7, at. 78,para. 140

climate change problems based on the harm prevention rule is comparatively limited. Further, the conceptual framework of international law has grown beyond the confines of the no-harm rule. It now can address collective environmental problems as well as potential future impacts. However, these developments did not influence the evolution and application of customary law as that of soft law and the treaty-based regimes. Based on these newly formed concepts, the soft laws and treaties could provide concrete remedial or preventive obligations, such as specific emission reduction obligations. They could also prescribe detailed procedural requirements and even establish appropriate oversight mechanisms.

But since the applicability of treaties islimited to the consenting State, it poses a considerable challenge to bringing other relevant States to act.[84] The challenge becomes even more complicated when global collective action involving huge costs is required to address long-term and uncertain harms like those of climate change. The modern environmental treaty regimes have adopted several strategies to ensure collective participation and action. They include treaty development, treaty design, and finally, its implementation and compliance.[85]The regime comprising various Multilateral Environmental Agreements (MEAs) are perpetual in nature with different sets of norms,principles, rules, and decision-making procedures that meet the expectations of State parties.[86]Adopting an MEA is the beginning of an international legal process with several intertwined features like the framework-protocol model, institutionalization, and ongoing standard-setting processes.[87]

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84 SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 14 (Oxford University Press 2003) (emphasizing the importance of participation, and suggesting that it be theorized jointly with compliance).

85 DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW (Harvard University Press 2010)

86 Steven Krasner, *Structural Causes and Consequences: Regimes as Intervening Variables*, 36 (2) INTERNATIONAL ORGANIZATION185, 186 (1982).

87 THOMAS GEHRING, *Treaty-Making and Treaty Evolution* in OXFORD

Framework Convention/Protocol model

The framework convention/protocol model is the modern way of creating a new regime. A framework convention is primarily developed under this model after the states negotiate. It becomes the fundamental legal and institutional framework for future action. The framework contains general obligations relating to development and exchange of scientific research and information along with other obligations. Based on this framework convention, protocols that contain specific regulatory measures and implementation mechanisms are later developed in detail.[88]Inthe framework-protocol model, even before a consensus is arrived atin response to a problem or even before a crisis, States can initiate measures to address them. This action on the part of the States can lead to the adoption of specific substantive commitments by the framework convention. It is generally observed that initially reluctant States gradually join the process, thus setting the international law-making process in motion.[89]

Institutionalisation

The framework-protocol and institutionalisation act in consonance with each other. MEAs establish, or collaborate with bodies having scientific or technical experts. There is a permanent Subsidiary Body for Scientific and Technological Advice and another Subsidiary Body for Implementation under the UNFCCC.[90] Similarly, the climate regime collaborates with the Intergovernmental Panel on Climate Change (IPCC) for scientific advice.[91]Collaborations with such scientific institutions help build consensus

HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 491(Bodansky *et.al.*eds.,Oxford University Press 2007)

88 Daniel Bodansky, *The Framework Convention/Protocol Approach*, (World Health Organization, 1999) WHO/NCD/TFI/99.1 (last visited Sept 28th 2018)

89 *Supra* note.85,.186–7.

90 UNFCCC1992, art.9 and 10

91 IPCC,"Organization"<http://www.ipcc.ch/organization/organization.shtml#.UcCt5b5zYeg>(last visited July 15th ,2015)

regarding collective concerns and the need for collective action.[92] They further contribute towards amending the regulatory strategies. In the case of climate change, IPCC determines what constitutes dangerous anthropogenic interference.[93] It also helps to determine the kind of global emission reduction strategies required to avoid the adverse effects of climate change.[94]Such collaborations are necessary for an effective regime development, though not an effective climate agreement.

The actual development of a regime rests on the plenary bodies, protocols or other agreements established by the framework convention. For some, the presence of plenary bodies makes the MEAs look like international organizations.[95] But for others, they are purely diplomatic conferences that facilitate regular, long-term engagements between technical experts, policy-makers, and lawyer.[96] The Conference of Parties and their subsidiary bodies remain the focal point for determining future international regulatory activities.

Under the UNclimate regime, three separate and independent plenary bodies exist. They are the Conference of Parties (COP) under the UNFCCC,[97] the Conference of Parties serving as the Meeting of the Parties (CMP) under

92 PETER HAAS, *Epistemic Communities* in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 791-806 (Bodansky *et. al.*eds., Oxford University Press 2007)

93 United Nations Framework Convention on Climate Change 1992, art. 2

94 JUTTA BRUNNEE AND STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 146-151 (Cambridge University Press 2010)

95 Robin Churchill and GeirUlfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International law* ,94 (4) AJIL 623 (2000)

96 Alan E. Boyle, *Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions* ,3 (2) JEL 229 (1991)

97 United Nations Framework Convention on Climate Change 1992, art 7

the Kyoto Protocol[98], and the Conference of Parties serving as the Meeting of the Parties (CMA) under the Paris Agreement.[99] However, both the CMP and CMA meet separately in conjunction with COP to enhance their efficiency.[100]

Standard-setting processes

The treaty-based regulatory processes have the potential to enhance collective actions.[101] Standard-setting is a collective enterpriseunder the MEAs, and the parameters are set to ensure that sovereignty is respected through consent requirements. The consent processes under the MEAs are built to maximize opportunities for collective actions. The ordinary consent-based methods continue to contribute to the regime's development under MEAs and States bind themselves only when they consent to these instruments. However, to tackle time bound collective action, various strategies are deployed.[102] Relevant standards can be changed or expanded for technical issues for all parties except those who opt out.[103] But in the climate regime, applying these strategies ischallenging mainly due to the consensus requirement and its sensitive nature.

Most treaty-based standards are defined based on the decisions taken by the plenary bodies. Climate regime is no exception. The regulatory

98 Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, art. 13

99 Paris Agreement to the United Nations Framework Convention on Climate Change 2015, art. 16

100 Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, Art.13.1; Paris Agreement to the United Nations Framework Convention on Climate Change 2015, Art. 16 envisages that, upon entry into force, the UNFCCC COP will convene to serve as its meeting of the parties.

101 Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?,*93 (3), AJIL596 (1999)

102 Jutta Brunnee, *Coping with Consent: Lawmaking under Multilateral Environmental Agreements*, 15 (1)LJIL 1 (2002)

103 *Id*

standards on key issues of UNFCCC, Kyoto Protocol and the Paris Agreement[104] are decided by the plenary body except in a few instances where the concerned treaty empowers the plenary body to adopt a binding rule. These include adopting standards on inventory and monitoring international emission trading in soft law form.[105] Nevertheless, even such soft standards are often subject to prolonged negotiations leading nowhere under the climate regime. The main advantage is that the process facilitates agreement on collective action in its efforts to address collective concerns, enabling the regime to evolve faster.

Climate change impact is an evolving problem. MEA-based standard-setting is beneficial because its scientific understanding and political situations also evolve, providing a better understanding of the problem. The first conference of the UNFCCC decided that the draft Rules of Procedure, except Rule 42 on voting, would be applied provisionally.[106]As a result, the parties to the UNFCCC adopted the general UN practice of consensus decision-making.[107] The inability of the parties to decide on the voting rules has set aside the beneficial effects on various occasions. The COP could not adopt the 2009 Copenhagen Accord, due to the objections raised by few States based on the consensus decision-making process.

The climate treaty regime provides a platform for non-State actors, such as international organizations, non-governmental organizations, and business

104 Paris Agreement to the United Nations Framework Convention on Climate Change 2015, art. 4.8, 4.9, 4.13, and 13.13

105 Robin Churchill and GeirUlfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*,94(4)AJIL639-640 (2000)

106 The draft Rules of Procedure are reproduced in UNFCCC, Organizational Matters: Adoption of the Rules of Procedure - Note by the Secretariat (22 May 1996) FCCC/CP/1996/2.

107 Patrick Széll, *Decision Making under Multilateral Environmental Agreements*,26 (5) ENVTL. POLY.L 210(1996)

entities, to participate in the regulatory process.[108] The accredited observers are entitled to participate inmeetings of treaty bodies on matters approved by the Convention and raise concerns with approval of the chairperson.[109]However, in the usual course, the meetings on significant matters are generally closed to the observers. Even in the case of their participation, interventions are not permitted often.[110] The Non-governmental entities may distribute information or policy papers and publishes summaries of the main developments in climate negotiations.[111]They may even meet with or be part of official delegations, and report on negotiations.Thus, treaty regimes provide an arena for the non-State actors to influence the standard-setting process and provide input into law-making processes shaping their outcome.

The Paris Agreement though do not grant any specific rights or status to the non-State actors, it is more explicit about protecting the interest of few. The preamble to the Paris Agreement, acknowledges 'that climate change is a common concern of humankind'. It acknowledges that the Parties should uphold their obligations torespect and protect human rights, the right to health, the rights of indigenous peoples, local communities, migrants and people in vulnerable situationsincluding children and disabled persons. The parties should also promote and consider the right to development, empowerment of women, gender equality and intergenerational equity while addressing climate change.

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108 UNFCCC, *Parties and Observers*<http://unfccc.int/parties_and_observers/items/2704.php>(last visited Dec 15th ,2020);JUTTA BRUNNEE AND ELLEN HEY, *Transparency and International Environmental Institutions* in TRANSPARENCY IN INTERNATIONAL LAW 23, 30–32 (Andrea Bianchi and Anne Peters eds., Cambridge University Press 2013).

109 UNFCCC, Art 7.6; Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, Art. 13.8 (both stipulating that observer entities must be 'qualified in matters covered by the Convention').

110 UNFCCC, A Guide to the Climate Change Convention Process (Climate Change Secretariat, 2002) <http://unfccc.int/resource/process/guideprocess-p.pdf>(last visited Jan 1 ,2020)

111 "ENB Archives", IISD Reporting Services, Earth Negotiations Bulletin, , <http://www.iisd.ca/voltoc.html>(last visited Dec 18 ,2018)

Treaty development and participation

The framework treaty initially promotes parties' participation through commitments and subsequently makes space for the treaty parties to take up further obligations. Thus, there is always an option to remain in a framework treaty at a relatively low level of commitment. Even though there may be a progressive development of the framework convention, the parties can't be forced to consent to new or more ambitious commitments, thus compromising its outcome.

The primary idea of framework-protocol model had always been to ensure widest participation at the initial stages and subsequent deepening of the commitments.[112] The UNFCCC is no exception and highlights the 'broad-then-deep' approach. Another approach starts with a deeper level of commitment but by a smaller group of parties and subsequently enlarges the size of the group, as in the case of Kyoto Protocol.[113]There, the industrialized countries and countries with economies in transition pioneered binding GHG emissions reductions commitments. But to the dismay of all, not only that the emission reduction targets were insufficient and unfulfilled, they could not extend concrete emissions commitments beyond the pioneering States. It took long years of negotiation on regime designs and changed economic scenario, to arrive at the Paris Agreement which is now widely praised a global agreement. There again, the Paris Agreement reintroduced the 'broad-then-deep' approach through its national determined contributions that necessitates subsequent enhancement.[114]

The MEAs have extensively used differential standards in coordination with the basic models.[115]The Montreal Protocol is one example where the control measures were common for all countries, but developing countries

112 *Supra* note 85 ,185–187

113 *Id*

114 Paris Agreement to the United Nations Framework Convention on Climate Change 2015, art. 3 and 4.3

115 *Supra* note.85,at.182

were granted additional time to comply to ensure their participation.[116]While the climate regime in its Kyoto Protocol introduced different commitments for different countries to ensure global participation. Under the Kyoto Protocol, quantified emissions reductions targets were set for industrialized countries and countries with economies in transition, but not for developing countries.

The Paris Agreement, adopted a much more nuanced approach to the principle of CBDRRC. The application of the principle is subjected to the prevailing different national circumstances, and the differentiation is determined based on the requirements in each area.[117] In the case of mitigation, each individual Stateis free to choose their level of commitment but is subject to certain normative expectations in matters of differentiation, progression, and ambitionof the greatestpotential.[118]

The 'nationally determined contributions (NDCs) under the Paris Agreement also promote participation by providing flexibility to its parties in setting their standards. Further, they are not binding under international law, and the parties are free to adjust their domestic policies to meet the normative expectations of progression and the ambitionof the greatestpotential. The flexibility approach is not new to the climate regime and has also been adopted during the Kyoto Protocol. The parties relied upon emissions trading and other market mechanisms in its individual capacity and in groups to meet their commitments.[119]But broad participation in an MEA cannot always be ensured through differentiated and flexible standard.

Several factors, including economic, technological, and regulatory capacity limitations faced by the developing countries, resist them from

116 Montreal Protocol on Substances that Deplete the Ozone Layer 1987, art.5

117 Paris Agreement to the United Nations Framework Convention on Climate Change 2015, Preamble and art. 4

118 *Id.* ,art. 4.2

119 Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, art. 4, 6, 12, and 17

implementing the emissions reduction commitments. To overcome this crisis, various kinds of implementation assistance has been adopted by the MEAs.[120] To induce the active participation of major developing countries, the Montreal Protocol had to introduce a funding mechanism to cover the costs of industrial conversion in developing countries and technical assistance, training and capacity-building.[121]The Montreal Protocol also established a compliance mechanism to assist the parties in achieving compliance.[122]This ensured universal participation and broad compliance with its progressively tightened control measures under the Montreal Protocol.[123] Even though the success of financial and technical assistance under the Montreal Protocol influenced the climate negotiations, its contribution to the climate regime is minimal.

The nature of environmental problem has a significant role in determining the mechanisms that is to be employed to ensure participation.[124] In the case of Montreal, the concern was to eliminate the production and consumption of specific categories of ozone-depleting substances. The protocol contained provisions to ban both their import and export by non-parties and thereby stop their production and consumption.[125]But it was not sufficient to induce all the developing countries to join the Montreal Protocol. Therefore, financial and technical assistance had to beintroduced to convince them. Though similar trade proposals were advanced from

120 *Supra* note.85 ,243–245

121 Montreal Protocol on Substances that Deplete the Ozone Layer 1987, art. 5.5

122 *Report of the Tenth Meeting of the Parties to Montreal Protocol on Substances that Deplete the Ozone Layer,* UN, 1998, UN Doc UNEP/OzL.Pro.10/9, Annex II: Non-compliance procedure (1998) para 7(d)

123 UNEP—Ozone Secretariat, *The Montreal Protocol on Substances that Deplete the Ozone Layer: Achievements in Stratospheric Ozone Depletion*, Progress Report 1987, 2012 (Nairobi: UNEP - Ozone Secretariat, 2012).

124 *Supra* note 85 at .183.

125 Montreal Protocol on Substances that Deplete the Ozone Layer 1987, art. 2, 2A-I, 4, 4A.

different corners, the climate regime does not provide such provisions.[126] Instead, the climate regime emphasised open and supportive international economic system. It discouraged climate change regulations that lead to unjustifiable discrimination or disguised international trade restrictions.

Enhancing implementation and compliance

Implementation and compliance mechanism is another important feature of the modern environmental regimes, and they generally rely on two inter-related approaches. The primary approach relates to measurement, reporting and technical review processes to enhance transparency in implementation efforts. The secondary approach is concerned with creating regime-specific mechanisms to facilitate compliance and response to non-compliance.

In the early stages of its growth, MEAs had onlylimited compliance-related features like reporting, assembly and publication of information on the parties' performance through the secretariats or COPs.[127]It also contained provision for resolution of disputes on the matters connected with the interpretation or application of the agreement. But due to the need for consensus of all the parties concerned, they were of elementary nature.[128] In cases where a single party triggered dispute settlement, recommendatory awards were the only result.[129]

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126 SCOTT BARRETT AND RICHARD STAVINS, *Increasing Participation and Compliance in* INTERNATIONAL CLIMATE CHANGE AGREEMENTS, 3 (4) International Environmental Agreements: Politics, Law and Economics, 349, 364–366 (2003); ZhongXiang Zhang, *Multilateral Trade Measures in a Post–2012 Climate Change Regime? What Can Be Taken from the Montreal Protocol and the WTO*?, 37(12)ENERGY POLICY 5105(2009).

127 Kamen Sachariev, *Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms*, 2(1) Y.INTL. ENV.L 31 (1991)

128 UNEP, *Study on Dispute Avoidance and Dispute Settlement in International Environmental Law* (1999) UN Doc UNEP/GC.20/INF/16, 54–6.

129 The Vienna Convention for the Protection of the Ozone Layer 1985, art. 11

But gradually, with the passage of time, the number of MEAs increased, and the need was felt to concentrate more on enhancing compliance mechanisms. The MEAs were facing performance-related problems associated with procedural and substantive obligations[130]and were not mostly equipped to ensure compliance. Moreover, the available dispute settlement processes were left unused, and conventional dispute settlement procedures were ill-suited to deal with the current global concerns.[131]Since the impact of climate change would be widely distributed, the possibility of engaging in bilateral dispute settlement would be rare. The objective is not to sanction wrongdoers but promote compliance through action by almost all the States.

More advanced compliance techniques are seen adopted by the MEAs in the recent times and among them, measurement, reporting and verification (MRV) requirements is the most popular.[132]They played a pivotal role in the climate regime from the initial stage itself and continues to maintain its importance in the Paris Agreement. It forms the basis for any subsequent compliance assessment and compiles and publicises reliable information on the performance of individual parties. Thus, it encourages other parties to take more actions and guarantees similarly obliged parties to execute their actions promptly. Such an exposure to the analysisof all parties, including the civil society actors and the general public, exerts pressure upon parties to meet their commitments without fail and enhance their implementation measures where ever necessary.

Another significant development is the emergence of dedicated procedures and mechanisms to ascertain compliance and measures to

130 Edith Brown Weiss, *Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths* , 32 U. RICH. L. REV. 1555, 1560–1561(1999).

131 Malgosia Fitzmaurice and Catherine Redgwell, *Environmental Non-Compliance Procedures and International law* ,31 NYIL 35, 37 (2000)

132 IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW 107-205(Sandrine Maljean-Dubois and Lavanya Rajamani eds. Brill Publishers, 2011)

facilitate or compel compliance.[133]Any State can initiate the non-compliance procedures (NCPs), but the bodies constituted to examine non-compliance consists of government negotiators and not independent experts. Therefore, they exhibit more of a diplomatic character than a judicial one. Under the Kyoto Protocol, the NCP gets initiated on its ownwhen an expert review process raises a question regarding a state's compliance.[134]Again, under the Kyoto Protocol, if not objected to by the parties, the non-governmental organizations can access meetings of the compliance bodies[135]and their findings.[136]They may even introduce factual and technical information regarding compliance,[137] but are not entitled to initiate the procedure or make any formal submissions. Therefore, even though collective interest of parties can be observed under the NCP on the matters of compliance, inter-State concerns remains crucial.

The response of MEAs towards non-compliance usually looks into its causes and the different circumstances of the non-complying States. Based on this managerial approach, under the Montreal Protocol,[138] the compliance committee identifies the facts and possible causes of non-compliance of each state.[139] It highlighted that transparency, justificatory discourse, and capacity-building inherent in managerial approach can address majority of

133 Gunther Handl, *Compliance Control Mechanisms and International Environmental Obligations*, 5 (1) TUL.J.INTL&COMP.L 29 (1997)

134 Decision 24/CP.7, 'Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol' (21 January 2002) FCCC/CP/2001/13/Add.3, 64, Annex: Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, Section VI, para 1.

135 *Id.*,Section IX, para 2.

136 *Id.*, Section VIII, para 7.

137 *Id.*, Section VIII, para 4.

138 ABRAM CHAYES AND ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS, 8(Harvard University Press,1995)

139 *Supra* note 122, Annex II: Non-compliance procedure (1998) para 7(d). (Montreal Protocol NCP).

compliance problems and also contribute towards promoting compliance.[140] The justificatory discourse under this approach demands explanation through documentary and oral communication with the compliance body.

The majority of the NCPs aim at achieving compliance through cooperative facilitation.This is evident from the Montreal Protocols' approach to securing an amicable solution while respecting the Protocol's various provisions.[141]Traversing through this cooperative facilitation, the NCPs give more importance to monetary and technological support and other capacity-building measures compared to those provided by the treaties.[142] Thus highlighting lack of capacity as the primary cause of non-compliance and that collective interest can be attained by encouraging full compliance rather than by punishing for non-compliance. However, it is also important to note that such measures may not be sufficient in cases where there is a deliberate violation of a treaty commitment and the need for enforcement-oriented measures arises.[143]The facilitative approach may also fall short whenever an agreement requires parties to take actions beyond business-as-usual.[144]

Even though the MEA compliance regimes reflect cooperative and facilitative approaches to varying degrees, they are not completely lacking on assertive features.[145]The publication of compliance records and the caution issued by the compliance bodies to the non-complying parties exhibit

140 *Supra* note 122, 22–26.

141 *Supra* note122, Annex II: Non-compliance procedure (1998) para 8 (Montreal Protocol NCP).

142 MATTHEW J. HOFFMANN, OZONE DEPLETION AND CLIMATE CHANGE: CONSTRUCTING A GLOBAL RESPONSE 107(Suny Press2012)

143 *Supra* note.122,.3–10.

144 George W. Downs, *Enforcement and the Evolution of Cooperation*, 19(2) MICH.J.INTL.L319 (1998)

145 O. Yoshida, *Soft Enforcement" of Treaty: The Montreal Non-Compliance Procedure and the Functions of Internal International Institutions*,10(1) COLO.J.INTL. ENVTL.L.&POL.95(1999)

certain enforcement characteristics.[146]The NCP under the Montreal Protocol, contains provision for suspension of certain 'privileges' in case of non-compliance. However, to promote participation and compliance, adopting cooperative and facilitative approaches had always been the best option for the MEAs.[147]

Capacity-building and financial assistance had little role to play in the case of Kyoto Protocol as only industrialized Statesand countries with economies in transition had emission reduction commitments. Apart from that, the emissions trading mechanisms under the Kyoto Protocol was not an easy path to compliance. The compliance procedure under the Kyoto Protocol explicitly aims to 'facilitate, promote and enforce compliance' and is therefore different from NCPs of other MEAs.[148]On the contrary ,the Paris Agreement relies on nationally determined contributions instead of internationally negotiated top downemission reduction commitments, thus reverting back to the conventional approach that facilitates implementation and promotes compliance.[149]

The Paris Agreement establishes a mechanism that consists of an expert committee which is facilitative in nature, transparent, non-adversarial and non-punitive for this purpose.[150] The Committee is obliged to take into consideration the capabilities and circumstances of respective parties

146 *Supra* note 122, Annex V: Indicative List of Measures that Might be Taken by a Meeting of the Parties in Respect of Non-Compliance with the Protocol in Report of the Fourth Meeting of the Parties

147 Jana von Stein, *The International law and Politics of Climate Change: Ratification of the United Nations Framework Convention and the Kyoto Protocol*,52(2) JOURNAL OF CONFLCT RESOLUTION 243–244(2008)

148 Decision 24/CP.7, 'Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol' (21 January 2002) FCCC/CP/2001/13/Add.3, 64, Annex: Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, Annex, Section I.

149 Paris Agreement to the United Nations Framework Convention on Climate Change 2015, art. 15.1.

150 *Id.* art. 15.2.

throughout the process, acknowledging the special circumstances of LDCs and SIDS.[151]

Addressing the Complex Problems of Climate Change

No-harm principle continues to be the conceptual foundation of international environmental law. It has undergone tremendous change and, at the same time, maintained its significance over time, from balancing competing State interests to usingthe territory. Even though there is yet to be clarity on the no-harm rule, it still creates a due diligence obligation upon a Stateto avoid transboundary harm to the environment, thus making it pertinentto the cause and impactof climate change. As a general practice, the individual States have been relying on the no-harm rule for initiating legal action against other States. The progressive expansion of the rule's due diligence, precautionary principle, and procedural elements, including the caselaw, has significantly enhanced its potential.

In the light of the rising number of environmental cases before the ICJ and other international tribunals, cases involving climate change will reach before an international court in the immediate future. Even without recourse to a formal dispute settlement or enforcement action,customary international law framework could potentially shape State conduct. In addition, key states' unilateral action can sometimes magnify an issue and create the force necessary to achieve progress or smoothen the collective decision-making process.[152]However, legal action or argument based on customary law does not take climate action beyond a particular limit. Further, the rules and principles of international environmental law evade a precise or holistic definition making it challenging to tackle climate change. The possibilities of holding the State accountable or enforcing their compliance based on rules of State responsibility are comparatively limited. Undoubtedly, it would

151 *Id.*, article 15 , Decision 20/CMA.1, Annex, paragraph 22 (a)

152 Daniel Bodansky, *What's So Bad about Unilateral Action to Protect the Environment*, 11(2) EJIL339 (2000)

always be better to adopt a cooperative approach rather than adjudication to combat a collective action problem such as climate change.

The most crucial role of international environmental norms has been to support policy demands and negotiate them. Its role in shaping the international environmental regimes, including the climate regime is significant and independent of the status of customary international norm. Though of varying degrees, different rules and principles of uncertain legal status, including precaution, common concern, common but differentiated responsibilities, and sustainable development have been dominant in the negotiations on climate regime.

Thus, a treaty-based approach would be more capable of addressing the complex problems of climate change than the customary law. In fact, the UNFCCC is phenomenal to the extent that it acknowledges the complex nature of climate change and adopts the rules and principles of international environmental law. Various MEAs have laid the basis for a range of features and innovative approaches to streamline meaningful collective action among the States. It includes institutionalization, standardsetting processes of the framework/protocol model, and techniques to encourage participation and facilitate implementation and compliance.

The climate regime can also benefit from the rich experience of other environmental regimes. But, since each international environmental problem has its own features and policy context, they do not have a universal application. The multidimensional nature of the climate challenge and political uncertainty impede the progress of climate regime despite adopting the framework-protocol model, and many other tried and tested features and approaches. Many a time, the negotiating parties were left with no option, but to forsake some of the well-known formulas and try new ones. Unfortunately, even after two decades of its adoption, the climate regime continues to remain an unending process.

Conclusion

The structure and processes of international law and international environmental law have significantly shaped, and continue to underpin, international climate change law. It is difficult to establish whether the progressive climate regime will have larger consequences for international law in future. The concern regarding endangering of obligatory nature of international law existed due to the introduction of flexibility in commitments, informal nature of NCPs, absence of sanctions for breaches of international law, assistance to non-compliant parties in various MEAs.[153] At the same time, there are also views that 'giving up the rule of law in favour of a specific set of goals' and making 'the binding force of international law negotiable' would lead to more cost-effective management of environmental problems.[154]

The non-legally binding, nationally determined contributions and proportionate soft compliance features of the Paris Agreement also does not alleviate these apprehensions. Despite these concerns, climate change regime is largely compatible with the general norms of international law. Even though the features of climate regime may look homogenous to the conventional international law standards, they convincingly deal with complex policy challenges of climate change. The futuristic holistic model of Paris Agreement can thus be expected to gradually bridge the gap and build momentum for states to comply with their obligations under general international law and mitigate climate change.

153 Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3(1) Y.INTL.ENV.L. 123(1992)

154 JAN KLABBERS, *Compliance Procedures* in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 995,1007-1008(Bodansky*et.al.* eds., Oxford University Press 2007)

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