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NCU Law Review is a peer-reviewed biannual academic publication of the Centre of Post-Graduate Legal Studies (CPGLS) at School of Law (SoL), The NorthCap University (NCU), Gurugram (formerly ITM University, Gurgaon). This publication is an endeavour to serve as a forum for the promotion and circulation of views on contemporary legal issues among members of the legal profession, academicians, and students. The Law Review aims at legal research centres, policy makers and government organisations. The views expressed in this publication are those of the authors and not necessarily those of the Editorial Board of the Law Review.

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EDITORIAL NOTE

The NCU Law Review, since its birth, has endeavoured to deliver pioneering and unconventional research. This journal is in succession to the previous two issues, and like its predecessors aims to bring severalty of legal perspectives to the mind of the reader. This issue is particularly special in so far we received academic scholarships from across the borders truly representing the expansive reach of the journal. We are proud to announce the arrival of this issue which encompasses a broad spectrum of literature on diverse domains of law and policy ranging from Law and Culture, International Arbitration, Criminal Law, Cyber Law, Copyright Law, International Law, and Constitutional Law.

The Editorial Board is appreciative of active involvement of hard-working student editors, namely, Ms. Priyanshi Sharda, Ms. Divya Singhal, Mr. Ayush Rai and Mr. Amardeep Chahal at every phase of this publication process.

In the article titled, “International Perspective of Indigenous Cultural Heritage’s Reparation Policies – The Case of Sacred Territories & Ancestral Remains”, Dr. Masoni firmly posits the need for reparations for the losses accrued to indigenous people in the light of modern International Law.

In the article titled, “Impact of Drug Abuse and Drug Trafficking in Educational Institutions: An Empirical Study”, Dr. Zubair Ahmed Khan & Vaishali, point out the high-priority concern of easy accessibility of drugs amongst the youth in educational institutes. In doing so, the authors underpin the role of NALSA, DLSA and other social organizations through empirical evidence.

Dr. Faizanur Rahman in his article, “Introducing Artificial Intelligence in The Criminal Justice System with Special Reference to India” seeks to explore the possibility of introduction of Artificial Intelligence in Indian Criminal Justice System by highlighting its multifaceted role including criminal behaviour detection, record management etc. in a comparative perspective.

Dr. Anita Yadav, brings to the forefront the issue of identification of Non-International Armed Conflict *qua* its characterisation and threshold, and illustrate the gaps in law. In addition to the stated, she further examines the challenges to regulate contemporary armed conflicts, and suggests the way forward in her article titled, “Increasing Violation of International Humanitarian Law During Non-International Armed Conflicts and Its Challenges”.

Dr. Nisha Dhnaraj Dewani & Dr. Mamta Sharma studies the role of copyright law in construction of course materials, and their photocopy for the purpose of research and development and academic improvisation in their co-authored article, “Evaluation of Copyright Reproduction Right in the Light of Fair Dealing in the Educational Sector in India”.

Areena Parveen Ansari & Gautam Gupta in their work, “A Critical Analysis On Application of Artificial Intelligence: A Socio-Legal Study”, present varying dimensions of Artificial Intelligence in quotidian living of the society. Specifically, they also mention about the use of AI in justice delivery system.

Farah Hayat, in her article “WTO Dispute Settlement Mechanism and The Role of The Appellate Body: A Critique” critically excruciates the functioning of the Appellate Board of WTO in resolving trade disputes generally, and the role of USA in bringing dysfunctionalities to the mentioned adjudicatory body.

Nubee Navid in his authored case comment, “The Potential Relevance of Uber Technologies Inc. v Heller in Assessing Unconscionable Arbitration Clauses”, examines the intricacies of one-sided arbitration clauses. Interestingly, he studies the implication of the decision for Indian Law.

Anirudh Vijay and Vaibhav Sharma in their jointly authored case comment, “Policing The Police Through CCTVs: Analysis of Paramvir Singh Saini v. Baljit Singh”, appreciates the Supreme Court for exhaustive guidelines on installation of CCTV cameras within the police stations in furtherance of human rights protection, yet simultaneously highlight the shortcomings in the judgment.

Akshay Luhadia, applauds the Madras High Court in his work “Thwarting the Might of Strategic Lawsuits Against Public Participation; Grievances Redressal Officer, M/s. Economic Times Internet Ltd., and Others Versus M/s. V. V Minerals Pvt. Ltd.” for its innovative use of the existing doctrinal framework to reinstate free speech of the press in the broader contemporaneous scenario where the Courts are becoming a place to silence free speech.

The Editorial Board expresses heartfelt gratitude to the authors for their scholarly contribution. We would further extend our appreciation to Sh. Daulat Singh, Hon’ble Chancellor, NCU, Hon’ble Members of the Governing Body, NCU; Prof. (Dr.) Prem Vrat, Hon’ble Pro-Chancellor (Academics), NCU; Prof. (Dr.) Milind Padalkar, Hon’ble Pro-Chancellor (Operations); Prof. (Dr.) Nupur Prakash, Hon’ble Vice-Chancellor, NCU; Col. (Retd.) Bikram Mohanty, Hon’ble Registrar, NCU for their continuous support, guidance and cooperation in this academic endeavour. We are also thankful to the reviewers, the dedicated staff of the University and Decorpac (I) Pvt. Ltd.

Editorial Board

NCU LAW REVIEW

MESSAGE FROM THE VICE CHANCELLOR, NCU

Research is a crucial and revered responsibility of the Higher Education Institutes. Not only it is a way of giving back to the community, but also ensures opening up of the academic vistas remaining to be explored. Hence, with immense pleasure, I present you with pride and happiness, the third issue of NCU Law Review published under the aegis of the Centre for Post-Graduate Legal Studies (CPGLS) at School of Law, The NorthCap University.

Our previous two volumes were a success taking within its fold running currents and trends of law. In fact, the issues through their amplified circulation reached the hands and minds of legal luminaries in the academic circles and legal profession. The present journal endeavours to carry the legacy of success forward, and keep the vibrancy of legal research vigorous. The law review intends to keep the spirit of inquiry and legal reform alive in the minds of avid readers, young and old academicians, advocates, and aspiring lawyers. The articles published in the journal meticulously scrutinize the legal quagmires, and fertile the soil for further thought and action.

I sincerely appeal to all legal scholars to contribute to the future issues of the law review, and further the cause of knowledge.

The publishing, editing and shaping up of the law review would have been impossible without the determined, and accurate work of the editorial team. I congratulate the entire team. I acknowledge my thanks and due regards to the contributors of the journal and hope for our long and continued relationship in future.

Best Wishes and All the Success!

Prof. (Dr.) Nupur Prakash,
Vice Chancellor,
NCU, Gurugram

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INTERNATIONAL PERSPECTIVE OF INDIGENOUS CULTURAL HERITAGE'S REPARATION POLICIES: THE CASE OF SACRED TERRITORIES & ANCESTRAL REMAINS

*Dr. Claudia Masoni**

ABSTRACT

Over the centuries, due to colonization and forced assimilation, genocide, ethnocide and systematic discrimination, Indigenous Peoples have undergone serious threats and violations of their rights, resulting in an unjustifiable loss of their cultural patrimonies and identities. This article intends to analyse international law's modern restitution policies that can today be successfully used to return cultural heritage to Indigenous Peoples. The article, therefore, considers indigenous heritage and culture as inclusive of objects, traditions, cultural expressions, sacred knowledge and traditional territories of cultural importance. While transcending the simple legal provisions referring to restitution policies, the article builds a bridge between law and anthropology, and structures an analysis as to why the sacred aspect of their heritage – be it land, knowledge or ancestral remains should, alone, be judged as an effective parameter to grant the restitution. In furtherance of its analysis, the article also deals with the case study involving the Māori Mokomokai of Aotearoa-New Zealand.

I. INDIGENOUS CULTURAL HERITAGE – WHAT IT MEANS TO THE INDIGENOUS PEOPLES

'Indigenous cultural heritage' is a broad concept, embracing all sorts of written and unwritten patrimony of an indigenous society. In the words of Ms Daes, Special Registrar of the Non-Working Group on Autochthonic Populations (1994-2001), 'heritage' is everything that belongs to a definite identity of a

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people. It includes all those things that jurisprudence regards because of the inventive production of human thoughts and acquisition, e.g., songs, music, dances, literature, artworks, research project and information. It conjointly includes inheritance from the past and from nature, like human remains, the natural options of the landscape, still as present species of plants and animals with that country has long been connected. With ‘cultural patrimony’ is usually means to ‘Associate in Nursing’ and having on-going historical, ancient or cultural importance central to the Autochthonic Peoples. Cultural patrimony conjointly includes those sacred objects and specific ceremonial objects, that are required by autochthonic spiritual leaders for the application of their spiritual traditions.¹ Likewise, cultural patrimony includes land sites of special spiritual significance for Indigenous communities, burials and territories that have shaped indigenous traits and their cultural traditions. In indigenous traditional worldview, cultural properties represent more than just objects and locations, they incorporate the identity of a human community, which has, over the centuries, identified itself in the cultural features it has shaped and from which it has been shaped. Hence, the unique religious and secular items each indigenous culture creates and the sacred places from which they originated are fundamental to its continuity.²

Today, cultural property, including symbolic items, artworks, religious artefacts, and human remains of indigenous ancestors, continue to be taken away from the Indigenous Peoples without their formal consent, fattening private and public collections worldwide. Since in indigenous traditions rare items of cultural and religious value are intended for public display and generally do not circulate outside the community, much of the indigenous heritage in museums and private collections can be considered of dubious provenance. For this reason, currently, and following a new global cultural renaissance among Indigenous Peoples worldwide, Indigenous communities are demanding the international community

¹See Robert K. Paterson, *Claiming Possession of the Material Cultural Property of Indigenous Peoples*, 6 MEDIA & ARTS L. REV. 193 (2001).

²See Irene Daes, *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, Preliminary Report of the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1994/31, Annex (1994).

to examine and adopt, as a matter of urgency, effective legal standards and instruments to guarantee the protection, preservation, possession and restitution of their cultural patrimony. In most cases, they ask to have the cultural property returned to the original holder (or the descendants) or, in case the holder is not identifiable, to return the unlawfully taken heritage to the community of origin.

In international law, of all the existing remedial programs, *restitution* is generally regarded as the primary remedy designed to re-establish the circumstances in place prior the occurrence of the wrongful act. It is only when restitution is not possible that other remedies are taken into account.³ Yet, when it comes to the Indigenous Peoples, restitution is generally considered the most unsettling of remedies, because it involves a direct confrontation with colonial and assimilationist practices that states have every interest to hide or ignore. Additionally, any claim for the restitution of artefacts, land, human remains and natural resources questions the very concept of ‘cultural property’ as understood by Indigenous and non-Indigenous people.⁴

For Indigenous Peoples, property is communal in nature and, as such, it is owned by a group and not by individuals. While the Western idea of cultural property implies ownership of the property (and its private or public use), Indigenous Peoples’ property, being it tangible or intangible, embodies the essence and the spirit of a community; its value is not economic, but profoundly and fundamentally idiosyncratic and spiritual; where the identity of an entire group is moulded into cultural expressions, ideas, memories, art and traditions, land and ecologic preservation. Thus, Indigenous’ request of restitution has not the same cultural and economic implications Western society gives to any claim over cultural property. Today like yesterday, it is in the ethic understanding of this difference that most of the controversies around restitution policies lie. Given the great economical value of Indigenous heritage, much of the issue today is associated with the restitution of native lands and territories originally owned by Indigenous societies and surrendered or surreptitiously taken away by

³See Ana F. Vrdoljak, *Reparation for Cultural Loss*, in REPARATIONS FOR INDIGENOUS PEOPLES 212 (Federico Lenzerini ed., 2008).

⁴See Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004-2046 (2007).

states. In this case, states have so far manifested a strong resistance in recognizing native title to land and have not started any systematic practice of land restitution yet. Such lands return would undermine states' sovereign right to property, and it would affect considerably the states' economy because most of the natural resources today extracted come from territories that originally belonged to Indigenous communities. In land claims, while identity, past wrongs and non-endorsed treaties play an important role in every Indigenous claim over land reinstatement, economy is what notoriously orient and influence the result of such disputes. According to Barkan, in this kind of conflicts, the economic resources determine the strongest party which possesses the most manipulative power over the disputes' outcome. Hence, as a recurring curse in Indigenous history, money wins over any ethical and moral evaluation; and economy becomes the trumping element determining the result of most of the restitution claims.⁵ So, how can Indigenous Peoples start winning a war they have 'traditionally' lost? There are not many effective answers to this question.

II. UN DECLARATION ON THE RIGHT OF INDIGENOUS PEOPLES

At present, the UN Declaration on the Right of Indigenous Peoples 2007⁶ seems to represent the most *omni*-comprehensive instrument referring to Indigenous Peoples' rights. Article 8, 10, 25 and 26 of the Declaration states that Indigenous Peoples have the right to the land and resources they have traditionally owned and they cannot be dispossessed of their territories and heritage sites without their prior-informed consent. Article 8, in particular, underlines the importance of land for Indigenous Peoples and call upon States:

to provide effective mechanisms for the prevention, 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;

⁵See ELAZAR BARKAN, *THE GUILT OF NATIONS* 181 – 82 (2000).

⁶ U.N. Gen. Ass'y by A/RES/61/295 (Oct. 2, 2007) [hereinafter 'UNDRIP' or 'Declaration'].

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; . . .

Whereas Article 25 stresses the fundamental holistic bond Indigenous Peoples have with the land they traditionally occupied:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Whereas Article 11 and 12 directly address “reparation policies by stressing Indigenous peoples’ rights to carry out their spiritual practices in their traditional territories:

Article 11.2 States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs . . .

Article 12.1 Indigenous peoples have . . . the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

At the same time, the Declaration acknowledges the importance of Indigenous culture and clearly states that worldwide Indigenous Populations have the right to foster their cultural identity counting of: archaeological sites, traditions, religious practices and rituals, customs, language, ceremonial objects and oral traditions. Therefore, Indigenous Peoples have the right to revitalize and practice

their traditions, to protect and develop past, present and future manifestations of their culture. Article 31 states that Indigenous Peoples have “the right to maintain, control, protect and develop their cultural heritage and their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

Since its adoption in 2007, the UNDRIP has become the legal discourse on Indigenous Peoples and has seemingly reached a legitimacy which it did not have beforehand. Not only is the Declaration the result of more than 20 years of intense negotiations, and it is the most recent instrument safeguarding Indigenous Peoples at international level, but it also represents the most comprehensive of all existing international instruments addressing Indigenous issues. It embodies, completes and redefines most of the existing law,⁷ and it includes *inter alia* most of the crystallized customary international law related to Indigenous Peoples.⁸

According to experts of the calibre of Prof James Anaya (UN Special Rapporteur on the Rights of Indigenous Peoples - 2008-2014), for instance, some of the articles included in the Declaration today reflect either customary international law, or laws which are in the process of crystallizing into customary international law.⁹ True, many lawmakers still argue that though the phrasing of the Declaration is clear and *omni*-comprehensive, it remains a non-binding instrument lacking formal enforceability. Additionally, although the Preamble recognizes Indigenous Peoples’ essential contribution to the “diversity and richness of civilization and cultures, which constitute the common heritage of mankind”, the UNDRIP opening paragraphs only encourage “states to comply

⁷“On the macro level, the Declaration enhances the fairness of international law by securing the place of indigenous peoples’ rights in international law, functioning, in turn, to reverse, or at least address, some of the injustice wrought against indigenous peoples under the guise of international law in the past”: Claire Charters, *The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 288 (Claire Charters & Rodolfo Stavenhagen, eds, 2009).

⁸See generally S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21(1) ARIZONA J. OF INT’L & COMP. L. 13 – 61 (2004).

⁹See *id.*, at 15.

and effectively implement all their obligations as they apply to Indigenous Peoples under international instruments” and refer to the Declaration as a “standard of achievement to be pursued in a spirit of partnership and mutual respect”.¹⁰ However, while the legal importance of UNDRIP is still under evaluation by lawyers and academics, it is now widely acclaimed that the Declaration symbolizes an important step forward in the recognition of Indigenous cultural, political and economic rights. Many of the Articles of UNDRIP, in fact, rephrase existing international law provisions already present in the Indigenous and Tribal Populations Convention, 1957 (No. 107) and Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization, Convention on Biological Diversity (CBD), Declaration on Environment and Development (Rio Declaration) - Agenda 21, Mataatua Declaration, etc.

In legal terms, the UNDRIP is mostly considered human rights law; and yet, its Article 11 clearly stresses that restitution is one of the most suitable forms of reparation for past wrongs done. The article considers ‘archaeological and historical sites’ as part of Indigenous ‘religious and spiritual property’, and so included within ‘Indigenous cultural heritage’ and consequently subjected to redress and restitution policies. According to Vrdoljak, however poignant, the right “sits uncomfortably with Art 12(1), which refers simply to ‘the right to maintain, protect, and have access in privacy to their religious and cultural sites’”.¹¹ Additionally, the Declaration’s wording remains vague on which reparation policies states should pursue. Article 12 of the convention stresses that Indigenous Peoples should be granted “access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains” and states should seek ‘to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned’. However, in actual fact, it could be used to trump the efficacy of Art 11. It could encourage

¹⁰See *Supra* note 7, at 212.

¹¹See *id.*, at 218.

states to believe that although those sites were of great spiritual significance for the inhabitants, and it was unjust to dispossess Indigenous Peoples of their sacred lands. On the other hand, States cannot go back in time and return those territories because they now are part of the sovereignty of a State. Maybe all that States are today willing to do is to let Indigenous Peoples pay, once in a while, a visit to their ancestral lands for their spiritual ceremonies.

III. RESTITUTIO IN INTEGRUM PRACTICE

Today, *Restitutio in Integrum* consists in the complete re-establishment of the original situation existing prior the wrong was committed; it also represents the most adequate and effective existing measure of reparation. According to Barkan, a claim for restitution starts from a ‘neo-Enlightenment morality – that is, the recognition of an ensemble of rights, primarily the rights of peoples and nations to decide for themselves and to reject external impositions. Restitution privileges partial solutions over no resolution’.¹² Today, under the influence of the UNDRIP, states’ practices and NGOs’ efforts, the focus of the new restitution claims of Indigenous Peoples has thus been shifting from an approach of closure and denial to the open undeniable admission that governments’ political ‘measures’ were discriminatory and profoundly unjust and, that in a multicultural world, it is unfeasible to keep talking of exclusivity and superiority of a culture over another. The old idea that Indigenous Peoples were non-existing underdeveloped entities with no legal personality or *locus standi* right or capacity to bring forth an action or a claim is today, generally overruled. And yet, Indigenous cultural property’s claims still go widely unanswered. Why?

Most of the restitution claims made by Indigenous communities are today based on massive violation of their human and cultural rights and, consequently, restitution cannot always be granted because much has gone missing in one way or another. When this happens, the degree of effectiveness and adequateness of

¹² “The focus of a negotiated solution (justice) is consent rather than a specific predetermined result and reflects an international trend that places ethical principles alongside traditional *realpolitik* considerations”. ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000).

any other measure (apologies, compensation, etc) is usually unable to restore physically and morally the wrong done.¹³

This is mainly due to the special and spiritual importance that heritage and cultural expressions traditionally have for Indigenous Peoples. For them, culture represents more than artistic creation. It is filled with a spiritual significance that is fundamental for the continuity of every Indigenous tradition and to deny Indigenous Peoples' access to their cultural inheritance means to deprive them of their identity and cultural continuity. In most recent years, Indigenous societies have brought more and more land claims or actions for the reparation of ancestral remains and the restitution of ceremonial objects forcing several governments with considerable Indigenous communities on their soil to address the issue of restitution at the national level.¹⁴ To give a well-known example, on October 1985, the Labour government of Prime Minister Hawke, transferred the title of one of the major Australian tourist attractions, the Uluru-Ayers Rock and Olgas, to Aboriginal ownership. The return's claim was carried out with reference to an unquestionable morality: the nobility of Aboriginal culture as culture; the incontrovertible sacredness of the site; the profanity of self-serving Western greed; the well-documented sin of the past; traditional affiliation with the land; the imperatives of human rights and the inalienable title to a "quality of life".¹⁵ The issue of establishing ownership over the Ayers Rocks required the formal proof that Aboriginals had spiritual connections to the land; they were physically using the land; and the rock represented a fundamental aspect of their cultural and spiritual life. The land ownership issue mainly referred to the use Aboriginals were making of that land prior Europeans colonialism. To prove their ownership, Aboriginals had to produce sacred lore from the dreamtime period showing how ancestral peoples were using the rock and its surrounding landscapes.¹⁶ Given the sacredness of the site, since 1985 the traditional owners of the Uluru have been asking tourists to avoid climbing the rock (with little

¹³See Dinah Shelton, *Reparations for Indigenous Peoples: Present Value of Past Wrongs*, in REPARATIONS FOR INDIGENOUS PEOPLES 212 (Federico Lenzerini ed., 2008).

¹⁴See Vrdoljak, *supra* note 3.

¹⁵See Elvi Whittaker, *Public Discourse of Sacredness: The Transfer of Ayers Rock to Aboriginal Ownership* 21 AMERICAN ETHNOLOGIST 311(1994).

¹⁶See *id.*

success). In 2019, after consulting with the wider Anangu community, the Uluru-Kata Tjuta National Park, in respect of Aboriginal spiritual traditions, decided to finally ban any tourists' climbing activity. What if Aboriginals did not have any testimony of their traditional spiritual activity in the Uluru area?

In Europe, for example, people tend to consider 'sacred' something that is generally connected to an official religion. Thus, no one would argue that, for example, St Peter's hill, the place that hosts the remains of the Saint and where the Basilica was built to commemorate the Saint's remains is a holy place. That piece of land is sacred because Catholics consider it as such. While the rest of the world might be of a different belief, the Basilica is unquestionably considered a sacred monument.

Indigenous Peoples never built cathedrals. Forests or caves were their cathedrals. They considered sacred the land they inhabited. According to their belief systems, a river, a rock, a mountain could be rightly considered holy. The fact that often indigenous societies worship their environment as something sacred and intrinsically connected with their creation and survival has always caused some confusion among states and jurists who customarily consider land a commodity. Historically, this double standard way of perceiving what can be plausibly labelled 'sacred' has brought to the dispossession and exploitation of Indigenous Peoples' territories, and the consequent erosion of their cultures and traditions. Yet, a landscape is not sacred because it fits into Eurocentric idea of what is spiritually sacred; a landscape is sacred because the humans living in it, or just visiting it so perceive it. These sites are sacred because, in some ways, they are holy, venerated or consecrated and thus connected with "religion or belief system, or set aside for a spiritual purpose".¹⁷ Most of these places¹⁸ are not connected with any religion; but they are associated with "living cultures

¹⁷ Bas Verschuuren et al., *Introduction: Sacred Natural Sites the Foundations of Conservation*, in SACRED NATURAL SITES – CONSERVING NATURE & CULTURE² (Bas Verschuuren, Robert Wild et al., 2010).

¹⁸On the UNESCO website it is possible to find out more about these spiritual places which are today World heritage Sites, *see generally* <http://whc.unesco.org>.

and traditions”, and specific rules must be respected.¹⁹

The Mount Arunachala (which means ‘Red Mountain’) in Tiruvannamalai, Tamil Nadu – India – is a beautiful example of what was just stated. The Mountain is considered sacred by Hindu people. Over time, it hosted the Sadhu Ramana Maharshi who during his lifetime lived in three caves along the mountain. The Mountain did not become sacred because of the Sadhu’s staying; but it was because of its sacredness that Maharshi choose it as refuge for his meditation. Hindu Mythology associates the Mountain to a dispute between Brahma and Vishnu which was afterwards settled by Lord Shiva who, according to legend, turned himself into the very mountain. Over time, the Mountain has attracted many Saints and spiritual seekers who settled around it, to benefit from its beauty, spiritual force and energy. Today, on every full moon, thousands of Hindu people walk around it. To them, the place is still the very manifestation of Shiva, and no one in India would ever challenge its sacredness, or privatise the land for dubious practices. Of course, over time Tiruvannamalai has grown around the mountain, and many tourists visit the place annually. But the Mountain, in its very force and beauty, still watches over those who take refuge in its sacredness.²⁰

Western civilizations, however, do not seem to share the same respect and awe for natural settings. To Western mind, any land is worth its economic value once expropriated and exploited. This general ‘attitude’ is very well exemplified by the *United States v Sioux Nation of Indians*²¹ case discussed by the Supreme Court of the United States in 1980. The case refers to the notorious Black Hills in U.S., a sacred place that traditionally belonged to the Sioux Nation and, in 1879, was expropriated by the United States government. On a legal level, the events that brought to the battle and the confiscation of the Hills, and decided of the sorts of the Sioux Nation were, not only unlawful, but purely economically

¹⁹ Jane Hubert, *Sacred beliefs and belief of sacredness*, in SACRED SITES, SACRED PLACES¹⁰ (David L. Carmichael & Jane Hubert et al., 1994).

²⁰ See Dr. BNV Parthasarathi, *The Glory of Arunachalam Tiruvannamalai Temple, Tamilnadu*, HINDU POST (last visited May 30, 2021, 10:00 AM), <https://www.hindupost.in/dharma-religion/arunachalam-tiruvannamalai-temple-tamilnadu/>.

²¹ 448 U.S. 371 (1980).

driven. The case reports that, in 1868, the Sioux Nation had signed the Fort Laramie Treaty with Federal Government. Sometime later, gold was found in the Black Hills. Under the push of a massive gain in gold, the U.S. Government forgot the Treaty and denied the sovereignty of Sioux Nation over the hills. The result was a double betrayal: for Sioux peoples the Treaty, not only embodied a spiritual commitment they had entered into ‘on the sacredness of the Pipe’,²² but the spiritual importance the Black Hills held for Sioux was well known by the Federal Government.²³ For Lakota (Sioux) people, that land still holds ‘Mother's heart and pulse’. They were the focal point of annual pilgrimage and ceremonies way before the days of the white man's presence, and for many Lakota peoples they represent the last opportunity ‘to restore the sacred hoop and to permit their heritage to flourish’.²⁴

In fact, Lakota tribes trace their origins from those hills, which are considered the *axis mundi* and the birthplace of their identity. In 1976, Frank Fools Crow, who was an Oglala Lakota civic and religious leader has declared:

The Black Hills are sacred to Lakota people. Both the sacred pipe and the Black Hills go hand in hand in our region. The Black Hills is our church, the place we worship. The Black Hills is our burial grounds. The bones of our grandfathers lie buried in those hills. How can you expect us to sell our church and our cemeteries for a few tokens Whiteman dollars? We will never sell.²⁵

Several Court decisions after, including one by the U. S. Supreme Court, determined that the Black Hills territory was illegally taken from the Sioux Nation (Lakota tribe being the one mostly affected), but restitution was denied, whereas a monetary settlement was attempted and constantly refused by the Lakota peoples. In 1980 the Supreme Court ruled that the U.S. owed \$122

²²THOMAS D. HALL & JAMES V., FENELON INDIGENOUS PEOPLES AND GLOBALIZATION: RESISTANCE AND REVITALIZATI 103 (2009).

²³See generally Frank Pommersheim, *The Black Hills Case: on the Cusp of History*, 4 WICAZO SA REV. 18 – 23 (1988).

²⁴See *id.*

²⁵Zia Akhtar, *Curse of the Black Hills: Breach of Treaty and Due Process Under the 5th Amendment*, 2 THE INT’L J. OF HUM. RTS. 1 – 19 (2010).

million for “stealing” the Black Hills. The amount was just a puny part of the value of the gold extracted in all these years, and yet, the recognition that the U.S. did “steal, cripple and defraud Indigenous Peoples”²⁶ represents an important form of amend which, though it would never give back what it was taken, it nonetheless brings forward the idea of redress and reparation for past wrong done.²⁷ The claim shows that, for Indigenous Peoples, the issue at stake is not just compensation, nor apologies. It is the firm belief that a piece of land that prior dispossession was originally owned by Indigenous populations, holds a sacred importance for an entire community. Maybe in a money driven world this means little, but if that same world seeks to bridge diversities and repair injustices and past wrongs, every state must start questioning the reasoning behind their reparation policies and, widen their understanding of what is morally and ethically permissible. Indigenous Peoples’ heritage has profound spiritual value, and once it is removed from its natural Indigenous setting the traditions connected with the heritage go lost. Much of it is culturally and spiritually irreplaceable.

What happens to Indigenous heritage (such as songs, or performances, human remains etc) whose only relevance and importance reside in the intrinsic sacred and cultural importance it has for a community?

Over the years, the United Nations has increased its interest in Indigenous cultural heritage. In 1970, United Nations Educational, Scientific and Cultural Organization (UNESCO) created the multilateral Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property dealing with the question of the illicit trafficking of cultural property.²⁸ The 1970 Convention was subsequently reinforced by the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995.²⁹ UNIDROIT Convention offers new operational capacities of private law and it is self-executing, which means that states do not have to embody its provisions

²⁶See BARKAN, *supra* note 4, at 182.

²⁷See *id.*

²⁸Opened for signature Nov. 14, 1970, 823 U.N.T.S. 231, (entered into force May 9, 1972)

²⁹June 24, 1995, 34 I.L.M. 1322 [hereinafter ‘UNIDROIT Convention’].

in their own legislation. The Convention mostly focuses on the recovery phase and sets uniform rules and conditions for restitution claims on stolen cultural objects.

In 1978, UNESCO also established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation which currently counts 22 states. In cases where international conventions cannot be applied, member states which have lost certain cultural objects of fundamental significance and which are calling for their restitution or return can contact the Committee. Being a non-legally binding mechanism, the Committee mainly “seeks ways and means of facilitating bilateral negotiations, promoting multilateral and bilateral cooperation with a view to the restitution or return of cultural property [...]”.³⁰

Likewise, the United Nations Economic and Social Council Commission on Human Rights, at its eleventh session, adopted the UNDRIP providing for the protection of the rights of Indigenous Peoples included *inter alia* ‘the rights to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs under Article 12 of the Declaration. In 1995 the Economic and Social Council drafted a report entitled: *Protection of the Heritage of Indigenous Peoples*.³¹

Although most of the above-mentioned instruments represent soft law with no legally binding capacity, they, on the other hand, help to lend legitimacy to

³⁰*Intergovernmental Committee*, UNESCO.ORG, <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/>. (last visited May 31, 2021).

³¹ See. According to Wiessner & Battiste, Special Rapporteur Dr. Erica-Irene Daes' conclusions and recommendations were guided by three major ideas: “(1) the need for a holistic view of the subject matter, flowing from indigenous peoples’ essential relationship to land and leading to a comprehensive definition of heritage; (2) the principle of locality, deferring to indigenous customs, laws and practices whether possible; and (3) the principle of effectiveness, leading to principles and guidelines that would provide utmost protection through the dominant legal systems, both national and internationals.” Siegfried Wiessner & Marie Battiste, *The 2000 Revision of The United Nations Draft Principles and Guidelines on The Protection of The Heritage of Indigenous People*, 13 ST. THOMAS L. REV. 384 (2000).

Indigenous claims of lost heritage and underline that Indigenous culture is not just a legal matter to be decided in a court of justice, but it involves ethical, philosophical and human considerations that cannot be avoided. And while claims of injustices are not new, the focus on restitution as an international system of declarations and conventions, agreements and public and private negotiations is showing the willingness (sometimes a reluctant one) of states to admit and readdress past wrongs without purposefully getting stuck in political and legal deliberations. On a regional level, the American Convention on Human Rights may require that States return ancestral lands to Indigenous Peoples. In this regard, the Inter-American Commission specified that any State's determination as to the maintenance of the rights of Indigenous Peoples to their ancestral lands must be "based upon a process of fully informed and mutual consent on the part of the Indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives".³² Indigenous ancestral lands do not count just as geographical areas. They are the places where remains of the ancestor's rest and the traditions live on. Those territories hold the cultural and historical records of a community, providing the identity and cultural idiosyncrasy that it needs for its survival.

IV. REPATRIATION OF ANCESTRAL REMAINS: AN ISSUE OF "SACRED" IMPORTANCE

So, the question arises that when land is not returned, what happens to the Indigenous ancestral remains buried in the land? Or what happens to the remains taken from lands that once belonged to Indigenous Peoples?

The issue of repatriation of Indigenous human remains is often linked to the expropriation of Indigenous ancestral land. These important remains were once buried in land that was 'occupied' by Indigenous communities. Once the land is

³²*Maya Indigenous Communities of the Toledo District v Belize*, Case 12.053, Report No. 40/04, Inter-Am. Ct.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), para 142.

lost, Indigenous Peoples often lose their right to visit and protect the sacred remains of their ancestors.

Over the centuries, countless Indigenous burials have gone destroyed because unmarked or simply because they did not satisfy the non-Indigenous definition of ‘protected graves’ or ‘cemeteries’.³³ In recent years, Indigenous Peoples have manifested a growing concern for their ancestral remains exhibited in museums and other public institutions. Same concern expressed by Robert K. Paterson, surrounds the scientific analysis carried on those remains. The concern is justified by the fact that in general common law that there are no recognized property rights over human remains because the general practice considers life as sacred and, consequently, no human body should be disrespected after death, avoiding any property rights’ questioning.³⁴ Similarly, today international law and international humanitarian law compel states to treat human remains with dignity and respect but does not question to whom the remains belong or if they should belong to somebody at all.³⁵ While the argumentation has its validity, however, when a corpse is considered of scientific and anthropological importance, such considerations are often ignored and the corpse exploited.

In her article, Vrdoljak stresses the importance of the UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity to provide the return of human remains to their families once they have been identified.³⁶ Likewise the UN Set of Principles, the Inter-American Court of Human Rights has recognized that the burial and care of ancestral remains is a core component of Indigenous culture and religious observance.³⁷ To deny this, would mean to deny Indigenous Peoples’ access to their traditional culture and identity. In the *Moiwana Community* case the Court took into

³³ J. A. R. Nafziger & R. J. Dobkins, *The Native American Graves Protection and Repatriation Act in Its First Decade*, 8 INT’L J. OF CULTURAL PROP. 80 (1999).

³⁴ Robert K. Paterson, *Ancestral Remains in Institutional Collections: Proposals for Reform*, in PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAW, POLICY, AND REFORM 156 – 57 (Catherine Bell & Robert K. Paterson eds., 2008).

³⁵ See Vrdoljak, *supra* note 3, at 215.

³⁶ See Pommersheim, *supra* note 21.

³⁷ *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 124 (Jun. 15, 2005).

account the impact that the inability to bury their dead would have on the community. In so doing, it considered the relevant customary laws of the community and ordered the repatriation of the *Moiwana* human remains. Although the massacre had occurred twenty years before, the community denial to properly bury their dead was considered as unlawful practice continuing to the present, and making it impossible for the Indigenous tribe to move on from the past.

Since at present there is no international jurisdiction safeguarding Indigenous remains, such protection is often left to regional or national law (like the Inter American Commission on Human Rights), or to private negotiations between institutions and Indigenous communities. Today, several states have put in place mechanisms to repatriate human remains and restore cultural heritage to Indigenous Peoples. Australia and United Kingdom have, for example, issued a joint declaration emphasizing that their governments ‘agreed to increase efforts to repatriate human remains to Australian Indigenous communities’; while Denmark has returned cultural materials to Greenland followed by the Danish national museum which returned cultural heritage to the Faroe Islands³⁸ In the United States, the U.S. Congress enacted the Native American Graves Protection and Repatriation Act, 1990.³⁹ Generally known as NAGPRA, the Act is considered a keystone in the legal framework for protecting and repatriating Indigenous heritage within the United States. First of all, NAGPRA clarifies that human remains do not belong to individuals or institutional or governmental organizations, and then it confirms that descendants have the right to determine what should happen to the remains.⁴⁰

According to Nafziger & Dobkins, the NAGPRA is essentially human rights law. Its legislative history confirms this by stating that: “such human rights include religious, cultural, and group survival rights, as understood within the context of U.S. and international standards of human rights and rights to self-

³⁸ Id.

³⁹ Pub. L. 101-601, 25 U.S.C. 3001 et seq., 104 Stat. 3048, (Nov. 16, 1990).

⁴⁰NAGPRA, sec. 3.

determination”.⁴¹ In the case of human and sacred remains, the collective right to self-determination, established under international law has been often invoked to justify claims for repatriation of sacred objects and other significant remains.⁴² Notoriously, the most obvious benefit of NAGPRA is its systematic promotion of human rights and distributive justice on behalf of Indigenous tribes. In practice, despite its human rights’ concerns and the employment of the word ‘Grave’ in its title, NAGPRA substantially ‘elaborates and broadens the framework of federal and state law to protect Indigenous heritage’.⁴³ The law requires national museums and federal agencies that receive federal funds, to inventory their Native American human remains and objects, to consult with lineal descendants of Native American tribes whose remains belong, and to repatriate the remains. Cultural objects protected by NAGPRA include Native Americans human remains, funerary objects, sacred objects and objects of cultural patrimony.⁴⁴ Over the years, NAGPRA has proved to be particularly effective in ending all trafficking in Native Americans cultural heritage by making such traffic a federal offence.⁴⁵ In so doing, it has set precedents with many museums authorities on a national and international level, encouraging institutions, as a matter of correct practice, to determine historical and cultural affiliation between the remains in their possession and the claimants of the ancestral remains. This has set in motion an interdisciplinary machine which questions the feasibility of restitution of the remains on the basis of scientific research; identity of the deceased; unknown affiliation or how close the affiliation must be; the righteousness of reburial; economic benefit and legal matters such as human rights and the right to self-determination. Other state practices are currently pushing worldwide for the restitution and repatriation of Indigenous heritage and human remains.

⁴¹See Nafziger & R. J. Dobkins, *supra* note 31, at 81.

⁴²See *id.*

⁴³See *id.* at p. 77

⁴⁴NAGPRA, sec. 2

⁴⁵J. H. MERRYMAN, A. E. ELSÉN & S. K. URICE, *LAW, ETHICS AND THE VISUAL ARTS* 370 (2007).

V. THE CASE OF MAORI'S HERITAGE CLAIMS

In 2003, the Government of New Zealand decided that the Te Papa Tongarewa Museum of New Zealand should “act on its behalf” to repatriate *koiwitangata* (Māorihuman remains) from all over the world.⁴⁶ The decision was based on the sacred and historical importance the remains have for Māori people. The art of Toi Moko (chiselled spirals in imitation of wood-carving)⁴⁷ and tattooing is an important part of Māori cultural tradition. It involves “the introduction of pigment permanently to the subcutaneous layers of human skin”.⁴⁸ Traditionally, the specificity of the Moko's design referred to the identity of the person and, as such, it always differed from person to person. Some Moko were purely decorating, while others underlined the tribal affiliation and the hierarchical importance within the tribe. Māori tattoos were Tapu, which was connected with the concept of Mana – the place of an individual in the social group of his tribe. The word Mana has different meanings: ‘authority, control, influence, prestige power, psychic forces etc’.⁴⁹

Māori tribes believe that everything in life possesses Tapu, an intrinsic connection with gods and the creation. To break Tapu meant to be deprived of gods' protection and, therefore, to put one's life in jeopardy. The human body was regarded as sacred and cherished. Of the whole body, since ancient times, the head was considered the most Tapu/sacred part. According to Besterman's Report for the British Museums, the Toi Moko embodied the spirit of the person and keeping the head of the departed was a way of enabling the deceased to

⁴⁶Neil. G. W. Curtis, *Repatriation form Scottish Museums: Learning from NAGPRA*, 33(2) MUSEUM ANTHROPOLOGY 234 (2010).

⁴⁷Joanna White, *Marks of Transgression: The Tattooing of Europeans in the Pacific Islands*, in *TATTOO: BODIES, ART AND EXCHANGE IN THE PACIFIC AND THE WEST* 39 (Nicholas Thomas, Anna Cole & Bronwen Douglas eds., 2005).

⁴⁸“An elegantly tattooed face was a great source of pride to a warrior, for it made him fierce in battle and attractive to women . . . The incision into the flesh was made by applying the edge to the skin, and driving it in by means of a smart tap applied to the handle with a small light mallet, thus causing a deep cut in the flesh.” TRISTRAM BESTERMAN, REPORT TO THE BRITISH MUSEUM TRUSTEES: REQUEST FROM TE PAPA TONGAREWA FOR THE RETURN OF SIXTEEN MĀORI KŌIWITANGATA TO NEW ZEALAND 12 – 13 (2007).

⁴⁹HIRINI MOKO MEAD, *TIKANGA MAORI HUIA* 29 (2003).

continue his presence amongst the living people,⁵⁰ and preserve the most sacred part of his whole body. Referring to Toi Moko, the British Museum's Report makes a distinction between Kin Toi Moko and Foe Toi Moko. The first preserving the nobility of its owner and therefore kept with great care and respect and "placed in secluded spots", and brought forth only in important occasions, celebrations or ceremonies. In the second case, the heads of enemies were taken as trophies, and exhibited as sign of victory and supremacy of one tribe over another. When Captain Cook arrived in Aoteaora (1770) and started trade of timber and other local resources, he employed Māori people for the works. The closeness between the races facilitated the exchange of products and cultural items. Europeans became very interested in Maori traditions and tattooing craftsmanship (Mokumokai) and started exchanging them with weapons. The trade's demand of more tattooed heads soon grew and forced Māori to introduce a third type of moko: the Trade Toi moko. This moko did not have the initiative and symbolic meaning of the other two. Māori used slaves for the purpose of tattooing their heads before killing them and selling the heads.⁵¹

The cruelty of the practice and new concerns about the massive amount of arms that were falling into Māori's hands, convinced Governor Darling to ban such trade in 1831. The ban, however, did not stop the trade in human remains and cultural objects. Traditionally, Koiwi Tangata are considered the remains of Māori's ancestors, and they are sacred and an integral part of Māori culture. As for the Toi Moko, Koiwi Tangata are Tapu for Māori tribes, and every tribe sees their removal or lying-in museums as highly "abhorrent and culturally insensitive".⁵² According to Māori people, such remains should never be publicly exhibited but should be buried with the appropriate tribal protocols. For this reason, from the 1980s Māori tribes started claiming back their ancestral remains. Like most of the Indigenous communities around the world, Māori people believe that no cultural interest justifies the museums' exposure of a

⁵⁰See Besterman, *supra* note 46, at 13.

⁵¹See *id.* at 15

⁵²D. Gareth & Robyn J. Harris, *CA Forum on Anthropology in Public: Archaeological Human Remains: Scientific, Cultural and Ethical Considerations*, 39(2) CURRENT ANTHROPOLOGY 255 (1998).

desiccated head or skeleton of an ancestor for the benefit of strangers who do not usually possess the cultural resource and background to understand the richness of Māori culture and mythology. Māori see their deceased as closely related to them. Being Aotearoa-New Zealand, a young country, Māori's remains are still closely related to living tribes. Memory and traditions are often still into existence, and sometimes a skeleton is related to the grandparents of the present generation of Māori.

To clarify their position, in 1993, a committee of Māori representatives adopted the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples.⁵³ Referring to ancestral remains, the Declaration stresses that:

2.12 All human remains and burial objects of indigenous peoples held by museums and other institutions must be returned to their traditional areas in a culturally appropriate manner.

2.13 Museums and other institutions must provide, to the country and indigenous peoples concerned, an inventory of any indigenous cultural objects still held in their possession.

2.14 Indigenous cultural objects held in museums and other institutions must be offered back to their traditional owners.

Again, the idea is that Museums cannot own indigenous ancestral remains, and after inventory of the remains in their possession, when possible, they should readdress the wrongs and return sacred objects and remains to the descendants or the community of origin. In case the remains are not identifiable, Indigenous Peoples suggest to bury them anyway in sign of respect.

Hence, respect for Indigenous heritage is not the only focus of the Mataatua Declaration. It also claims that Māori's objects and remains were acquired unlawfully through dishonest exploitative measures and restitution should be therefore endorsed nationally and internationally. The Declaration is an important instrument because although not binding upon States, speaks a

⁵³ U.N. Doc. E/CN.4/Sub.2/AC.4/1993/CRP.5 (Jun. 1993) [hereinafter 'Mataatua Declaration'].

language of restorative justice, human rights, and Indigenous customary laws, which adds up to the international existing regulations safeguarding Indigenous Peoples. It also underlines the importance for Indigenous Peoples to define themselves,⁵⁴ and acknowledge that the existing mechanisms are ineffective in granting the respect of Indigenous rights.⁵⁵ It also stresses the importance of changing the double-standard habit that considers Western societies superior and better entitled to take decisions on behalf of Indigenous Peoples. Not only the idea is senselessly neo-colonialist, but it clashes against fifty years of human rights' reasoning.⁵⁶

VI. CONCLUSION

How can an economically driven world understand the priceless significance of Indigenous heritage? How can Indigenous Peoples convince states to restore their cultural patrimonies?

While it is true that from mid 1990s an increasing attention at national and international level has been focusing on Indigenous issues, it is also true that longstanding legal, political and economic structures have so far 'either ignored or worked to the detriment of Indigenous Peoples.'⁵⁷ Thus, until recently, the negation and depreciation of Indigenous cultures has been the main focus of international law and states' practices.⁵⁸ Regardless the general attempted sabotaging of most of the international community, indigenous cultural dissimilarity from western cultural parameters lies at the heart of contemporary discussions on Indigenous rights. In such discussions, Indigenous Peoples are the only legal personalities who have the knowledge and cultural resources to

⁵⁴Mataatua Declaration, art. 1.1.

⁵⁵*Id.* at 1.2.

⁵⁶*See generally* Spencer Lilley, Indigenous intellectual and cultural property rights, presented at the 8th Asia-Pacific Specials, Health and Law Librarians Conference, Hobart, Tasmania (Aug. 22 – 26, 1999), <https://mro.massey.ac.nz/bitstream/handle/10179/7628/iicprls541.pdf?sequence=1&isAllowed=y> (last visited May 30, 2021).

⁵⁷*See* Gareth & Harris, *supra* note 50, at 227.

⁵⁸*See id.*

make decisions over their own lives; since they understand the meaning and values of their own culture; values which cannot be understood by people operating from different cultural frameworks. In an ideal world, developed countries with Indigenous Peoples would seek advises from Indigenous representatives to create *ad hoc sui generis* legislation protecting their interests nationally and internationally. In the real world, things are more complicated. Too much economic interest lies behind an effective protection of Indigenous heritage, and debates concerning the commercial value of Indigenous cultures are, at present, very animated.

Needless to say, international human rights instruments today seem to better respond to the violation of Indigenous cultural rights. Standards of protection of Indigenous cultural rights today originate from various international and regional instruments of human rights, and from minority rights provisions and instruments specifically designed for Indigenous Peoples (UNDRIP and ILO No. 169). Unfortunately, the most comprehensive instrument created for the protection of Indigenous Peoples' cultures, the UN Declaration on the Rights of Indigenous Peoples, remains a non-legally-binding instrument. This leaves states to either endorse nationally the Declaration or to ignore it altogether. And yet, if developing and developed countries want to support Indigenous Peoples' cultural claims, they must first recognize that it is important to respect the multiculturalism of the world and, following the 'propositions' of UNDRIP, act to preserve and restore Indigenous heritage. From this new perspective of respect and integrity, judicial remedies will then guarantee a reconciliation and solidarity between Indigenous Peoples and states that seems, at present, unattainable.

IMPACT OF DRUG ABUSE AND DRUG TRAFFICKING IN EDUCATIONAL INSTITUTIONS: AN EMPIRICAL STUDY

*Dr. Zubair Ahmed Khan & Vaishali**

ABSTRACT

The issue of drug addiction and drug trafficking are major concerns for law enforcement agencies considering increasing offences every year as per National Crime Report Bureau. It has become worrying a factor for academic institutions, colleges, and schools where youth are prone to consumption of illicit drugs due to easy availability of drugs and accessibility of peddlers in the proximity of such institutions. It is a matter of contemplation to examine the nature and scope of awareness campaigns against drug abuse where important obligations must be adopted by universities and schools through establishing anti-drug clubs in such premises. The article analyzes the common perception of drug abuse and addiction through small empirical research where the role of NALSA, DLSA and social organizations are of great significance. This article also analyses as to how drug addiction affects physical and mental health of vulnerable youths as well as their families, considering the requirement of rehabilitation of affected persons. Lastly the article is concluded with certain suggestions to curb drug trafficking.

I. INTRODUCTION

The word “Drug” not only includes the drugs with medicinal properties which are easily available in our nearest drug stores or with the Doctors’ prescriptions but also the illicit drugs which are illegally cultivated and smuggled, in any nation through various means. The United Nations Office on Drugs and Crime (UNODC) defines “Drug trafficking” as the illegal business including the production, sowing and transaction or dissemination of drugs in violation of the

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law forbidding the using of drugs.¹ The term “drug trafficking” or “drug distribution” is related to every type of the illicit business of drug, from producing or undertaking of illegal drugs, transporting, selling or illicit importation of prohibited products like heroin, cocaine, marijuana, or different illicit drugs. The trafficking practice of drugs also includes unauthorized sale or transit of prescribed drugs, which has also evolved as a major issue over the period of time. Anyone who grows heroin from opium produces (for example), will be criminally liable of trafficking as dealers who put it for the sale as raw product or make it accessible to the public. In any case, the type of illicit drugs is irrelevant. Yet the most common illicit drugs and popular amongst the youngsters are Marijuana or *ganja*, Cannabis or *charas*, 3, 4-methylenedioxy-methamphetamine (MDMA) or ecstasy, LSD an acronym for lysergic acid diethylamide and the most abused prescription drugs is either a pain killers like Aspirin or methaqualone, used to treat sleep disorders and malaria.²

In India, the act of drug trafficking or any kind of drug abuse or drug trafficking is penalized under Narcotic Drugs and Psychotropic Substances Act, 1985 and other laws in India. Among various government agencies for administering the drug policies and drug related issues, the drug law enforcement agency to implement and prevent the violation of the abovementioned enactments is the Narcotics Control Bureau. Also, The National Legal Service Authority (NALSA) has been constituted by the Central Government of India under Legal Services Authorities Act, 1987. In 2015, NALSA has framed the scheme as an effort to combat the national issue of drug abuse and drug trafficking in India as well as for the purpose of disseminating awareness regarding adverse ramifications of addiction of drugs and measures related to de-addiction of victims of drugs towards rehabilitation, known as “NALSA (Legal services to the Victims of Drug Abuse and Eradication of Drug Menace) Scheme, 2015”

¹U.N. Off. On Drug & Crim., Drug Trafficking, UNDOC, <https://www.unodc.org/unodc/en/drug-trafficking/index.html> (last visited May 31, 2021)

² Nikita Bhalla, *4 types of drugs and what they do to your body: Heroin, Cocaine, Meth and LSD*, INDIA TODAY (Jun. 27, 2016), <https://www.indiatoday.in/lifestyle/wellness/story/types-drug-abuse-body-heroin-cocaine-crystal-meth-lsd-udta-punjab-16451-2016-06-27>. (last visited May 31, 2021).

(hereinafter ‘NALSA Scheme’)³. Recently, the national program for drug demand reduction has been formulated by the Ministry and for that, University Grants Commission has passed a notification to all the High Educational Institutions (HEIs), Universities and Colleges to undertake proper measures and to form action plan for addressing the drug menace in HEIs. On June 26, 2020, the Union Minister of State for Social Justice and Empowerment launched Nasha Mukh Bharat Annual Action Plan 2020-21.⁴ The cumulative efforts of the government policies, law enforcement agencies, educational institutions, together with the efforts of individuals (drug users/drug dependents) and their relatives can produce great results and help in curbing drug menace from the society and the nation.

II. OBJECTIVES OF THE STUDY

Even if obvious, it is worth noting at the outset that the topic, Drug abuse and drug trafficking is complex, extensive, and important. If drug trafficking and drug abuse was already a complex and extensive topic earlier, it is even more so today. In many cases the drugs (illicit/prescription) have been found to be misused by mostly the teenagers and high school students to reduce the stress/depression or to avoid the other life problems that should be cured with the help and care of friends and family members. The objective of the present study is to analyze the concept, policies and regulations related to ‘Drug Abuse and Drug Trafficking’. Broad objectives of the study are mentioned below:

1. To trace the evolution of the drug usage, from cultivation to trafficking by peddlers in India.

³See generally NAT’L L. SERV. AUTH., NALSA (LEGAL SERVICES TO THE VICTIMS OF DRUG ABUSE AND ERADICATION OF DRUG MENACE) SCHEME (2015), <https://nalsa.gov.in/acts-rules/preventive-strategic-legal-services-schemes/nalsa-legal-services-to-the-victims-of-drug-abuse-and-eradication-of-drug-menace-scheme-2015>(last visited May 31, 2021)

⁴See generally DEPT. OF SOC. JUST. & EMPOWERMENT, NASHA MUKH BHARAT: ANNUAL ACTION PLAN (2020-21) FOR 272 MOST AFFECTED DISTRICTS, http://socialjustice.nic.in/writereaddata/UploadFile/AAP_Nasha_Mukh_Bharat_2020_21.pdf. (last visited May 31, 2021)

2. To study and analyze various government programs and policies to deal with the growing drug menace in the nation and the latest government policies and legal services towards the safeguarding and protective measures against drug addiction and drug trafficking and rehabilitative initiatives for victims and their feasibility. Further to find out loopholes and the problems that hinders the implementation of such policies.
3. To study the issues faced by the drug dependents and the peddlers during the lockdown due to COVID-19 situation in India.
4. To understand the reasons for initiation of the substances use by the teenagers and adolescence, its cure and the suggestions for the drug dependent and their families, and also analyze the data collected online through “Drug Impact Evaluation” where this issue has been distinctly highlighted.
5. The case analysis, to conclude the legal perspective towards the drug menace.

III. ANALYSIS OF EXISTING LAW ON NARCOTIC DRUGS IN INDIA

The International Day against Drug Abuse and Illicit Trafficking was observed by the UN General Assembly on June 26, 1987. India is a signatory to the three United Nations Drug Conventions. The 1961 Single Convention on Narcotic Drugs (hereinafter ‘1961 Convention’), which eliminated the illegal production and non-medicinal utilization of narcotics, cannabis and cocaine. The 1971 Convention on Psychotropic Substances (hereinafter ‘1971 Convention’), it extended to psychotropic prescription drugs or synthetic drugs (e.g., amphetamines, barbiturates and LSD) and the 1988 Convention against Illegal Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter ‘1988 Convention’), the third convention against unlawful drug trafficking was focused on the concealment of the illicit worldwide market, and the limitation was extended to the precursor chemicals.⁵

⁵See generally Ajit Avasthi & Abhishek Ghosh, *Drug Misuse in India: Where do we stand & where to go from there?*, 149 (6) IND. J. OF MED. RES. 689-692 (2019)

Domestic legislation to offer effect to these treaties and practicing its forces to make law for the nation for implementing “any treaty, agreement or convention or decision made at international conference”, the Indian Parliament passed the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) hastily, which came into force on November 14, 1985, replaced the Opium Acts and the Dangerous Drugs Act. The NDPS Act was enacted to give sufficient penal provisions for trafficking of drugs, fortify execution authorities, execute international conventions to which India was a party, and enforce control over psychotropic substances. The Act was further amended in 1989, 2001 and lastly in 2014. The present law related to narcotics actually banned the growing, raising, propagation, trade, importation, exportation, usage and ingestion of illicit drugs and psychoactive things other than for medicinal causes. The criminal liability will also arise in the case of preparation of committing such crime. In fact, cases of abetment and criminal conspiracy are also considered to be serious crimes related to narcotic drugs. The Preservation of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act is another legislation passed in the same year 1988 through which pre-trial custody of persons suspected of drug peddling or dissemination.⁶

IV. EARLIER GOVERNMENT POLICIES AND SCHEMES FOR CURBING DRUG RELATED ISSUES

India has adopted the three-pronged strategies to address the drug menace - supply, demand, and harm reduction. Following the 1971 Convention, the Ministry of Health and Family Welfare, Government of India, set up an Expert Committee to investigate the issue of drug and liquor use in India. The Committee's report was submitted in 1977, and after endorsement from the Planning Commission, Drug De-Addiction Program (DDAP) was rolled out in 1985-1986, with the purpose of drug demand reduction. During this period, India had enacted the Narcotic Drugs and Psychotropic Substances (NDPS) Act in 1985, which was last amended in 2014.

⁶ See Tripti Tandon, *Drug Policy in India*, Briefing Paper, INT’L DRUG POLICY CONSORTIUM, (Feb. 2015), https://idhdp.com/media/400258/idpc-briefing-paper_drug-policy-in-india.pdf. (last visited May 31, 2021)

The essential objective of the NDPS Act was 'to prevent and combat drug abuse and illicit trafficking', hence emphasizing on the supply reduction. The consultative committee (an advisory committee framed by the NDPS Act), which was established in 1988, formulated a national-level policy to control drug abuse. The committee created a fund, National Fund for Control of Drug Abuse and involved a few other stakeholders - the Ministry of Health (and Family Welfare) and the Ministry of Welfare (currently Social Justice and Empowerment). The Ministry of Health had the job of prevention and treatment of drug addicts, whereas the Ministry of Welfare had the responsibility of the rehabilitation and social integration of people with drug addictions. The Ministry of Health established seven treatment centers during the first phase (in 1988). The objective of such establishments is to provide proper care, awareness based documented content and capacity building programs for health professionals to make efficient manpower for tackling the aggravated issue of drug trafficking and exploitation. Apart from these establishments, within the purview of DDAP, lump-sum financial assistance was given to more than 100 de-addiction cells of different psychiatric institutions of state medical universities and regional hospitals.

There are many NGOs in the nation which were financially assisted by the Ministry of Welfare for the purpose of counselling and helping DACs to create awareness campaigns and rehab targets by using human resources. The Ministry further recognized ten local resourceful and capacity building cells which come directly under National Institute of Social Defense, for mentoring, training, and providing proficient practical platform to diverse NGOs.⁷The Ministry of Social Justice and Empowerment published the National Drug Demand Reduction Draft Policy in 2013 for the drug demand reduction. Also, the Ministry has revealed the 'Central Sector Scheme of Assistance for Prevention of Alcoholism and Substance Abuse and Social Defense Services' in 2015. The Ministry of Social Justice has additionally issued a five-year plan, 'National Action Plan for Drug Demand Reduction' in 2018. Currently, the NGOs across the nation are working as the Integrated Rehabilitation Center for Addicts. The DDAP has

⁷See Avasthi, *supra* note 5.

likewise expanded its purview from the DACs to the recently formed Drug Treatment Centers (DTC). These are portions of general emergency clinics, where the treatment for substance use disorders, and medications are provided free of cost.⁸The Mental Health Care Act, 2017 has included liquor and drug addiction issues under its ambit.⁹

V. 2015 SCHEME FOR PROVIDING LEGAL SERVICES FOR DRUG ABUSE VICTIMS

NLSA Scheme was framed as an effort to combat the national issue of drug abuse and drug trafficking in India as well as for the purpose of disseminating information related to adverse consequences of addiction of drugs and rehabilitation of victims. The observational studies disclosed that crores of individuals in India are associated with drug abuse, out of which a substantial percentage are drug addicts. The increased cases of drug abuse and drug trafficking among the youngsters and teenagers have genuine ramifications. Prevention of this menace is necessary for the States for the welfare of public. To eradicate the drug menace, all the agencies of State, NGOs, and active involvement of Panchayat establishments shall work in coordination with each other. Interestingly, an annual forum of all the State Legal Service Authorities concluded that addiction of drugs and exploitation of drugs would be focal points of attention of SLSAs. Therefore, NALSA decided to create a framework for demand and production reduction, rehabilitation of drug victim where proper measures could be taken to resolve it strategically, because of which the scheme for the victim assistance related to drug abuse was passed.¹⁰

⁸MIN. OF SOC. JUST. & EMPOWERMENT, GOV'T OF INDIA, CENTRAL SECTOR SCHEME OF ASSISTANCE FOR PREVENTION OF ALCOHOLISM AND SUBSTANCE (DRUGS) ABUSE AND FOR SOCIAL DEFENCE SERVICES: GUIDELINES(2015),<http://socialjustice.nic.in/writereaddata/UploadFile/Revised%20Scheme-%20April%202018636589657884024892.pdf>. (last visited May 30, 2021)

⁹MIN. OF SOC. JUST. & EMPOWERMENT, GOV'T OF INDIA, REVISED MANUAL ON MINIMUM STANDARDS OF SERVICES FOR THE PROGRAMS UNDER THE SCHEME FOR PREVENTION OF ALCOHOLISM AND SUBSTANCE (DRUGS) ABUSE (2009),<http://socialjustice.nic.in/writereaddata/UploadFile/Minimum%20Standard%20of%20Care.pdf>. (last visited May 30, 2021)

¹⁰NALSA Scheme, *supra* note 3.

The basic objectives of this initiative is to disseminate knowledge based learning among parents, teachers and the general public with regards to the legal provisions, policies, programs and schemes, regarding drugs and Psychotropic products and about negative impacts of substance abuse among the teenagers and youngsters in schools and universities, streets and vulnerable youths in small dwelling houses, drug consumers, family units, inmates, workers, drug traffickers and society in general. Further to organize literacy camps for sensitizing farmers engaged with illegal or illicit cultivation of narcotics, as well as various stakeholder. It is also necessary to create strong connection and collaboration with different centers working on de-addiction and rehabilitation against drug usage for quality services towards victim so that they could be entitled to basic legitimate services for the victim of drug abuse.¹¹

The Drug Impact Evaluation illuminated the fact regarding awareness of legal services provided by NALSA and Delhi Legal Services Authorities (DLSA) to the victims of addiction of drugs within the school students and other youths. In this context, an empirical research was done among undergraduate students where several questions were asked. Most people participated in the survey *i.e.*, around 56.6% of the respondents were not aware of the legal services available for victims of drug abuse. Although the responses for awareness about the laws regarding drug abuse and the need for tweaking the present law to prevent drug abuse, had only 20.8% negative and other 22.6% believes that the present law may or may not require changes, other 56.6% strictly believe that the present laws and legal system is neither sufficient nor efficient for preventing drug abuse and trafficking in the nation.

¹¹ *See id.*

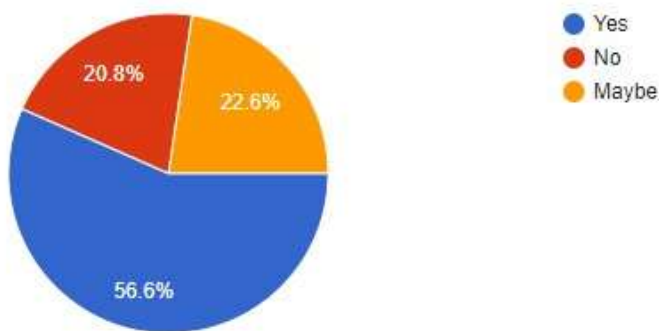


Fig 1: Response for “Aware about the laws regarding drug abuse and does the present law to prevent drug abuse needs tweaking?”

It clearly shows that substantial people know about existing laws against drug addiction, however, the problem of drug abuse is still increasing, and a great area of concern is for parents, universities and law enforcement agencies. However, there is an over the sufficiency of awareness of law related to drug abuse and more specifically its penal related provisions.

VI. ACTION PLANS FOR DRUG DEMAND REDUCTION

A. National Action Plan for Drug Demand Reduction (2018-2023)

Drug abuse not only adversely affects an individual’s mental and physical health but also affects their families and hence, becomes an intimidation to the entire society. A National Action Plan has been prepared for 2018-2023 to reduce drug demand and the adverse consequences of drug abuse by the Ministry of Social Justice and empowerment. The whole scheme involved the collaborative and cumulative role of Central Government, different State governments and NGOs, where multi-dimensional approach was adopted through educational initiatives related to de-addiction, reformation of drug inhaler/adductors, spreading awareness, diagnosis, and counselling.¹² The evolving public engagement and

¹²See MIN. OF SOC. JUST. & EMPOWERMENT, GOV’T OF INDIA, IMPLEMENTATION FRAMEWORK OF NATIONAL ACTION PLAN FOR DRUG DEMAND

societal participation in the area of drug depletion is quite significant as active role is played by local bodies, different associations working in the same direction involving many volunteers, stakeholders for organizing awareness sessions and restricting transportation of illegal drugs through illicit channels (whereby strict surveillance can be done by cyber cells).¹³

B. Nasha Mukta Bharat Annual Action Plan (2020-21)

On June 26, 2020, the Union Minister of State for Social Justice and Empowerment launched Nasha Mukta Bharat Annual Action Plan (2020-21) for 272 most affected districts of the country and initiate a three-way concerted endeavor of NCB, sensitization raising advocacy by Social Justice and diagnosis and healthcare facility through the health institutions. The components of this Action Plan are similar to those of the earlier drug demand reduction action plans, i.e., sensitization advocacy program, focal attention on academic institutes, colleges, schools, society outreach and emphasis on healthcare provision in hospitals and continuous training sessions for facility providers, skill development, and livelihood support of ex-drug addicts.¹⁴ These underlying factors are concurred with research of National Survey on Pattern of Drug Use in India and regions where there is vulnerability with respect to supplies identified by NCB, Ministry of Social Justice that has undertaken number of treatment based sessions in different sensitive regions in the country.

VII. HIGH SCHOOL STUDENTS AND TEENAGERS AS DRUG ABUSE VICTIMS- REASONS, CURE AND SUGGESTIONS (DATA ANALYSIS)

The high school students, adolescents, teenagers are most vulnerable to drug abuse and addictions due to less understanding towards the consequences of substance abuse, other than this, the youngsters and teenagers try to experiment

REDUCTION, <http://socialjustice.nic.in/writereaddata/UploadFile/Scheme%20for%20NAPDDR.pdf> (last visited May 31, 2021).

¹³See *National Action Plan for Drug Demand Reduction (2018-2023)*, INSIGHTS IAS, (Jan. 2019), <https://www.insightsonindia.com/2019/01/17/national-action-plan-for-drug-demand-reduction-2018-2023/>. (last visited May 31, 2021).

¹⁴See DEPT. OF SOC. JUST. & EMPOWERMENT, *supra* note 4.

with drugs for the sake of fun and entertainment in groups. According to a survey, around 11.6% of the individuals engaged in drug addiction in India are under 20 years of age. Numerous teenagers get their first encounters with illicit drugs and substances during high schools or colleges as the freedom, opportunity, curiosity and ease of experimentation is both exciting and frightening. As well as the casual attitude of teenagers and high school students towards drug abuse encourages them to use liquor and drugs, including prescribed drugs, which are no more considered as a taboo and also, illicit and prescription drugs are easily available around the campus, making it accessible to students during parties etc., which sometimes leads them to addictions and other consequences.¹⁵ It was found that 72.1% have never used any drugs other than prescription drugs but even the drugs prescribed for medicinal purposes have been abused by around 11.5% of all the individuals', out of those, 10% users got addicted to those prescription drugs. It is significant to understand as to how teenagers and college students perceive “drugs”, which in turn explains their evaluation and understanding for drug use. The individuals discerning drugs as an escape mechanism (9.8%) from any stressful situation or getting high or stoned (6.6%) for fun and enjoyment, have higher chances of getting indulged in substance abuse in the situation where they hope for the same results than the individuals who perceives the drugs either as a medicine (52.5%) or as a health problem/addiction (31.1%).

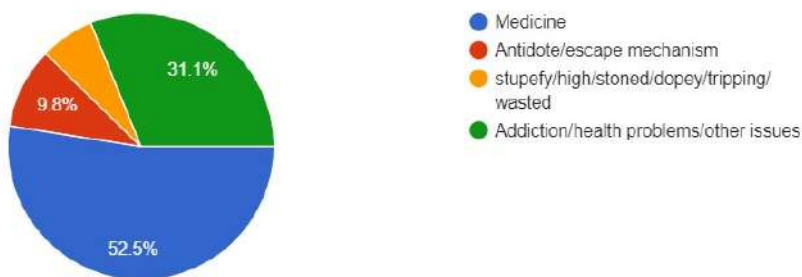


Fig 2: Response for “Meaning of Drugs”

¹⁵See Shelley Zansler, *College Student’s Guide to Avoiding Drug and Alcohol Abuse, Addiction, Recovery and Navigating Substance Use Culture on Campus, Community for Accredited Online Schools*, (Sep, 05, 2019)

<https://www.accreditedschoolsonline.org/resources/avoiding-substance-abuse/>. (last visited May 30, 2021).

In India, people are more exposed to stressful and difficult situations especially during teenage and adolescence due to strong stakes and contests in education and workplace, also with the age comes duties and responsibilities within household and towards society. Besides, “Age and Change” are not mutually exclusive, whether the change is physical, mental or emotional. This period of progress and transition affects the teenagers, their psychological thinking, reasoning, emotional quotient, and risk-taking behavior. As per the assessment responses, high school students and teenagers are exposed to easily accessible illicit drugs, most commonly available drugs are Opium, Hashish, Cocaine, Morphine, LSD, Ecstasy, crystal, crack and Marijuana. Students and teenagers fall prey to the drug abuse in an environment where social and peer pressure are hard to oppose.¹⁶ Curiosity to try drugs with peers is most accepted reason for indulging in drug use, other than that, there can be numerous reasons for excessive use or abuse of illicit drugs, such as,

- to suppress negative emotions such as stress, disappointment, and anger;
- to avoid dealing with the problems in life;
- to cope up with different emotions and feelings in some situations, and
- Enjoyment and fun during parties etc.

Also, nowadays, social life and social networks are of a huge concern for people. To make an impressive false image in front of society many adolescents and teenagers indulge in drug use, in some cases it is due to peer pressure without knowing the adverse effects of drug use. They think drugs could be a solution for problems in life. But in the long run, the drug use or abuse becomes an issue.

¹⁶ See generally Jiloha R C. Prevention, early intervention, and harm reduction of substance use in adolescents, 59 IND. J PSYCHIATRY 111 – 18 (2017).

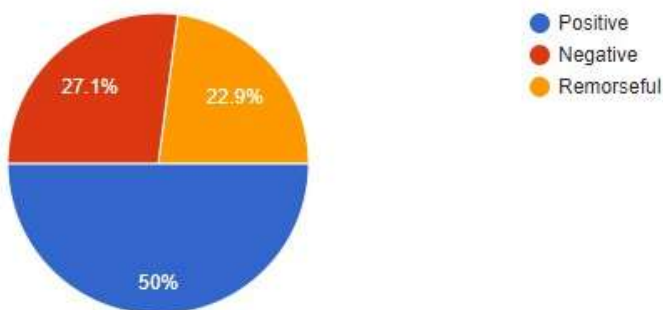


Fig 3: Response for “Immediate effects of using/ inhaling drugs excessively/ usage of illicit drugs”

The problems related to drug abuse must be addressed as soon as the signs of problems are discerned by the users. For that concern, students should be aware of their habits, and it is necessary to understand for the users as to when the fun is turning into dependency or an addiction for life as it can cause physical and mental health issues as well as personal and professional troubles in future.¹⁷The people with drug abuse problems face more social ramifications than others. According to the evaluation responses, 37.2% drug users have experienced trouble at workplace/school/college, 20.9% have started to neglect their families and more that 21% drug users indulged into fights under the influence of substances and lost friends due to excessive use of illicit drugs. The most noticed mental and psychological changes occurring after using Psychotropic substances are more negative than positive such as dependency on the drugs or addictions, self-mutilating or suicidal behavior, depression, anxiety and feeling of loneliness, also causes problem with motivation, concentration, and memory loss or weaker memory. Other medical problems like hallucinations, blackouts etc. also occur after excessive use of illicit drugs. It is unambiguous from the Fig. 4 that the teenagers and high school students are aware of the temporary or the long-term mental and physical complications of substance abuse as 76.3% have agreed on it. It is more troublesome for those who are indulged in substance abuse and also a part of those 20.3% who are unaware of these

¹⁷See *id.*

complications that can affect their health.

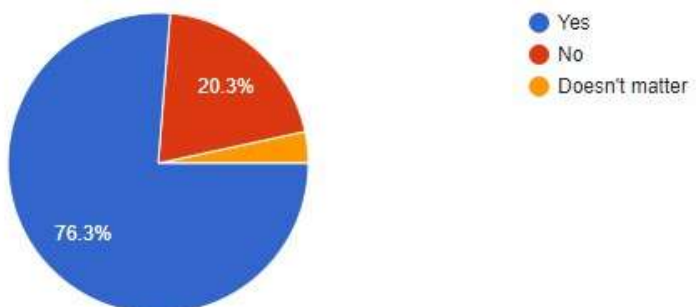


Fig 4: Response for “Awareness regarding the short term or long-term complications of drug using/ inhaling drugs excessively/ usage of illicit drugs”

Have you noticed any kind of other medical problems in using drugs excessively or any illicit drug?

44 responses

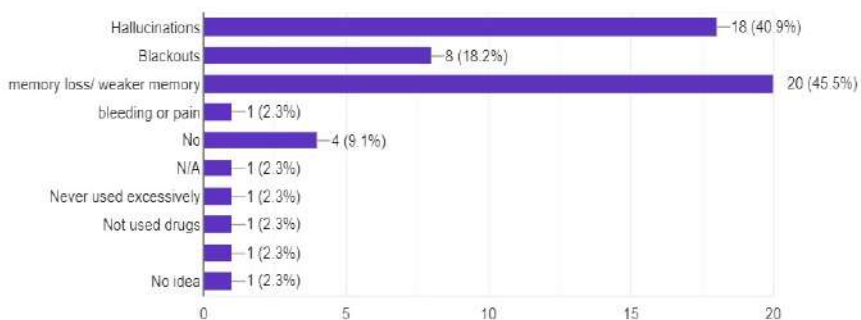


Fig 4: Response to question about medical problems in using drugs excessively or illicit drug from the survey, where it is clear that medical problems like memory loss, hallucinations and blackouts are quite prevalent among drug affected people.

Are you aware of the legal services provided by NALSA and DLSA to the victims of drug abuse

53 responses

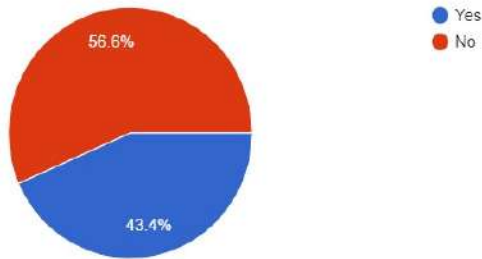


Fig. 5: The survey shows the level of awareness among youth regarding legal services provided to victims of drug abuse by NALSA & DLSA.

By fulfilling the duty of restricting the consumption of drugs which are detrimental to health under Article 47 of the Constitution, the NALSA introduced their scheme with regard to legal service of victims of drug abuse in the year 2015. Apart from providing legal assistance to victims of drug abuse, the main target of this mechanism is to spread socio-legal awareness among school students, college students and youth in general. This kind of literacy campaign can be successful when it involves all stakeholders including different institutions at primary level, schools and colleges. In fact, the State Legal Service Authorities (SLSA) with the help of NALSA can play a constructive role in collaborating with different NGOs working in this reformatory direction and social literacy against drug abuse.

VII. DRUG ABUSE & TRAFFICKING DURING LOCKDOWN DUE TO NOVEL CORONA VIRUS SITUATION

The UNODC cautioned that drug use and abuse has been increasing at a "disturbing" rate over the past few years and believed that the corona-virus pandemic could cause an increase in the abuse and trafficking of drugs as well as an increased dangers for drug dependents reason being, increase in unemployment and absence of opportunities would expand the odds that

impoverished and poor would turn to illegal activities related to drugs either in production or transportation.¹⁸ The Corona-virus could cause a general rise in narcotics use with a move towards less expensive products and injections, which could mean more serious problems for dependents as border closures and other restrictions due to the Virus have caused shortage in drugs on the streets, which in turn lead to increased prices and decreased purity of drugs. Also, in the pandemic situation, nations were bound to additionally decrease drug related financial plans or budgets and are least concerned while dealing with anti-trafficking activities and global participation. The UNODC said that the pandemic could have a further “far-reaching impact”.¹⁹

European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) is one of the EU based agency which attempts to comprehend the character of drug abuse issues and did a comprehensive study. The report of this comprehensive study elaborated on implication of the pandemic phase on drug usage in European states and stated, “Trafficking has continued despite the restrictions. This has resulted in higher prices, but the illegal drugs market has proved very resilient and dynamic during the lockdown. Organized crime groups have adapted themselves.” Also stated that modern strategies were adopted by the drug peddlers to supply drugs which includes food supply amenities. "Dark net" sites are progressively utilized for purchasing drugs in this lockdown period. The availability and accessibility of drugs may increase devastatingly, with the lockdown limitations being facilitated. Numerous users and peddlers in many member states are stockpiling the drugs in anticipation of the lockdowns as per the studies. For future pandemics or similar to Corona-virus situation, the key lesson is that every expert who involve in continuous counselling of drug victim/consumers must have accessibility of secured paraphernalia.²⁰

¹⁸*COVID-19's far reaching Impact on Global Drug Abuse*, UN NEWS, (Jun. 25,2020), <https://news.un.org/en/story/2020/06/1066992>. (last visited May 30, 2021).

¹⁹U.N. OFF. ON DRUG & CRIM., *WORLD DRUG REPORT, 2020*, UNODC, <https://wdr.unodc.org/wdr2020/>. (last visited May 31, 2021).

²⁰Martin Banks, *Drug dealers exploiting COVID-19 crisis by using food delivery services to deliver drugs*, THE PARLIAMENT MAGAZINE, (Jun. 9,2020).

Punjab has been tormented by drug abuse and trafficking for a considerable period of time. The significant international transit-route for illicit drug-trafficking from Afghanistan was North Indian states on the border with Pakistan. The abrupt lockdown in March 2020 came as a surprisingly beneficial turn of events for the state since it resulted in a huge decline in illicit drug business and also substantial increase in numbers of drug victim and their demand for treatment. It turned out to be a major accomplishment for the government since frontiers were closed and transit was restrained which affected illicit drug trafficking. Like a huge number of drug users or dependents in the State of Punjab, they were sent to state monitored rehabilitation centers with the purpose of recovery and alleviation from detached manifestation during the lockdown period due to the pandemic situation in the nation which in turn broke the supply chain. It was reported that the number of patients had increased tenfold for treatment and rehabilitation after the supplies dried up in the lockdown period.²¹ Like every other business, the law of supply and demand, works even in the drug trading business and therefore, the sellers and the buyers of the drugs are necessarily required for running a business. Similarly, in drug trading business the sellers or the peddlers for trading in the illicit drugs are required to interact with the interested buyers or the consumers for the illicit drugs, which are mainly, the victims of drug abuse and drug dependents or addicts.

The pandemic situation in India induced lockdown which in turn interrupted the interaction of these peddlers and the drug users and henceforth resulted in a broken supply chain. The lockdown has affected the impoverished and poor the most, rendering them with no food, no work and even no money in hand. Sometimes, impoverished and the poor become peddlers to trade illicit drugs to the users for the sake of livelihood. During the lockdown peddlers also got affected as much as the drug users, as the drug trafficking channels dried up

<https://www.theparliamentmagazine.eu/news/article/drug-dealers-exploiting-covid19-crisis-by-using-food-delivery-services-to-deliver-drugs>. (last visited May 31, 2021).

²¹See Taniya Dutta, *Coronavirus: lockdown a lifesaver for drug addicts in India*, THE NATIONAL (Jun. 26, 2020), <https://www.thenational.ae/world/asia/coronavirus-lockdown-a-lifesaver-for-drug-addicts-in-india-1.1039447>. (last visited May 31, 2021).

within a period of a month and so their entire business got ruined, peddlers and cartel operators were compelled to switch over to smuggle cigarettes, or other alternatives. Also, they were compelled to indulge into unethical practice to continue the trade, by preparing a concoction of left-over pure quality stock with powdered paracetamol tablets etc. and so the quality of the drugs diminished.²² Even though the lockdown situation in India have been proved to be a curse to the peddlers and cartel operators, it turned out to be silver lining for young addicts which lead them towards de-addiction and rehabilitation, helping them in curbing the addiction issues.²³

VIII. RECENT INITIATIVE TAKEN BY UGC AGAINST DRUG ABUSE IN 2020

The chronic drug use has become a significant issue in numerous varsities and educational institutions with various instances of youths getting dependent on substance use. Consequently, the national programme for drug demand reduction has been formulated by the Ministry of Social Justice and Empowerment together with the Narcotics Bureau, NGOs, and Health Institutions. Accordingly, the University Grants Commission has passed a notification to all the High educational Institutions (HEIs), Universities and Colleges to undertake proper measures and to form an action plan for addressing the Drug menace in HEIs. The measures to be undertaken by the universities and educational Institutions includes the constitution of “Say No to Drugs” student bodies, headed by a faculty member to act as an early warning system to ensure no supply and use of drugs in the HEIs premises by informing regulatory agencies for barring the drug supplies. Also, support the rehabilitation of dependents through communication and counseling for ingraining fearlessness and self-belief with the financial support provided by the Ministry through capacity building. Institutions have additionally been instructed to conduct awareness programs for disseminating the ill effects of substance abuse and

²²See Debasish Panigrahi, *Drugs and the City in Lockdown: Trade nosedives, rehab pick up*, MUMBAI MIRROR, (Jun. 26,2020), <https://mumbaimirror.indiatimes.com/coronavirus/news/drugs-and-the-city-in-lockdown-trade-nosedives-rehab-picks-up/articleshow/76644037.cms> (last visited May 30, 2021).

²³ See *id.*

addictions through street plays, poster making etc., and also, the student bodies ought to advance the idea of ‘Health Promoting University’ accentuating holistic health and wellbeing of all stakeholders.²⁴This kind of initiative highlighted by UGC plays a constructive role in identifying the vulnerable categories of students who are affected with drug abuse. A student body will definitely help in identifying the victim and potential source of drug distribution (possibly drug peddler).

From the victim’s point of view, it is important to check the status of mental health of victims and vulnerable people affected with the drug abuse as addiction of any degree will bring more anxiety and stress. So, in that case, it is desirable to create a proper channel for counseling at school and college level where such vulnerable persons can be guided by a psychologist, student counselor along with parents. However, confidentiality is also necessary in case of rehabilitation of victims of drug abuse. So, it is important to create a mechanism where anonymity or pseudonym can be maintained to execute welfare scheme promoting awareness against drug abuse as there is possibility that such vulnerable people might feel hesitating in coming forward to such anti-drug club as recommended by UGC for academic institution. In fact, UGC and government governing bodies must make it compulsory for academic institution to create anti-drug club by putting as important point in different accreditation mechanism and ranking portal like NAAC, NIRF, etc.

IX. JUDICIAL APPROACH TO DRUG ABUSE IN THE EDUCATIONAL INSTITUTIONS

The judicial approach in tackling the issue of drug abuse in educational institutions is clear over the period of time. In such few cases, the court made insistence to create some sort of Anti-drug cell within the premises of such academic institutes. Such cells could formulate different strategies for organizing different seminars/conferences on adverse effects of drug abuse and

²⁴See Rajnish Jain, *Say No to drugs*, F.no1-13/2020, UGC(Mar. 4,2020), https://www.ugc.ac.in/pdfnews/4064429_Say-No-To-Drugs.pdf (last visited May 30, 2021).

legal awareness campaigns on anti-drug addiction, which will definitely help in reforming many vulnerable youths. Sometimes, it is also important to execute anonymous studies to identify the case of drug abuse and understand the level of addiction among those vulnerable students and intimate their respective parent or relative. It becomes relevant to counsel them slowly in a reformative manner.

Over the period of time, the judiciary has understood the fact that youth at a tender age get distracted in different environments even admitted in any reputed academic institution. Such types of wrongdoings become the usual course of things because of excitement and delinquent behavior. That's why, it is important that such types of vulnerable cases have to be addressed with a great amount of sensitivity. Over-exposure, public humiliation may further deteriorate the psychological well-being of drug affected youth since their supervision of mental health is equally important apart from reformation. It is also necessary in such cases that reformative strategies are preferable than punitive or deterrent approaches.

In the case of *Bachpan Bachao Andolan v. Union of India*,²⁵ a public interest litigation was filed by an NGO named Bachpan Bachao Andolan in 2014 under Article 32 of the Constitution of India, seeking a direction for the formulation of a National Action Plan for controlling drug menace amongst children; Creating module containing an appropriate curriculum for children of different age groups to protect them from substance use, including other issues such as, identification, investigation, recovery, counseling and rehabilitation and other reliefs. The Hon'ble Supreme Court of India disposed of the petition in 2016, directing the Union Government to conduct a national survey on substance and liquor use among Educational Institutions in India and to redress the basic issues like (a) sensitive states, locations; (b) intensive risk people; (c) need for efficient anti-drug/rehabilitation establishments in different states; (d) need for learned workforce and personnel; (e) mechanism for reformation, rehabilitation and care based mental therapy services as well as to finalize an Action Plan to curb the drug menace with the objective of training, learning integrated development of facility contributors dealing with vulnerable group to create learned workforce,

²⁵AIR 2017 S.C. 754.

strong awareness based platform; setting up of de-addiction centers in the most vulnerable areas with respect to high risk population.

There is a need to create a database or record of all individuals with previous convictions or pending cases registered under Narcotic Drugs and Psychotropic Substances Act, which would be prepared by local police stations for taking strong and prevention-based measures against drug suppliers/peddlers. Punishment for such offenders for selling narcotics material to the juveniles should be enhanced under Section 77 of Juvenile Justice Act. Local police shall ensure Zero Tolerance on this issue by regularly visiting the vulnerable schools identified by Department of Education, GNCT of Delhi to identify the peddlers and for scrutinizing, restricting accessibility and dissemination of illicit drugs amongst young students. Use of Pharmaceutical drugs specially the Habit-Forming drugs (schedule H1) drugs are a real menace, hence the Drug Department is required to initiate strong measures against the exploitative and nefarious people actively engaged in the illicit trade of prescribed and non-prescribed drugs.

In the case of *Court on its Own Motion v. State of Himachal Pradesh*,²⁶ Kangra District Police (Himachal Pradesh) initiated a comprehensive course of action against drug abuse, its traffickers and those who were involved in the process of distribution of illicit drug and psychotropic drug sellers and in this process about 200 cases were registered by the police in the years 2015-17 within the Drugs and Cosmetics Act against illicit drugs suppliers/sellers in Kangra as substantial amount of drugs were confiscated, even though recording of sizeable number of cases, charge sheet against erring persons came to be filed in three cases only, prompted the Court to take the *suomoto* cognizance of the matter and accordingly Public Interest Litigation came to be registered. Secretary (Health) to the Government of Himachal Pradesh, submitted before this Court that every best possible effort is always taken and being taken to check any menace through its regulatory mechanisms, in order to secure the Constitutionally provided “right to healthy life” to its citizens as also to curb the evil from the

²⁶C.W.P.I.L. No.65 of 2017.

society.

In the case of *Shveta Mashiwal v. State of Uttarakhand*,²⁷ the petition has been filed seeking the strict enforcement of Section 71 of NDPS Act, 1985 as well as to direct the state government to take stern actions and other effective measures to control, prevent and solve the problem of the increasing menace of drug trafficking, drug addiction and other issues throughout the state of Uttarakhand including the Educational Institutions and while dealing with this issue, all the Governmental agencies should strictly enforce the provisions of the Law.

The Hon'ble Delhi High Court issued certain directions to the Director General of Police, State of Uttarakhand, such as to constitute Narcotics Squad in each district; to give serious emphasis on regions near surrounding educational institutions so as to deal with street peddlers and to have a control over the supply chain as well as School administration staff must be vigilant while identifying for drug suppliers/providers in nearby location and inform about those unscrupulous people to law enforcement authorities. The Government is directed to increase public awareness in the society; to create and encourage anti-peddling team-force having jurisdiction everywhere; to formulate anti-drug groups for promoting drug-free environment for everyone; to sensitize the jail officials for identifying and apprehending narcotics in jail premises.

In case of *Devaki v. State of Kerala*,²⁸ the Writ Petition (Criminal) has been dismissed on the ground that the order of detention of detenu was justified. It was alleged that the detenu was indulging in sale of ganja in small packets to the students who had not attained majority, which is detrimental to the preservation of law and order. Peddling or dissemination of drugs among minor kids and students will definitely put an adverse effect on physical and mental health of young vulnerable people, numerous students will get affected as teenagers could become easy prey and victims of substance abuse. Such continuous inhalation of illicit drugs by young kids will affect their social sustainability with respect to health, career prospects and their relationships with parents and community in general.

²⁷W.P. No.160 of 2017.

²⁸2014(3) K.L.T. 725.

The amicable ambience of academic establishments will be damaged seriously if a substantial number of students are adversely affected and influenced by consumption of drugs. Sometimes, peddlers use different tactics to influence/trap young vulnerable youth to buy and consume drugs, therefore it is necessary to take strict measures to block any attempt or endeavour. Such widespread usage of illicit drugs by youth is a serious concern which can destroy the social fabric of our nation.

X. CONCLUSION AND SUGGESTIONS

It is true that the real problem of drug addiction and further exploitation require a major campaign of awareness and educative drive in the form of different interactive sessions and programs in academic institutions, schools where all stakeholders including psychologists, psychiatrists, narcotic officers, rehabilitation officers, teachers, parents and students can participate. Necessary and effective measures are required to be adopted to form and develop a positive and adequate attitude toward self-confidence and strong emotional quotient to deal with drug menace. For drug abuse prevention, necessary strategies like demand reduction strategy to reduce, prevent or delay the substance consumption and diminishing the interest of the adolescents to obtain or consume the substances; supply reduction strategies to distort the production, possession, availability, accessibility, and trade of licit or illicit drugs, making it difficult to obtain and use for the adolescents. Lastly, strategies to alleviate the negative fitness and societal ramification of drug addiction to reduce effects of drug abuse and other related activities on individual and the society;²⁹ and early interventions to identify the signs of risk and problems in youngsters due to substance abuse, for restraining and limiting the use of substance beforehand and diminishing the long term effects of drug abuse; providing necessary treatment, counseling and medical services to cope up with the drug abuse habits

²⁹See U.N. Off. On Drug & Crim., *School-based education for drug abuse prevention*, UNDOC (2004), https://www.unodc.org/pdf/youthnet/handbook_school_english.pdf. (last visited May 30, 2021).

and addictions.³⁰

There is a need to perceive drug abuse in a friend or any close or loved one as antagonistic and burdensome for all and addressing of this addiction problem should be delicately addressed. Therefore, planning and communication could be an effective way to convince the user or dependents to quit drug use. There is a need for a constructive approach to improve the status of mental health of all vulnerable persons, which directly or indirectly helps in de-addiction and boosting confidence in them. Supportive behavior towards such drug consumers is somehow necessary to understand their struggle towards rehabilitation and improvement of inter-personal relationships. Such an approach will definitely reduce the possible communication gap between vulnerable youth and his/her parents/relatives/friends as a result of which counseling can become easy.

A healthy environment can also reduce the influence of drug addiction. Academic Institutions can play a constructive role in sensitizing the short-term and long-term adverse effect on physical and psychological behavior of drug victims. Institutions can also engage in different physical activities like Yoga, meditation and sports, etc. in their premises on a regular basis. The accumulated opinions of the participants through the Drug Impact Evaluation regarding the participation of legal service authorities, education institutions and judiciary in eradicating drug abuse are based upon quality and clinical education. None of the above can work efficiently if people would not participate and try to educate themselves first. Because giving advice to others is only correct when you yourself are educated enough. So, educating ourselves and others is necessary for individuals and the community as a whole. The priority needs to be the education about drugs and drug related issues. Educational institutions play a very important role in educating and making people aware regarding drug addiction and exploitation. Also, the teenagers must be made aware of the drug related issues in the schools because this is the age where most of them become drug addicts.

Therefore, drug education should be added in the school curriculum. Education

³⁰See generally Jiloha R C., *supra* note 16.

has a great role to play in the life of youth and providing knowledge from the grass root level is essential to prevent the drug menace. People vouch for participation and good work of legal services in disseminating awareness and conducting awareness programs. With that there is always a scope for improvement. It is important to spread awareness even to the primary and secondary school students, their parents and relatives and make them aware of the consequences or effects of the substance use on their mental and physical health. They can help in identification and rehabilitation of the victims of drug abuse and can frame various policies regarding the help provided to the victims of drug abuse. They are working efficiently in bringing awareness amongst the people who are involved in drug abuse. There is also a need for collaborative research-based events including workshops to be organized by the Narcotics Control Bureau in academic institutions against drug-abuse and legal ramifications. It is also important to engage any sort of whistle-blower or undercover officer who can identify the source of dissemination of illicit drug supply near academic institutions so that prevention of drug-abuse is possible.

INTRODUCING ARTIFICIAL INTELLIGENCE IN THE CRIMINAL JUSTICE SYSTEM WITH SPECIAL REFERENCE TO INDIA

Dr. Faizanur Rahman *

ABSTRACT

Advancements in the field of Artificial Intelligence (AI) are conquering unexpected heights. The central concept of AI is to replace humans in order to minimize human effort and to create a highly automated society. The advantage is that these automation systems would take over the monotonous, humiliating, and dehumanizing tasks, freeing us up to follow our interests. AI encompasses a variety of techniques for information transmission, knowledge representation, and automated reasoning, all of which are used to allow machines to act intelligently. The aim of overall data analysis and information augmentation is for machines to learn and solve complex real-world problems. AI is a set of innovations, experiences, and allied networks that aid machines in demonstrating intelligence and reasonability. In the criminal justice system, AI has extended its wings. AI tools have been developed in order to eliminate the gaps that still exist in the criminal justice system. In the short, medium, and long term, AI has the power to question a wide range of legal assumptions. Despite the advancement and growth of artificial technology, the role of AI in the criminal justice administration system remains unaddressed. In light of this, the present paper attempts to investigate the impact of incorporating artificial intelligence into the criminal justice system.

I. INTRODUCTION

The 21st century is heading fast with rapid technological development that has posed many critical problems such as its impact on different aspects of societies. And, securing justice has always been one of the paramount goals of any civilized society. But difficulties arise as to how to incorporate these changes to

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advance the motto of justice and help it to flourish as it remains unaddressed. Questions regarding adaptability, impact, and synthesis of this technological development with the criminal justice system requires a fair analysis as to how the legal systems of the world are coping with it and what must be the future course of action. Artificial Intelligence (AI) has been extending its tentacles in every field including criminal justice. But whether AI can be successful in upholding the basic tenet of human society that is ‘Justice’ has been confounding scholars for a very long time.

AI has the power to redefine the basics of our society because of its competence to challenge or rather surpass human intelligence by imitating it. Hence, a need arises to address this bewildering yet mighty development of AI and its intersection with the legal system such as what challenges it poses for the legal fraternity to deal with its utility, ethics, liability, and so on. Therefore, it is crucial to have information about the strength and weakness of the present AI technology for a proper understanding of it in the legal domain. This aids us in proper understanding about the likely effect including the limitations of AI in the legal enforcement mechanism. In this backdrop, the author in the present paper attempts to study the impact of the incorporation of artificial intelligence in the criminal justice administration system.

II. CONCEPTUALIZING ARTIFICIAL INTELLIGENCE

Artificial Intelligence is a computer science discipline whose main field of work is the development of computer programed machines, a computer-controlled robot and advanced self-learning software / algorithms whose process of thinking is similar to or more advanced than humans. AI as a concept can be given various interpretations from different scientific points of view, leading to the lack of a unitary and concise definition. However various researchers and prominent figures in this field have come up with their own interpretations of the term AI, which now comprises a separate body. Initially, during the conception of AI, it was defined as a field and concept, and not a capability, while nowadays it is defined as the ability of systems to perform certain tasks. The definition of AI is not fixed and remains to evolve as John McCarthy, an

American computer scientist pioneer and inventor, who is considered by many as the father of AI described it as “*the science and engineering of making intelligent machines, especially intelligent computer programs.*”¹ In the contemporary era, it is Nilsson’s definition which is widely accepted by scholars. According to him “*AI is that activity devoted to making machines intelligent, and intelligence is that quality that enables an entity to function appropriately and with foresight in its environment.*”² Nilsson hints that an intelligent machine will be one that possesses awareness of itself and its surroundings. This is where and how the notions of ‘weak’ and ‘strong’ AI are born.

However, a more comprehensive approach to defining artificial intelligence is proposed by Peter Norvig and Stuart Russel by defining it in the context of machine learning as “*Machine learning refers to a subfield of computer science concerned with computer programs that are able to learn from experience and thus improve their performance over time.*”³

The British Parliamentary report on AI entitled ‘*AI in the UK: Ready, Willing and able?*’ concluded that “*There is a tendency to describe AI by contrasting it with human intelligence and stressing that AI does not appear ‘in nature’.*”⁴ The report comes up with the following definition of AI:

A set of statistical tools and algorithms that combine to form, in part, intelligent software that specializes in a single area or task. This type of software is an evolving assemblage of technologies that enable computers to simulate elements of human behaviour such as learning, reasoning and classification.⁵

¹ See John McCarthy, *What Is AI? / Basic Questions*, STANFORD PROJECT JMC, <http://jmc.stanford.edu/artificial-intelligence/what-is-ai/index.html> (last visited May 31, 2021).

² NILS J NILSSON, *THE QUEST FOR ARTIFICIAL INTELLIGENCE: A HISTORY OF IDEAS AND ACHIEVEMENTS* 223 (2010).

³ STUART RUSSEL & PETER NORVIG, *ARTIFICIAL INTELLIGENCE: A MODERN APPROACH* (2009).

⁴ 145 Parl Deb HL (5th ser.) (Arp. 16, 2018) col. 4.

⁵ See *id.*

From the analysis of the above-mentioned definitions, it seems that in its true sense, AI is the particular branch of computer science which seeks to replicate or reproduce human intelligence in machines.

III. BASIS OF ARTIFICIAL INTELLIGENCE

Artificial Intelligence technology has been used in all spheres of life and has therefore sometimes been shown to be hazardous, triggering considerable damage, both to property and to human beings. AI therefore, can be explained as the ability of computer systems to simulate the cognitive functions, which are associated with intelligence, of human beings.

The main idea and concept behind AI are to create such systems and software which can imitate human cognitive functions and hence replace them. This involves a sophisticated level of coding and skills. The idea is to create such data processing units that may compute input and develop such output which could be attributed as coming from a human mind. The goal of work in AI is to build machines that perform tasks normally requiring human intelligence.⁶ The research scientists in AI try to get machines to exhibit behaviour that we call intelligent behaviour when we observe it in human beings. AI is “*the science of making machines do things that would require intelligence if done by man.*”⁷ Another way of looking at AI is that it is a technological innovation which is used presently for the pre-historic analysis of the human brain. This is the scientific answer. AI is concerned with finding out how people think, and that, by the nature of our discipline; we demand a process-based response that can, in principle, be made to work on a computer. That is, we are looking for explanations of human mental processes that either involve, or lead to, algorithms that replicate those processes.

The scope of AI encompasses various techniques for knowledge transmission, knowledge representation, automated reasoning, and this is used to empower

⁶See NILS J. NILSSON, PROBLEM-SOLVING METHODS IN ARTIFICIAL INTELLIGENCE 332 (1971).

⁷JAMES R. SLAGLE, ARTIFICIAL INTELLIGENCE: THE HEURISTIC PROGRAMMING APPROACH 79 (1971).

machines to behave intelligently. The purpose of overall data analysis and knowledge augmentation is to make machines learn and solve complex real-life problems. AI is actually an ensemble of technologies, interactions and allied platforms which take part in helping machine to demonstrate intelligence and reasonability.⁸

It is, therefore, correct to state that the idea embodied by AI is to ultimately replace humans so as to reduce human effort, and to develop a highly automated society. It is to increase the level of automation, so as to reduce the costs, such as costs associated with Human Resource. Its horizons have still not been charted out clearly. The circumvention of such a broad and prospective concept cannot take place at such an early stage. The idea is to reach technological singularity, the point where machines surpass humans. The benefit is that these automation technologies will take over the tedious, mortifying and dehumanizing jobs, and leave one free to pursue things they like.

IV. APPLICATION OF AI IN CRIMINAL JUSTICE SYSTEM

AI has presented itself as an efficient tool for legal practices. Its implementation and usage in the judicial system can also be pondered upon. Globally, judicial systems have already implemented the usage of AI with the development of litigation systems as a tool for their justice system reform. AI has spread its wings in the criminal justice system. AI tools have been launched worldwide in order to remove the discrepancies that remain in the criminal justice system worldwide.

Crimes affect the quality of life, economic growth, and reputation of a nation. With the aim of securing the society from crimes, there is a need for advanced systems and new approaches for improving the crime analytics for protecting their communities.⁹ Accurate real-time crime predictions help to reduce the crime rate but remains a challenging problem for the scientific community as crime occurrences depend on many complex factors. The unique advantage with

⁸See R. ANAND, A. TANEJA & D. GUPTA, *ARTIFICIAL INTELLIGENCE* 225 (2013).

⁹See generally Hitesh Kumar Reddy et al., *Crime Prediction and Monitoring Framework based on Spatial Analysis*, 132 *PROCEDIA COMPUTER SCIENCE* 696 – 705 (2018).

AI is its ability to accurately predict behaviour. While comparing the working of AI with the human mind the University of Houston research found that reliable algorithms can be coded which can incessantly monitor the actions and forewarn about the suspicious behaviour which is likely to end up in a criminal act. This can be done with the use of a network of cameras. It relies upon the dress, bone structure, behavioural traits etc. to earmark and people likely to be involved in the activities with the help of imaging and camera.¹⁰

Thus, this process of predicting the acts through analysis although it is based upon a synthesis of data can be a great boon to the criminal justice system. The difference being that previously the analysis was done by police, probation practitioners etc. who took years to get experience while the AI does not need that much time and can do the same with the minimal resources and time.¹¹

Another advantage with AI is that it can efficiently process huge records of crime related data to accurately forecast the repeated offenders. Currently, the researchers at Research Triangle Institute are collaborating with other researchers in designing an automated warrant service for the state-wide warrant repository for North Carolina. The team members are availing algorithms for examining data sets containing more than 3,40,000 records. This program functions by adjudicating trees and executing survival analysis to establish the likely interval for the repeat of an event of note and foretell the peril of repeat offence by the absconding offender. In the case of success this pattern will be helpful to the practitioners for effectively serving the warrant in the event of a backlog remaining. This tool can be also helpful in geographical profiling in a manner which can mark the area with concentration of likelier absconders. This can help to prioritize the target which will lead to better utilization of

¹⁰See Cristiano Rigano, Nat'l Inst. of Just., *Using Artificial Intelligence to address Criminal Justice Needs*, NATIONAL INSTITUTE OF JUSTICE, (Mar. 7, 2018), <https://nij.ojp.gov/topics/articles/using-artificial-intelligence-address-criminal-justice-needs>. (last visited May 31, 2021).

¹¹See Nat'l Inst. of Just., *Effects of Human Factors on the Accuracy of Fingerprint Analysis*, (May 16, 2012), <https://nij.ojp.gov/topics/articles/effects-human-factors-accuracy-fingerprint-analysis> (last visited May 31, 2021).

resources.¹²

There is another promising aspect of AI that is it can help in the prevention of elderly abuse in the physical as well as economic sense through its predictive techniques. In a research project undertaken by the University of Texas, AI was commissioned to explore the victimisation of the elderly population. The algorithms displayed a positive role in determining the potential victims, perpetrators, and the environment to differentiate between the financial and other forms of elderly abuse. They were also effective in distinguishing between the *pure* economical exploitation and mixed categories of exploitation wherein the economical exploitation is accompanied with physical or mental abuse. It is expected that in future the same technology can be used for developing internet-based programs to aid the practitioners in figuring out the likelihood of economic exploitation and get involved in that without wastage of time.¹³

Last but not the least AI is being increasingly used for nipping in the bud the likely victims of violent crimes by processing the behavioural and societal pattern of the people, The Police in Chicago has collaborated with technological partner in using the algorithms for accumulating the data and divide them into structure which can then be used for predicting the people likely to be at risk of being affected by crime. The system will detect if there are any suspicious changes in their behaviour or unusual movements.

At present, no nation has adopted a national predictive policing programme, though predictive policing tools have been developed and operational at local level across the globe. In the United States, predictive policing tools were developed and deployed in cities such as Chicago, Los Angeles, New Orleans and New York since 2012.¹⁴ Likewise, countries like

¹²See Nat'l Inst. of Just., *Applying Data Science to Justice Systems: The North Carolina State-wide Warrant Repository (NCAWARE)*, (Sep. 16, 2015), <https://nij.ojp.gov/funding/awards/2015-ij-cx-k016> (last visited May 31, 2021).

¹³See JASON BURNETT ET AL., NAT'L INST. OF JUST., *EXPLORING ELDER FINANCIAL EXPLOITATION VICTIMIZATION: IDENTIFYING UNIQUE RISK PROFILES AND FACTORS TO ENHANCE DETECTION, PREVENTION AND INTERVENTION*(MAY 2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/250756.pdf> (last visited May 31, 2021).

¹⁴See Odhran James McCarthy, Ctr. For Pol'y Res., U. N. Univ., *AI & Global Governance: Turning the Tide on Crime with Predictive Policing* (Feb. 26, 2019),

hina, Denmark, India, Netherlands, and United Kingdom reportedly deployed predictive policing tools on a local level.¹⁵ More recently a predictive policing programme approved in the United Kingdom that could be rolled out sooner or later to all national police forces.¹⁶ However, it is certainly not exhaustive as more nations will adopt the predictive policing programme as AI becomes more advanced and law enforcement becomes more familiar with its potential.

Hence, it can be truly said that predictive policing can be a game-changing technology, affording law enforcement the opportunity to turn the tide on crime for the first time in history. But, if the data that drives this technology is biased, the risks will trump any benefits.¹⁷

The infrastructure of every city is getting smarter and smarter as governments are trying to make their countries grow at a great pace. With the help of AI, real-time information can help detect crimes as soon as they happen. Crime is a collection of patterns for which AI can read patterns accurately. The use of AI technology can help to monitor content or the digital footprints of a person and detect any unusual activities. The goal of law enforcement should not be to catch criminals, but it should be to prevent crime in the first place.¹⁸ For that, it is imperative to scan and isolate the activities and articles which can be used for spotting illegal activities which are continuing for timely interruption by the authorities, additionally it can be used for supplementing the investigations. A technological tool which can accurately understand and point out a particular event from amongst a variety of different scenarios can go a long way in aiding

<https://cpr.unu.edu/publications/articles/ai-global-governance-turning-the-tide-on-crime-with-predictive-policing.html>. (last visited May 31, 2021).

¹⁵ Vikram Sharma, *Indian Police to be armed with big data software to predict crime*, THE NEW INDIAN EXPRESS, (Sep. 23, 2017),

<https://www.newindianexpress.com/nation/2017/sep/23/indian-police-to-be-armed-with-big-data-software-to-predict-crime-1661708.html> (last visited May 30, 2021).

¹⁶ Chris Baraniuk, *UK police wants AI to stop violent crimes before it happens*, NEW SCIENTIST, (Nov. 26, 2018), <https://www.newscientist.com/article/2186512-exclusive-uk-police-wants-ai-to-stop-violent-crime-before-it-happens/> (last visited May 30, 2021)

¹⁷ See McCarthy, *supra* note 14.

¹⁸ See Naveen Joshi, *The rise of AI in crime prevention and detection*, ALLERIN BLOG, (Nov. 30, 2019), <https://www.allerin.com/blog/the-rise-of-ai-in-crime-prevention-and-detection> (last visited May 30, 2021).

the law enforcement agencies in providing a lead for reference in investigations. In a breakthrough research jointly undertaken by University of Central Florida and Orlando Police Department the researchers were able to successfully identify objects in the video through the aid of algorithms developed by them, remarkable all this was done by the algorithm without any help from the human agency. Additionally, algorithms were also used for detecting traffic related incidents and physical crimes.

AI can also be used to prevent the occurrence of fraud, the online payment giant PayPal always manages to stay a step ahead of the scamming groups by using enormous data which is used by their programs for predicting prospective fraud techniques and isolating the unusual activities for learning novel patterns which may be of help in preventing future frauds.¹⁹ In India, the Kolkata Police is now expanding the footprint of the CCTV cameras AI-powered devices in crime detection. Similarly, an AI-powered CCTV camera aided the cops in identifying and punishing a citizen for spitting and defacing public property in Gujarat. These smart cameras installed by the Ahmedabad Municipal Corporation (AMC) were able to identify a citizen's body movements, interpret them, and understand that the person who was breaking the law.²⁰

The contours of AI in crime investigation can be explained with the scenario that visual analysis is increasingly being used by law enforcement agencies to process data related to individuals, things and activities and all this data is useful in conducting investigations related to crime. Applied to the criminal realm, a criminal investigation refers to the process of collecting information (or evidence) about a crime in order to: determine if a crime has been committed; identify the perpetrator; apprehend the perpetrator; and provide evidence to support a conviction in court. If the first three objectives are successfully attained, then the crime can be said to be solved.

¹⁹See Christopher Rigano, *Using Artificial Intelligence to Address Criminal Justice Needs*, NAT'L INST. OF JUST., (Oct. 8, 2018), <https://nij.ojp.gov/topics/articles/using-artificial-intelligence-address-criminal-justice-needs> (last visited May 30, 2021).

²⁰See Prajakta Hebbar, *Kolkata Police to use AI in Crime detection*, ANALYTICS INDIA MAGAZINE (Dec. 9, 2019), <https://analyticsindiamag.com/kolkata-police-to-use-ai-in-crime-detection> (last visited May 30, 2021).

Another boon of the AI based tools is its potential in aiding the legal system in processing the scientific evidence like DNA testing which is increasingly playing an important role in solving criminal cases, it is challenging yet rewarding for successful criminal investigations. With the progress in this technology a path breaking avenue is unlocked which makes it possible to establish a proof of certain acts which was impossible in the bygone era. Thus, the analysis of DNA and separating it in case of mix up of various DNA which is impossible to be executed perfectly by human involvement can be successfully dealt with by using the AI.

The examination of the DNA provides us with an enormous quantity of data which is in the digital form and includes patterns which are not possible to be decoded by humans, yet are crucial for the investigations. A problem arises in dealing with this data, to overcome this problem researchers at Syracuse University collaborated with other agencies and experimented with a novel method which involved the combination of human analysis with AI algorithms and data mining. It was used for spotting individual DNA. This minimised the drawbacks of relying only upon human accuracy or AI and was a hybrid technique which involved the best of both worlds. Although it is still in the nascent phase but it has the prospects of helping in future for processing complex data.²¹

Presently, courts and correction departments worldwide are using algorithms to determine a defendant's risk which ranges from the probability that an individual will commit another crime to the likelihood a defendant will appear for his court date. These algorithmic outputs inform decisions about bail, sentencing, and parole. Each tool aspires to improve on the accuracy of human decision-making that allows for a better allocation of finite resources.²² For instance, a city in Britain is using AI for enhancing the present system which is used for setting

²¹See generally Syracuse Univ., *A Hybrid Machine Learning Approach for DNA Mixture Interpretation*, NAT'L INST. OF JUST., (Sep. 11, 2014) <https://nij.ojp.gov/funding/awards/2014-dn-bx-k029>.

²²See Jason Tashea, *Courts Are Using AI to Sentence Criminals. That Must Stop Now*, WIRED (Apr. 17, 2017), <https://www.wired.com/2017/04/courts-using-ai-sentence-criminals-must-stopnow> (last visited May 30, 2021).

free a suspect. This program nicknamed as HART (Harm Assessment Risk Tool) used the criminal data of 5 years and anticipated whether the person in question falls in the category of low risk, medium risk or high-risk individual. It has been claimed that the algorithm managed 98% accuracy in predicting low risk individuals while being accurate 88% in case of high-risk individuals. In a related development the US has been relying upon algorithms for risk assessment related to the release of pre-trial release. This practice being used for over a decade is used to determine the question of whether or not a prisoner should be released on parole or not, this decision is crucial because of the reason that the release of a person can lead to further crimes being committed by the released person.

V. AI IN INDIAN CRIMINAL JUSTICE SYSTEM

The Indian legal system is in the initial stage of evolution with AI technology. The use of AI has been adopted in policing in India. The assumption of it to be a threat in the field of law is absurd. It has been evidently shown from the usage in other industries that it works towards enhancing the efficacy along with reducing the time invested over the tasks when done manually. The apparent reason for AI to not intervene and just provide support is that the judicial system holds features such as variability, complexity, flexibility, and discretion. Various States have already adopted different strategies vis-à-vis AI in India.

In November 2019, Gurugram-based start-up Staqu launched its video analytics platform, JARVIS or Joint AI Research for Video Instances and Streams, in Uttar Pradesh. JARVIS mines CCTV footage to offer a string of services like violence, intrusion and pick-pocketing detection, besides crowd analysis. This is a new way of tapping AI to generate useful information from long CCTV footage through short real-time alerts, and it significantly reduces the time to come up with actionable data.²³

Similarly in 2018, Punjab Police started using the Police Artificial Intelligence

²³See Swat Sudhakaran, *How AI can be used in policing to reform criminal justice system*, THE PRINT (Aug. 19, 2021), <https://theprint.in/tech/how-ai-can-be-used-in-policing-to-reform-criminal-justice-system/384786/> (last visited May 31, 2021)

System or PAIS, developed by Staqu, which is equipped with options like face search, text search, etc., and a database with more than 1 lakh records of criminals housed in jails across the state.²⁴

Moreover, in UP, Trinetra has been aiding the police force which is an AI-enabled application that contains a database of approximately 5 lakh criminals with facial-recognition features. In 2017, Delhi Police joined hands with INNEFU Labs' facial recognition software AI Vision, which offers gait and body analysis. A homegrown artificial intelligence start-up, INNEFU is tapping into the booming demand for facial biometrics in India with their tests on Indian faces and feasible prices.²⁵

Further in a developing country like India, AI tools could provide relief in flagging police violence and preventing escalation that adds to a prison's already stressful environment. Reporting abusive behavior by guards and collation of previous cases of violence can improve the chances of seeking help for guards and other personnel on duty who otherwise continue to function with repressed issues. AI can curb illegal operations and smuggling on prison premises by flagging abnormal activity and movement. If prisons must be correctional facilities, then AI tools can prove worthwhile in preventing inmates from going astray, for example, by assisting in tackling drug addictions through monitoring. This technology holds massive potential advantages which will further prove to be expeditious and cost effective for India.

VI. GLOBAL ACCEPTABILITY OF AI

The technology has the possibility of becoming an integral part of the criminal justice delivery system, supporting the investigation agencies and professionals and enhancing public safety. It also can open up previously uncharted territories and areas in criminal justice without compromising on the quality of justice delivered.

It is contented that law enforcement with the aid of AI tools and predictive

²⁴ See Mohd Ujaley, *Punjab Police won smart policing award for Punjab Artificial Intelligence System*, EXPRESS COMPUTER, (June 4, 2018), <https://www.expresscomputer.in/egov-watch/punjab-police-won-smart-policing-award-for-punjab-artificial-intelligence-system/24958/> (last visited May 31, 2021).

²⁵ See Swat Sudhakaran, *supra* note 23.

policing analytics integrated with the computer-aided response and live public safety video enterprises will be better able to respond to incidents, prevent threats, stage interventions, divert resources, and investigate and analyse criminal activity.

It is therefore established that AI adjudication with codified justice can accelerate both the technology's adoption and encourage its development in ways inimical to equitable justice. The foremost strengths of AI adjudication are two hallmarks of codified justice, *i.e.*, efficiency and uniformity.²⁶ AI adjudication in addition also creates powerful new incentives and opportunities to criticize the discretion inherent in equitable justice and mostly in human decision-making.

In this backdrop, the US White House in 2016 made an effort to pin down the difficulties and avenues related to AI and looked at ways to make a better use of this technology for better governance while keeping the risks of the technology to a minimum. In the field of law, it is stated that AI can help in analysing case law history, assisting with the discovery process and in summarizing evidence.

In India, the incumbent CJI has proposed using the AI for improving the justice dispensation system of the country. However, while advocating on using technology, *i.e.*, AI in judiciary, he clearly stated that people should form the impression that the AI would ever replace the judges. According to the CJI, machines cannot replace humans, especially the knowledge and wisdom of judges. The deployment of the AI system will help reducing pendency and expedite judicial adjunction.²⁷

In 2018, the United Nations Interregional Crime and Justice Research Institute (UNICRI) and the International Criminal Police Organization (INTERPOL) organized a global meeting on the opportunities and risks of AI and robotics for law enforcement, thereby illustrated that, although AI is a new concept for the

²⁶See Eric Niiler, *Can AI Be a Fair Judge in Court? Estonia Thinks So*, WIRED (Mar. 25, 2019), <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/>

²⁷See Smriti Srivastava, *Supreme Court to use Artificial Intelligence for better judicial system*, ANALYTICS INSIGHTS(Nov. 27, 2019),<https://www.analyticsinsight.net/supreme-court-use-artificial-intelligence-better-judicial-system/> (last visited May 30, 2021).

law enforcement community and there are gaps in expertise, many state agencies are already actively exploring the application of AI to enhance crime prevention and control.²⁸

However, limitations of AI in the criminal justice system are a subject of debate. In this regard, low accuracy of AI can be traced back to insufficient data sets which induce bad weighing processes and poor connections between input and output data. The grey issues on the implementation of automated decision-making such as risk assessment tools designed by private companies into judicial decision-making processes, thereby indirectly delegating public powers to private companies.

AI systems being an automated system cannot understand the social-ethical dimensions in rendering a decision. Humans make mistakes, but over time and with practice they accumulate knowledge to avoid errors by constantly refining the system. As AI only imitates human function, they may lose this attribute in transition and even miss out the ability of courts to shape the law.

IV. CONCLUSION

AI tools are capable in assisting judicial officers by predicting vital information regarding an on-going case which constitutes number of accused in a case, date of filing of the charge sheet, number of witnesses examined during evidence stage, witness turning hostile, reasons for adjournments, First Information Report details, quantum of punishment, compensation granted etc. which are recorded in the daily orders and the final judgment based on past cases of an analogous nature. Therefore, these variables can help judges to make better strategic decisions in reducing delays in final disposal of a case. Similarly, AI algorithm would be a reliable tool in the hands of the trial judges in highlighting the summary of the documents and oral evidence which in turn would enhance the capability of the trial judges in adjudicating complex matters involving voluminous records efficiently.²⁹

²⁸See McCarthy, *supra* note 14.

²⁹See Srivastava, *supra* note 27.

AI has undoubtedly shown its worth when it has come to criminal prediction or detection; and forensics. However, in the context of criminal sentencing and its liability many doubts remain. Nations are still grappling with issues pertaining to can Judges be replaced by AI Judges to a certain extent, who is to blame in case of fault, how to determine the extent of liability and others. While the positive impact is highlighted, the concern about data privacy and protection is being acknowledged too. There is need of data protection in the systems with accountability of data controllers that will restrict and monitor the AI users while handling, retrieving, and using the data. The personal privacy of the individuals needs to be prioritized, which brings the need of censoring machinery too to monitor and filter the said activities and data. Thus, it's a high time that nations should come up with a concrete policy to regulate the use of AI in the criminal justice system and fix issues of liability in case of their failure.

INCREASING VIOLATION OF INTERNATIONAL HUMANITARIAN LAW DURING NON- INTERNATIONAL ARMED CONFLICTS AND ITS CHALLENGES

*Dr. Anita Yadav**

ABSTRACT

In recent years, internal armed conflicts are more frequent in numbers than the International armed conflicts. However, the problem does not lie in the increase of such conflicts, but in the identification of the same which reaches the threshold or meet the criteria of non-international armed conflict (NIAC) as opposed to international armed conflict under the International Humanitarian Law (IHL). Therefore, it is imperative to understand the demarcation of both conflicts in order to apply IHL rules and fix the accountability of violators involved in such internal conflicts reaching to the threshold of NIAC. Difficulty also arises while identifying the NIAC from other internal armed conflicts not meeting the criteria of NIAC. This difficulty to identify the nature of the NIAC substantially contributed to violation of IHL norms. The Sri Lankan civil war in 2009 is one of the prominent examples of IHL violations committed by parties involved in the conflicts. In this background this article examines the characterization and threshold of NIAC by highlighting the gaps in law and challenges to regulate contemporary armed conflicts.

I. INTRODUCTION

Conflict, being a very basic feature of all social systems, is impossible to stop completely due to various existing interests of people.¹ In such a scenario, it is pertinent that law should regulate such violent conflicts occurring all around the

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¹Aswini K. Mohapatra, *Armed Conflicts in the World: An Overview*, WORLD FOCUS, <http://www.worldfocus.in/articles/conflict-zones-of-the-world/armed-conflicts-in-the-world-an-overview/> (last visited May 31, 2021).

world either amongst the states or between non-state actors and government forces or amongst the non-state actors only.² While the first category falls in inter-state conflict which means conflict between the states even though formally states have not recognized the declaration of war and remaining two situations considered as intra-state conflict within a state.³ Identifying international armed conflicts is an easy task due to clear involvement of states. However, it is often found difficult to understand the level of internal armed conflicts which has reached the threshold of non-international armed conflict (NIAC) because all internal armed conflicts cannot be NIAC in character unless they meet required criteria – resulting in non-application of the International Humanitarian Law (IHL) principles.⁴

According to the World War Report, 2017,⁵ 38 armed conflicts occurred in 21 states all over the world are non-international in character.⁶ In the period between 1989 and 1998, 92 out of 108 wars were domestic, with the highest number in Asia, followed by Africa and Europe.⁷ Sri Lanka is ravaged by a 17-year-old civil war and India remains torn within Jammu and Kashmir and Northeast States. These statistics clearly show the changing nature of armed conflicts in the modern era. There has been a clear shift from traditional warfare which has been fought amongst the states to ‘new wars’ or intra state conflicts where the state is one among many other players.⁸ Considering the increasing number of NIACs, their impact within border and cross border cannot be ignored.

²Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art. 2, Aug. 12, 1949, 75 U.N.T.S. 31.

³ Geneva Conventions of Aug. 12, 1949, common art. 3.

⁴Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(2), Jun. 8, 1977.

⁵See ANNYSSA BELLAL, THE GENEVA ACAD. OF INT’L HUMANITARIAN L.& HUM.RTS., THE WAR REPORT ARMED CONFLICT IN 2017 17(2018).

⁶See STUART CASEY MASLEN, THE WAR REPORT 2012 3 (2013).

⁷See Navnita Chadha Behera, *The Long Road Ahead: Engendering Conflicts Analysis in South Asia*, 11 IND. J. OF GENDER STUD.34 (2018).

⁸See *id.*

The UN Secretary-General has also stressed on the problem posed by this increasing number of internal armed conflicts while stating that as internal armed conflicts have proliferated, civilians have become the principal victims and identification of armed elements leads to enormous problems.⁹ It is now conventional to say that, in the past few decades, the number of NIAC victims has increased drastically.¹⁰

II. ARMED CONFLICTS AND THE UNITED NATION CHARTER

After the Second World War when the United Nations (UN) was established in 1945, slowly the concept of ‘war’ started fading away with the term “threat or use of force”.¹¹ The main purpose of the UN is to maintain international peace and security all over the world.¹² Therefore, “threat or use of force” was expressly prohibited by the UN Charter in its Article 2, paragraph 4 which clearly states that in their international relationships, all members should refrain from threatening or using force against any state’s territorial integrity or political independence, or in any other way inconsistent with the United Nations’ purposes.¹³ However, Article 2, Paragraph 7 of the UN Charter lays down:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state requires the member to submit such matters to settlement under the present Charter.

A close analysis of Article 2, paragraph 7 shows that the UN and its members will respect the principle of sovereignty of states and will not interfere in internal matters of any state. In other words, this article gives the scope to states

⁹REPORT OF THE SECRETARY-GENERAL TO THE SECURITY COUNCIL ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT, U.N. S/2001/331, (Mar. 30, 2001), <https://casebook.icrc.org/case-study/un-secretary-generals-reports-protection-civilians-armed-conflict> (last visited May 30, 2021).

¹⁰See EVA LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS1 (2008).

¹¹See U.N. Charter, art. 2 (4).

¹²See generally U.N. Charter, chap. VII, art. 24, 25 & 51.

¹³See YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOL OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1323 (1987).

to maintain law and order situation in their own territory without having any fear of being condemned by the United Nations. Therefore, states are allowed to manage and suppress the internal conflicts which are in their domestic jurisdiction.¹⁴ Nevertheless it does not give the states complete free hand to manage their internal matter the way they want, Article 2, paragraph 7 has also made an exception to the principle of non-interference by stating that in order to prevent threat to international peace and security, Security Council can take necessary measures according to Chapter VII of the United Nation Charter. Therefore, non- interference is not an absolute right and if ‘international peace and security’ are threatened due to internal matters of any state which is essentially within the domestic jurisdiction of that particular state, the UN can interfere in order to restore and maintain international peace and security as these are its prime objective defined in Preamble.¹⁵

Before the enactment of Common Article 3 of the four Geneva Conventions of 1949, internal armed conflict was considered to be an internal matter and subject to domestic laws of a particular country. It was only after the enactment of Geneva Conventions of 1949, the term “armed conflict” was incorporated and made applicable to all kinds of armed conflicts immaterial if states recognized it or not. Thus, Common Article 3 of the Geneva Convention of 1949 has brought a great shift in fixing the accountability of parties involved in internal armed conflicts¹⁶ by regulating the conduct of parties and by extending the protection to the victims of such conflicts.

III. NON-INTERNATIONAL ARMED CONFLICTS BEFORE ENACTMENT OF GENEVA CONVENTIONS, 1949

As far as regulation of international armed conflicts is concerned rules and laws were in existence for many years but with regard to regulation of NIAC there was no universal law prior to the enactment of Geneva Convention, 1949.

¹⁴ *See id.*

¹⁵ *See* U.N. Charter, art. 2 (7).

¹⁶ Peterson G Alex, Major, order Out of Chaos: Domestic Enforcement of the law of internal armed conflict. Vol. 171 21 (Mar. 2002).

Internal conflicts are often considered to be exclusively a domestic matter of state. Where in states have their own way to handle it. Consequently, states are often hesitant to give any legal protection to non-states actors involved in armed conflicts in their own territory.¹⁷

Before 1949, the states might have followed a certain set of rules to regulate the internal armed conflicts due to the recognition of belligerency, but that was done only out of self- interest of states and for some political benefits. This recognition of belligerency is often considered as charity or some kind of concession to non-states actors involved in internal armed conflicts. States were never considered to be bound by law while giving any recognition to non-state actors. Therefore, there were no universal and uniform practices which were followed by states across the world in terms of the recognition of belligerency which would have resulted in any customary practices to regulate such conflicts. In the absence of any customary practices, it is the sole discretion of the state to recognize or not legal entitlement of non-state actors involved in internal armed conflicts.¹⁸ This has further necessitated the need to create a concrete set of rules applicable during internal armed conflicts to save the victim of such conflicts.

IV. REGULATION OF NON-INTERNATIONAL ARMED CONFLICTS AFTER 1949

The development of the international human rights principles and incorporation of NIAC within the scope of IHL have brought a significant change in the modern era of warfare. The traditional shift in approach from “state-sovereign oriented approach” to “human-rights oriented approach” has contributed immensely for the protection of victims of such conflicts which is often considered only a domestic matter since many decades.¹⁹

Further, enactment of Universal Declaration of Human Rights (UDHR),

¹⁷See Lindsay Moir, *The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts*, 47 INT’L & COMP. L. Q. 338 (Apr.1998).

¹⁸See *id.*

¹⁹See generally Aurey Xavier, *The Universal Declaration of Human Rights and Armed Conflicts: From Fragmentation to Complexity*, 2 ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL 48-67 (2009).

International Covenant on Civil and Political Rights (ICCPR), Geneva Conventions of 1949 and other international human rights treaties have extended its protection in all areas of conflicts including internal one. Now the state is not the sole authority to determine and decide the way they want to treat the parties to conflicts. Therefore, there is a clear obligation on the states to abide by the rules and regulations during internal armed conflicts enshrined in various international human rights treaties.²⁰

It was only after the enactment of Geneva Conventions in 1949 when NIAC found its express mention in Common Article 3 in all four Geneva Conventions, which provided certain minimum basic humanitarian law principles to be respected during NIAC. At a later stage, this protection was further extended with the enactment of the two Additional Protocols, 1977 of the Geneva Convention. The first additional protocol dealt with international armed conflicts and second specifically focused on NIAC. Both additional protocols extended effective protection to the victim of armed conflicts and widened its scope for effective protection of parties involved in the conflicts.

V. TREATY LAWS AND NON-INTERNATIONAL ARMED CONFLICTS

In order to understand the protection afforded by Common Article 3 in all the four Geneva Conventions, it is necessary to make a detailed analysis of elements of Common Article 3, its scope and application during NIAC conflicts. In fact, after enactment of Geneva Convention 1949, it was only the Common Article 3 which regulated the NIAC beyond which NIAC fell outside the scope of IHL principles until the enactment of a second additional protocol in 1977. Therefore, this part of the article analyses in detail the elements of Common Article 3 of the Geneva Convention, 1949.

The Common Article 3 has laid down certain minimum international humanitarian law principles applicable during NICA. Humane and non-discriminatory treatment are two cardinal principles imbibed in Common Article

²⁰Macro Sassoli, State responsibility for violation of international Humanitarian law, 84 INT'L REV. OF RED CROSS 401 (June 2002).

3 for the protection of the victim during NIAC.²¹ It extends its protection to people who do not or no longer directly participate in hostilities or persons who are *hors de combat* (outside the fight), or incapable of fighting. Therefore, Common Article 3 equally binds both the parties involved in the conflicts immaterial of any state recognition.²²

Despite good efforts to regulate NIAC by Common Article 3, various lacunae still persist while addressing such kinds of conflicts. The first and foremost thing is that Common Article 3 does not provide any definition of NIAC; it simply states “*armed conflict not of an international character*” without explaining the essential elements of NIAC. In such scenarios it is very difficult to demarcate those conflicts which have reached the status of NIAC.²³ It does not also give clarity about the status of detainees captured during such conflicts which often leaves them without any legal protection.

As far as application of Common Article 3 is concerned, it will be only applicable whenever there is armed conflict. In the absence of a clear definition of ‘armed conflicts’ in the Conventions, it further leaves a scope for the states to determine the status of conflicts in their own territory and naturally, states are apprehensive to declare armed conflict situations in their own territory. States are reluctant to accept accountability and to bind themselves by principles of humanitarian law. In such situations, these existing gaps in law always give ample opportunity to states to avoid the application of IHL in their internal

²¹See M. Gandhi, *Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals*, 11 ISIL Y.B. OF INT’L HUMANITARIAN & REFUGEE L. (2001), <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html#:~:text=Article%203%20offers%20an%20international.protections%20offered%20under%20this%20provision> (last visited May 30, 2020).

²² See Marco Sassoli, *Introducing A Sliding-Scale of Obligation to Address the Fundamental Inequality Between Armed Groups and States*, 93 INT’L REV. OF RED CROSS 428 (2011).

²³See A. Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 461 (A. Cassese ed. 1979).

armed conflicts.²⁴ This further makes it an easy way to violate the IHL rules due to absence of clear threshold and procedural qualification of such conflicts

VI. AN ANALYSIS OF ADDITIONAL PROTOCOL II TO THE GENEVA CONVENTIONS

A. Understanding the Criteria for Non-International Armed Conflicts

In order to address the violation of IHL principles during non-international armed conflicts and considering the lacunae and gaps existing in Common Article 3 of the Geneva Convention, there arose a need for a comprehensive legislation to deal with internal armed conflicts. In 1977, Additional Protocol (AP) II was enacted to deal specifically with the victims of NIAC.²⁵ AP II was brought to develop and supplement Common Article 3 to the Geneva Convention and it laid down the scope and procedural qualification for situations in which hostilities will be considered to have reached the threshold of NIAC. Therefore, to understand the applicability of AP II it is necessary to analyze in detail the procedural qualification of NIAC set forth in Article 1 of AP II that deals with the criteria and threshold for the NIAC. The text of the provision is reproduced below:

1. This Protocol, which develops and supplements article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its

²⁴See Theodor Meron, *the Humanization of Humanitarian Law*, 94AM. J.OF INT'L L. (Apr. 2000).

²⁵See YORAM DINSTEIN, *NON- INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW*7 (2014).

territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

An analysis of AP II reveals that the protocol is enacted to further supplement and develop Common Article 3 of the Geneva Convention without modifying its existing condition. AP II laid down a detailed criteria and threshold to demarcate internal armed conflicts by making two categories: a) an internal armed conflict which fulfils the material criteria of NIAC and b) an internal armed conflict which does not fulfill the criteria of NIAC like internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. In order to apply AP II, it is necessary that parties involved in internal armed conflicts must be organized under responsible command to carry out sustained and concerted military operations and can have the ability to enforce the protocol. A detailed analysis of each criterion is required to understand the applicability of AP II relating to internal armed conflicts.

Article 1 of AP II of the Geneva Convention has set out detailed criteria and procedural qualification for determination of situation falling under the category of NIAC. By introducing these criteria like the nature of parties involved in conflicts, territorial control, sustained concerted military operation and capability to enforce, the protocol leaves no arbitrary scope for the states to decide the existence of internal armed conflicts in their territory. Therefore, any internal armed conflict situation will be covered in AP II the moment it fulfils all the criteria laid down by AP II. In order to understand the applicability of AP II it is imperative to analyze each criterion in detail.

B. Nature of the Parties involved in Internal Armed Conflict

In the absence of clear procedural qualification for determination of NIAC in Common Article 3, AP II brought a great improvement in determination of NIAC by introducing certain criteria to determine the nature of armed conflicts

falling under the category of NIAC and one such criteria introduced by AP II is nature of parties involved in internal armed conflicts. According to Article 1 of AP II, it will be applicable only to those internal armed conflicts wherein parties involved are armed forces of the high contracting party and dissident armed forces or other organized armed groups. However, the major problem is that in case of non-involvement of government armed forces, this protocol will not be applicable and considering the present scenario, many emerging armed conflicts happening all around the world do not always have government armed forces involved due to various reasons. This rigid criterion for applicability of AP II sometimes becomes a major hurdle to cover all those internal armed conflicts in which government armed forces do not have a major role to play.

C. The Responsible Command and Organized Armed Group

In order to apply AP II to internal armed conflicts the next criteria introduced by Article 1 of AP II is responsible command amongst the parties involved in conflicts. Therefore, it is necessary that parties involved in conflicts must have some level of organization in order to plan and sustain its military objective. Further the commentary on AP II makes it clear that the level of organization should not be in a formal hierarchical manner. However, sometimes it is very difficult to determine the level of command due to the absence of a clear definition of responsible command in AP II. In such a situation the threshold set by AP II in terms of responsible command becomes almost impossible to satisfy in ground reality.

D. Control over the Territory

The next criteria controlling the part of territory further heighten the threshold for applicability of AP II to internal armed conflicts.²⁶ The criteria of controlling a part of territory will exclude various internal armed conflicts. For instance, guerrilla warfare tactics wherein it is not necessary that guerrilla forces must occupy a certain part of territory since deceptive and underground attack on enemy forces are popular tactics of guerrilla strategy of warfare, in such a situation, usually these kinds of irregular forces do not occupy any specific

²⁶LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 105(2002).

territory. Further, there is no clarity in AP II what portion of territory needs to be controlled in order to fulfill the threshold of Article 1.²⁷ This high threshold has often been criticized by various legal scholars. Since, it is practically impossible to meet such a threshold in contemporary armed conflicts.

E. Sustained and Concerted Military Operation

There is no clear definition of “sustained and concerted military operations” provided by AP II, which often creates the difference of opinions amongst the states in terms of its understanding and applicability. As per one view, sustained and concerted operation can only be possible when there is ‘continuous and planned’ operation in internal conflicts. However, few scholars believe that this criterion creates a very high threshold which is impossible to meet in reality.²⁸

F. Test of ability to implement Additional Protocol II

As per this criterion in AP II it is required to check the potential of the parties involved in the conflicts to implement this AP II. The ability to implement the Protocol is very much dependent on all criteria mentioned above. Therefore, non-state actors should have responsible command with control over the part of territory in order to implement this protocol effectively, which is an essential criterion to implement AP II.²⁹ This high threshold often limits the application of Protocol II. One of the main arguments advanced by the states is that only those non-state actors with ability to implement the protocol will be in position to comply with IHL principles.³⁰

²⁷See SANDOZ ET AL., *supra* note 13 at 1352.

²⁸See SIVAKUMARAN SANDESH, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS* 188 (2012).

²⁹YVES SANDOZ LEILA ET AL., *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI* 1353 (2008).

³⁰Marco Pedrazzi, *Additional Protocol II and Threshold of Application*, in *THE ADDITIONAL PROTOCOLS 40 YEARS LATER: NEW CONFLICTS, NEW ACTORS, NEW PERSPECTIVES* (Fausto Pocar ed., 2018).

VII. CUSTOMARY LAWS AND ITS APPLICABILITY IN NON-INTERNATIONAL ARMED CONFLICTS

As we all know, the Geneva Convention has been signed and ratified universally by the states. However, in case of additional protocols, the reality is different. Many states are not a party to the additional protocols in such situations; the role of customary laws becomes very important. Moreover, each aspect of NIAC is not covered by the treaty laws; in such scenarios customary laws work as a guiding tool to address this problem and try to fill the gaps in law.³¹

The development of customary laws applicable to NIAC can be traced from the precedents developed by various ad-hoc international criminal tribunals, especially the International Criminal Tribunal for the Former Yugoslavia (ICTY) and later on the International Criminal Court (ICC). The development of customary laws in NIAC has been further contributed in 2005 by International Committee of the Red Cross (“ICRC”) study on customary laws applicable on both international and non-international armed conflicts. ICRC has identified various common customary laws which have equivalent application on both kinds of conflicts.³² This study reveals that gradually the demarcation between international and NIAC conflicts started diminishing due to various common customary laws applicable on both conflicts. Few customary principles applicable to NIAC are discussed below:

A. Principle of humanity

Respect for humanity is one of the core ideas of IHL which can be found in various religious texts and cultural practices. Modern IHL is not unaware of the idea of humanity which is a very central notion of all treaty laws including Common Article 3 of the Geneva Convention wherein the concept of humanity finds an express mention in the text. Therefore, its application on NIAC is inevitable.

³¹ Int’l Comm. of the Red Cross, *Customary International Law*, ICRC.ORG., <https://casebook.icrc.org/case-study/icrc-customary-international-humanitarian-law>.

³² The ICTY and ICTR agreed that at least ‘the core’ of Additional Protocol (AP) II is part of customary international law. *See Prosecutor v. Dusko Tadic* (Appeal Judgement), IT-94-1-A, Int’l Crim. Trib. for the Former Yugoslavia, Jul. 15, 1999.

B. Principle of distinction

Principle of distinction is one of the cardinal principles of IHL wherein an obligation is imposed on parties involved in conflicts to distinguish between combatant and non-combatant. It obliges the parties to the conflict to attack only legitimate military targets and not the civilian objects like school, hospital, food stock etc. Further, this principle of distinction gained importance in the advisory opinion of the International Court of Justice in the *Nuclear Weapons case*.³³ Later on, ICTY also recognized the principle of distinction between civilians and combatants as customary law applicable in both international armed conflicts and NIAC and states are obliged to respect it.³⁴ With the enactment of the AP II, principle of distinction came to be recognized in Article 13 para 1 of AP-II.

C. Perfidy

Perfidy is one of the tactics or methods in warfare wherein one party to the conflicts invites the other party's confidence and trust with the intention to betray that confidence. According to ICRC study, practice of perfidy is clearly prohibited in state practices and has gained the status of customary international law applicable to both international armed conflicts and NIAC. As far as development of treaty laws are concerned, Additional Protocol II does not make any express mention of prohibition of perfidy. However, the same has been recognized in Article 37 para 1 of the Additional Protocol I applicable to international armed conflicts. Despite the absence of this principle in AP II principle of perfidy being customary in nature is also applicable to internal armed conflicts.

D. Proportionality

The principle of proportionality has also not been recognized in AP II. Despite the express absence of this principle in AP II, customary international law plays an important role to fill this gap. ICRC in its 2005 study on customary

³³See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226.

³⁴See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 255 (2005).

international law recognizes the principle of proportionality as a part of customary IHL applicable to NIAC.³⁵

E. Prohibition of unnecessary suffering

IHL lays down that means and methods of warfare during the conflicts are not unlimited. Therefore, IHL does regulate the amount of suffering needed to be inflicted to achieve the military target. Prohibition of unnecessary suffering is clearly prohibited in various religious and customary practices; for example, the ancient Hindu texts clearly prohibit use of poisonous weapons which may cause unnecessary suffering while killing the enemy. Likewise, each state has its own customary practices for prohibition of unnecessary sufferings. This principle is applicable both on international and internal armed conflicts due to its inherent nature of customary law.

F. Prohibition of certain conventional weapons

There have been state practices, judgements of ad-hoc tribunals, resolutions of United Nations Security Council and various newly emerged treaty laws which clearly prohibits use of certain conventional weapons, which have the capacity to cause mass destruction and can be indiscriminate in nature. Military manuals of various countries also prohibit the use of conventional weapons because it can cause unnecessary sufferings. For instance, the military manual of Belgium (1983) clearly prohibits use of weapons which causes unnecessary suffering and pain. However, use of such weapons are permitted only in extreme exertional situations. Further, the US Field Manual (1956) also prohibits use of such weapons which can cause unnecessary suffering to individuals.

As far as ad-hoc tribunals are concerned, ICTY in *Tadic* casein appeal stated that “there is general consensus in the international community that use of chemical weapons must be prohibited in internal armed conflicts as a matter of customary international law”³⁶ This customary norm has been further supplemented by Kampala Conference (The Review Conference of the Rome

³⁵Geneva Conventions of Aug. 12, 1949, common art. 3.

³⁶JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I RULES 262 (2005).

Statute, Kampala, 2010) and recognized by United Nations Security Council (“SC”) in its Resolution 1540 adopted in 2004 wherein SC officially mentioned that possession of weapons of mass destruction by non-state actors is a threat to international peace and security. It further seeks to prevent non-state actors from acquiring, possessing or using such weapons.³⁷ In 2013, during Syrian armed conflicts, SC again in its Resolution 2118 condemned the use of chemical weapons. Later on, subsequent development in treaty law has extended its application on usage of conventional weapons applicable on both international and non-international armed conflicts.³⁸

Moreover, it is affirmed by the International Court of Justice in *Nicaragua case*³⁹ that Common Article 3 of the Geneva Convention has attained the status of customary international law. Likewise, some of the principles of AP II have also become the part of customary international law, few of which have been already discussed in this article.

VIII. INTERNATIONAL JUDICIAL INSTITUTIONS AND NON-INTERNATIONAL ARMED CONFLICTS

Ad-hoc international criminal tribunals contributed significantly to the development of law regulating the NIAC. As discussed in this article, absence of definition of “armed conflicts” in Common Article 3 of the Geneva Convention often gives the scope for the states to avoid their accountability. This was finally resolved by ICTY which held that irrespective of its international or non-international nature, “*an armed conflict exists whenever there is resorts to armed forces between states or protracted armed violence between governmental authorities and organized armed groups within the state*”.⁴⁰

³⁷See U.N. S.C. Res. S/RES/1540 (Apr. 28, 2004).

³⁸ See generally Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, opened for signature Sep. 3, 1992, 1975 U.N.T.S. 45, (entered into force Apr. 25, 1997).

³⁹ *Case Concerning Military and Paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America) 1986 I.C.J. 14 (Jun. 27, 1986).

⁴⁰See DEREK JINKS, APPLYING INTERNATIONAL LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 45 (2014).

It was the first time that the ICTY in *Tadic* case⁴¹ laid down those customary rules of international laws that are also applicable to internal conflicts and violation of these rules can amount to breach of obligation of IHL rules. While rejecting the argument of *Tadic* with regard to non-applicability of Article 3 of the ICTY statute during internal armed conflicts. The Court stated that Article 3 of the ICTY statute cannot be violated even during internal conflicts.

Establishment of International Criminal Tribunal for Rwanda (ICTR) in 1994 further strengthened the laws regulating the NIAC by making an express criminalization of IHL principles during NIAC.⁴² Article 4 of ICTR Statute clearly criminalizes the violation of Common Article 3 of the Geneva Conventions and of Additional Protocols.

The enactment of the Rome Statute and the establishment of ICC in July 1998 played a significant role in the development of rules relating to NIAC. The Rome Statute clearly recognizes the “grave breaches” of Geneva Convention and it consists of two sets of war crimes list which is applicable during NIAC. First list deals with the grave breaches of Common Article 3 of the Geneva Convention from (Article 8 (2) (c) of the ICC statute) and second list deals with violation of customary laws applicable to NIAC contained from article 8 (2) (e) of the Statute.⁴³ Hence, Article 8 (2) (c) (f) outlines the important provisions dealing with the NIAC. A comparison between Common Article 3 and Article 8 (2) (c) of the ICC statute shows various common features which gives a clear indication of the gradual diminishing difference between international armed conflicts and NIAC.⁴⁴

⁴¹See *Prosecutor v. Dusko Tadic*, *supra* note 32.

⁴²See LJ. VAN DEN HERIK, *THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW*206 (2005).

⁴³See ANTONIO CASSESE, ET AL., *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*379 (Oxford University Press 2002).

⁴⁴See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 166 (2002).

IX. CONCLUSION

The discussion made in this article on laws regulating NIAC gives a clear indication of the vast development in the regime of NIAC in the last few decades. Its scope and application have developed by treaty laws, customary laws, ad-hoc tribunals, ICC and various SC resolutions. However, there are certain inherent limitations which have been highlighted in this article which often make it difficult to determine the nature of armed conflicts as non-international in nature due to the higher threshold set by Article 1 of Additional Protocol II.

Considering the fact that today most of the contemporary armed conflicts happening all around the world are internal in nature, it is a pertinent time to amend AP II of Geneva Convention by lowering the threshold of NIAC criteria to cover widely violent internal conflicts and to extend the protection to the victims of such conflicts. Further, the international community also needs to establish an independent monitoring body to look after such kinds of conflicts. Since, ICRC which is given mandate under Common Article 3 of the Geneva Convention has very limited role to play in such conflicts. Another solution to address the violation of IHL norms during NIACs can be solved by removing the substantial differences between international and non-international armed conflicts, considering that most of the customary international laws like principle of distinction, necessity, prohibition of torture etc. are applicable on both kinds of conflicts. Secondly, the recent development of treaty law relating to the regulation of various types of weapons has also made no difference in terms of applicability of its provisions based on the nature of armed conflicts.

EVALUATION OF COPYRIGHT REPRODUCTION RIGHT IN THE LIGHT OF FAIR DEALING IN THE EDUCATIONAL SECTOR IN INDIA

*Dr. Nisha Dhnaraj Dewani & Dr. Mamta Sharma**

ABSTRACT

The primary goal of the copyright laws is to promote educational and cultural development. To accomplish this goal, there are exclusive marketing rights, neighboring rights, performer's rights and broadcasting rights. In academics, the research and development play a very pivotal role but the availability, affordability and accessibility create many issues for its expansion. Therefore, the Doctrine of Fair Dealing and its implementation in Indian academics is the need of the hour to raise the concern in the context of photocopying of textbook and course material, etc. The main concern is whether the photocopying of course material for the purpose of research and development and academic improvisation is considered as the infringement of copyright? Thus, this article covers the jurisprudence and necessity of copyright along with the fair use provisions in the realm of Indian educational sector and the stand of other countries like US and the UK. Further, the articles highlight judicial determination on reproduction rights with special emphasis on the fair dealing in its entirety. Lastly the article is concluded with certain defects in the existing system of fair dealing.

I. INTRODUCTION

Intellectual Property Rights (IPR) law implies rules that arise from intellectual practices in the fields of industry, research, literature and art. The artistic function of the human mind is intellectual property. Many countries provide intellectual property regulations for two purposes. First, it is important to express the moral and economic rights of author and the right of the public to

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access such works. Secondly, the dissemination and use of that work as per governmental policies and the promotion of fair use principle which contributes to economic and social growth of any country. Protection of intellectual property is very crucial as it meant to shield the person who created the work, intellectual products and services manufacturers by giving them some limited privileges to regulate the usage of intellectual property. These rights are specific to the intellectual production as well, not the actual object through which the technology is applied. IPR is generally split into industrial property and copyright, two separate divisions.¹

The reproduction of copyright work without the permission of author is not allowed. However Fair dealing doctrine in copyright law allows limited use of copyrighted material without requiring permission from the right holders. In India in the arena of academia, certain exemptions are allowed when dealing with intellectual property for scholarly research and personal use. Under Fair dealing, small portions of protected intellectual property works can be used to support or refute personal research claims, as well as support or rebut already published research. Such scholarly exemptions are allowed provided proper credit is given using established citation formats.²

The jurisprudence of IPR was much supported by Locke as “*who saw a person’s work as a person’s, and when the State takes the essence for him — some “goods” such as ‘normal’ — and incorporates his work with him, it generates ownership*”. As per above, it is worth fostering both creativity and better productivity to create social capital by converting goods and growing resource by means of labour expenditure. Both constructive creativity and the satisfying creation of value are important in the transition from tangible possession of intellectual property. The IPR laws encourage innovation, morally sustainable innovations and the additional benefit of the currently delivered goods and services. They promise that no one can afford rights by guaranteeing that they are accessible for a limited time only after the establishment of a public domain

¹ See Lalit Jajpura et al., *An Introduction to Intellectual Property Rights and their Importance in Indian Context*, 22J. OF INTELL. PROP. RTS. 32 – 41(2017).

² See E.J. Duffy & J. Lloyd, *Biodiversity*, THE ENCYCLOPEDIA OF EARTH, <http://www.eoearth.org/article/biodiversity> (last visited May 30, 2021).

by an intellectual production. Hegel primarily supports this view: “*personality's nature is land.*” The property is thus extremely personal and private and must be secured. The moral rights under the copyright law demonstrate that intellectual protection is highly valued. These are the inalienable privileges of the artist to preserve the dignity of his art from modifying the author's appearance or actual importance. There is no entirely appropriate rationale for ensuring that they are treated together as arguments for the security of IP; from the viewpoint of function or identity the entire expertise of the IP is best served by intellectual property law only. Different IP groups tend to be justified by different degrees from different angles. In the light of the identification copyright and the trade names, further protection can be given to patents and industrial designs as well.³

II. INTERFACE BETWEEN THE DEFINITION OF ‘WORK’ AND THE ECONOMICS OF COPYRIGHT WORK

IP laws cover all forms of laws relating to copyright, which refers generally to the human mind's creations. The IPR safeguard the innovators’ and creators’ desires by granting them rights to their inventions.⁴

The copyright and associated privileges should be secured to encourage creativity, the enrichment of cultural resources, and dissemination of work and knowledge resources to the public at large. The protection and security from piracy promotes and enhance value the production of new and original works and their investment. Writers, artists, distributors, and publishers are granted sufficient economic and moral privileges. There is often an effective structure for their exercise. There are also productive processes, protocols, solutions, and penalties for their compliance in effect. The World Intellectual Property Organization (WIPO) demonstrates as:

“. . . ‘intellectual property’ shall include the rights relating to:
literary, artistic and scientific works, performances of performing

³See M. D. Nair, *GATT, TRIPS, WTO and CBD-relevance to agriculture*, 16J. OF INTELL. PROP. RTS. 176 – 82 (2011).

⁴See S.K. Verma, *Financing of Intellectual Property: Developing countries’ context*, 11 J. OF INTELL. PROP. RTS. 22 – 32 (2006).

artists, phonograms, and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields”.

The Copyright which is granted to the creator becomes his property right in their creation on demonstration that their work with their own original expression as copyright law is based on Idea- Expression Dichotomy. This forbids others from copying their creations without authorization, thereby creating intellectual property protections for literature and creative works.

One of the most important and substantial economic viewpoints of copyright work protection is of the fact that it is for the “*public good*” as the creation of a work requires relatively high costs and time for the development of a work. However, once versions of the created work become available to the public, they are subject to a very limited degree of non-rival use.⁵ Precisely restricted access to copyright work and stringent implementation of copyright related rights with exclusive distribution in the hands of author weigh the importance of this law. In this scenario, encouraging writers and their approved publishers becomes vital to capture a profit beyond the marginal cost of expression. In addition, selling over the marginal cost leads in less copies being bought than if the books were offered at the lowest reasonable price. Those people who value copies above the marginal cost, for example, would instead buy items they value less. As a result of this decreased access to jobs, copyright allows culture to sacrifice deadweight. In order to strike the equilibrium between the interests of copyright owners and copyright holders, this illustrates the substantial productivity trade-off between social and private costs that must be covered by copyright laws. Copyright rights must, however, be restricted in scope and length.

⁵Aleksandar Stojkov, Goce Naumovski, & Vasko Naumovski, *Economics of Copyright: Challenges and Perspectives*, 7(1) MIZAN L. REV. 132 (2013).

III. COPYRIGHT IN WORK

Professor Zechariah Chafee addressed the basic concepts guiding copyright roles in his landmark paper, *Functions of Copyright*, written in 1945. One of the basic concerns he raised in this essay was: What is it that copyright law is actually seeking to achieve? An investigation into this topic prompted him to postulate the basic concepts he defines as being the six copyright law values. These six principles are:

(1) Maximum coverage, (2) a single monopoly, (3) Protection to work should be international, (4) Protection should not reach well beyond the intent of protection, (5) copyright owner protection should not stifle other people's independent development, and (6) legal regulations should be easy to work with. The first three of the six principles were optimistic because they embraced the copyright owner's rights, while the other three were negative because they appeared to narrow the spectrum of protection.⁶

In India, section 2(y) and 13(1) of the Copyright Act, 1957⁷ define work and work in which copyright subsist.*i.e.*, literary, dramatic, musical or artistic work, a cinematograph film and a sound recording. Also, section 14 gives economic rights to an author with respect to his work as an exclusive right to reproduce the work, issue copies of the work to the public, communicate the work to the public, to make any cinematograph film or sound recording of that work, to translate the work and adaptation of any such work. Moreover, with respect to Cinematographic and Sound recording the authors have additional rights that is right to sell, hire including rental rights.

On the other hand, section 13(2) provides that copyright shall not subsist in a work unless the work is published work in India or the work is first published outside India and the author is dead but the author at the time of death was an Indian citizen.

⁶See Benjamin Kaplan et al., *In Memorium: Zechariah Chafee, Jr.*, 70 (8) HARV. L. REV. 1345 – 52 (1957).

⁷Act No. 14 of 1957.

IV. LITERARY WORK AND COPYRIGHT

The copyright was initially conceived for the protection of literary works, particularly books only. During the twentieth century and with the advancement of new technology in computer science the new methods of creation, reproduction, dissemination was drastically changed the way works are created, reproduced and disseminated. The development of communications technology such as fiber optic cable and satellites has dramatically revolutionized the way information, voice, sound and images can be transmitted. An effect of these kinds of technology is that the authors earn income from unauthorized uses of their creative works.⁸ These all changes were accommodated in copyright as a new category of works such as computer programs and databases.

Before to discuss about reproduction or photocopy in copyright, it is important to light upon that what may be appropriated. The finality of the work is achieved by an individual upon another is the result of the labour, skill and capital, not through with the raw materials or its related components, in which the labour and skill and capital of the first have been spent. As Copyright subsists in expression not in idea itself. Further to obtain copyright for the final work, it is important that the contributing factors such as a creator's labour, ability and his resources should be invested enough to divulge to the final work to some consistency or its character. This formula is applicable to all the work as explained under section 2(y).

Now the next is what is literary work? Literary work is defined under section 2(o) and this definition is inclusive not exhaustive. The literary work consists of tables and numerous compilations for example a dissertation is a literature work. It means "a written work" in particular. The term "*original*" would not require the functionality must be of novel or original thought. Copyright is not associated with thoughts, nor with expressions of the minds or mental method. The originality must be seen by the stylistic, printing and the validity of the originality must be proved.⁹

⁸T.C. James, *Indian Copyright Law and Digital Technologies*, J. OF INTELL. PROP. RTS.423 – 35 (2002).

⁹*Fateh Singh Mehta v. O.P. Singhal*, (1990) 1989 W.L.N. U.C. 522 (India).

Apart from above, in *University of London Press Ltd. v University Tutorial Press Ltd.*¹⁰ Peterson J. was asked to decide: whether examination papers were subject to copyright. According to him, “*it may be difficult to define literary work as used in the Act, but it seems to be plain that it is not confined to literary work in the sense in which the phrase is applied, for instance, to Meredith’s novels and the writings of Robert Louis Stevenson*”.

Besides above, the next question is whether copyright subsists in literary work? To answer this question, there is plethora of cases. Amongst all the most popular was *Pope v. Curl*¹¹ where an English author went to an English court to protect his literary work. The case related to an unauthorized publication of a collection of letters consisting of those written by Alexander Pope to Jonathan Swift and those written by Swift to Pope. Lord Chancellor Hardwicke ruled in favor of Pope stating that letters are subject to copyright and that their publication requires explicit authorization from their author. This momentous case in English and American copyright law had set a rule that “*copyright in a letter belongs to the writer, not to its recipient.*” But what is still more remarkable about this case is not so much the ruling that letters are protectable under the Statute as was the distinction which Hardwick drew between the receiver’s tangible property in the physical letter (paper) and the writer’s intangible property in the words.

Many of the lawyers were opposed to consider literary property as a species of property for a number of reasons. The chief among the opponents of literary property was Justice Joseph Yates. In his dissenting opinion in *Millar v Taylor*,¹² Yates, for example, raised several objections against the recognition by law of property in intellectual productions. First, he categorically denied the existence of property in literary production due to non-presence of object and substance. He maintained that copyright exists in literary composition.

“ . . . is all ideal: a set of ideas which have no bounds or marks whatsoever, nothing that is capable of a visible possession, nothing

¹⁰1916 2 Ch. 601.

¹¹(1741) 2 Atk. 342.

¹²(1769) 4 Burr. 2303.

that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other mode of acquisition or enjoyment than by mental possession or apprehension; save and invulnerable from their own immateriality; no trespass can reach them; no tort affects them; no fraud or violence, diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff off.”

Then, in *Donaldson v. Becket*,¹³ in 1774, the House of Lords reversed the judgment taken in *Millar Case*¹⁴ and ruled that “*literary property was limited to the words*” stated in the Act. For the first time, literary works are available for all to print for free. Similar to how after the Donaldson case, booksellers in Edinburgh and London did some of their best thorough collections of classic British works in multi-volume sets. John Bell, so successful in publishing the works of Shakespeare, also published a multi-volume set of Shakespeare's works the same year as the decision in *Donaldson v. Beckett*.¹⁵

Precisely the jurists of many countries were in favor to give recognition permanently to the author who created the work or with believe that copyright is a necessity if the “*reward of literary labour*” was to be “*in just proportion to its deserts*.” The movement for copyright reform in the late 1830s and early 1840s was a part of the larger copyright reform movement led by Thomas Tal fourd and William Wordsworth. Both Tal fourd and Wordsworth agreed that copyright was a natural right and its period should be computed from the death of the author. Surprisingly it led to the Copyright Act, 1842 where the term to the author's life plus seven years or a total of 42 years, whichever was longer¹⁶ was set up. Henceforth 19th century was just the reconsideration of 18th century.

¹³1 Eng. Rep. 837 (H.L. 1774).

¹⁴*Millar v Taylor*, *supra* note 12.

¹⁵*See Donaldson v. Becket*, *supra* note 13.

¹⁶Mark Rose, *Nine-Tenths of The Law: The English Copyright Debates and The Rhetoric of The Public Domain Law and Contemporary Problems*, 66 L. & CONTEMP. PROB.83 (2003).

With the passing time, the ownership of the copyright had become an integral issue where it was considered different from the ownership of the work and this is independent. Essentially, copyright is a contractual award of rights to which a particular work is entitled. It is a package of rights that entitles its holders to print, reprint, distribute and sell, but the freedom to sell is not the right to sell a work, but to sell a replica of the work. In essence, these rights are exploitation rights that affect the pecuniary assets of the author and are thus provided to allow the author, or his assignor, to take advantage of the work in the market. Because the copyright is a multiple divisible right, the holder may jointly pass or grant these rights or assign these rights. Beyond above, the transfer of ownership, or the individual privilege thereof, does not represent an assignment of the work itself. In relation to the task, it is literally a permission to perform such actions. Thus, ownership of the work ultimately resides with the creator, subject to the different privileges containing copyright that the author grants.

IV. LITERARY WORK AND FAIR USE PROVISION

A. Genesis of Fair Use in Copyright Law

The purpose of copyright is to preserve the creator's interest and encourage them to produce creative content in order to expand information. Based on the 'sweat of brow' theory, monopoly right over it is gained by this information generated by the maker. In the opposite, the author finds a way to avoid the monopoly of study for the advancement of creative works to better culture, from being a copyrighted by social science. Because of the tension between personal and societal priorities, decision leaders and the courts continued to make attempts to align the interest of the originator/creator and the general interest in the quest for facts over time. According to their tradition, the Berne Convention for the Protection of Literary and Artistic Works (hereinafter 'Berne Convention')¹⁷ grants the nation the power to enable or restrict accessibility and to allow unrestricted access to particular works for the good of society, with the exception of copyright being integrated into the laws with the goal of balancing

¹⁷*Berne Convention for the Protection of Literary and Artistic Works*, Sep. 9, 1886, as revised at Stockholm on Jul. 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

the public and personal interests. This is how the idea of 'balanced dealing', 'balanced free use' or 'fair use' is defined.

Fair usage or fair dealing is a doctrine which makes a reproduction of copyrighted content without infringing copying, except though the copyright holder has not permitted copying. Copying is not permissible. Nowhere has the term 'fair dealing' been described. It is impossible for the courts to set down specific criteria. The test offered under Berne Convention must be considered when determining whether a use is likely to affect the competition or the reputation of the copyrighted work. A significant test has emerged in the review of case law in different countries.¹⁸ In some situations, fair-use privileges allow the public to make use of copyright content in addition to the details and principles of the copyright work. According to many jurists, the "fair use" doctrine is known to be the main copyright problem. This encourages a violation that may be freely available, because there is no guideline to decide whether or not a specific act was fair and there have been no defined criteria for the determination of fair usage, such as legal precedents or customary rules, before then, any factors regarding the extent and nature of the use of copyright, the quantity and length of the service and the effect of the use of copyright. By comparison, the absence of specific, quantitative criteria to assess reasonable usage tends to frustrate many consumers. Therefore, fair usage was supposed to be useful, with the potential to raise new requirements and applications. The price we pay for this flexibility is confusion. In order to eliminate copyright infringement cases, in particular, the word 'fair use' must be redefined. People that misuse copyright deliberately but are within the shadow of "fair use" shall do so only after it has been clearly and safely reconstructed.¹⁹

In 1841, the term fair use doctrine was a sensibly established by Justice Story in the famous case of *Folsom v. Marsh*,²⁰ ". . . we must often, in deciding questions of this sort, look to the nature and objects of the selection made, the quantity

¹⁸ See generally *Civic Chandran v. Ammini Amma*, [1996] PTMR 142; *Hubbard v. Vosper*, [1972] 2 QB 84 (CA); *Sony Corporation v. Universal City Studios Inc.*, 464 US 417 [1984].

¹⁹ G. D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use*, 53 MCGILL L. REV. 309 (2008).

²⁰ See *id.*

and value of the material used and the degree to which the use may prejudice the same or diminish the profits or supersede the objects of the original work”.

B. Berne Convention

Article 2.1 of the Berne Convention "to protect intellectual works," as inserted into the TRIPS Deal, obligates participants to protect "literary and artistic works." The term often discusses several diverse modes of expression including ones in the literature, science, and creative realms. Article 2.1 lists non-exhaustive descriptions of works. Other works copyrighted from which examples may be taken include novels, journals, other written works, musical performances, animations, photos, paintings and architecture. Two forms of limitations are recognized in the Berne Convention: credited restriction and uncredited one. Generally, uncredited restrictions represent uses or activities that are not deemed part of the legitimate reach of the copyright grant of the author. Credited restrictions generally mean that, as part of the copyright incentive system, the copyright owner is not able to decide when the work is used, but is still entitled to remuneration. According to the Berne Convention, all works other than photographic and cinematographic works are copyrighted for at least 50 years after the death of the author, although the parties are free to grant longer terms, which was the case for the European Union with the 1993 Directive on the harmonization of the copyright security era. The Berne Convention establishes a standard period for photography of 25 years from the year in which the image was taken, and the minimum for cinematography is 50 years after the first broadcast, or 50 years after the development, if it was not seen within 50 years of the creation. Countries under older treaty amendments can opt to have their own conditions of protection, and shorter terms may be given for such forms of works (such as phono records and motion pictures). A variety of particular copyright exceptions are contained in the Berne Convention which are distributed in other provisions owing to the historical explanations for the Berne negotiations. For e.g., Article 10 (2) requires Berne representatives, under their copyright laws, to provide for a 'teaching exemption'. The exemption is restricted to the usage of the subject matter learned for example, which must be relevant to educational practices.

In addition to specific exceptions, in Article 9 (2), the Berne Convention lays down a 'three-step test' which establishes a mechanism for Member States to create their own national exceptions. Three conditions are set down in the three-step test: “*the law be restricted to such (1) exceptional cases; (2) that the exemption should not interfere with the usual exploitation of the work; and (3) that the exception is not unreasonably prejudicial to the author's valid interests.*”

The Berne Convention has followed certain restriction or exemption: - that the right to reproduction work must: (1) be restricted to such exceptional cases; (2) not interfere with the ordinary working of the work without the consent of the author; and (3) not irrationally influence or interfere in the legal and reasonable interests of the author. The test applies proportionally, causing all three prongs of the test to be met by a given constraint. Article 13 of the TRIPS Agreement²¹ also follow the three-step evaluation concept but has potentially narrowed its application further. "Article 13 states that "*Members shall confine themselves.*" Limitations as discussed above demonstrates that the factors like those exceptional circumstances which do not interfere with the use of the work and which do not harm the genuine interests of the author unreasonably should always be considered.²²

The Berne Convention gives writers of literary and artistic works the exclusive privilege, by wireless dissemination of signs, sounds or pictures, to permit broadcasting and public communication.²³ This clause provides a secondary privilege, whether the contact is rendered by an entity other than the first broadcaster, to permit the re-transmission of the job to the public by cable. Finally, it is the sole right of the creator of the work to approve. Public communication of the work through transmitting via a loudspeaker or other.

As per the laws, every country protects and preserve the copyrights of their

²¹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (hereinafter 'TRIPS Agreement').

²² Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, 15 UNCTAD, https://unctad.org/system/files/official-document/iteipc200610_en.pdf.

²³ Berne Convention, art. 11bis (1).

writers, producers, photographers and singer, either under the obligations of the Berne Convention 1883 (Article 9 & 10) or under the obligations of the TRIPS Convention (Article 13), subject to exceptions under its statutory authority. In USA, the exclusive use limits, *i.e.*, fair use, are found in Articles 107 to 122. These parts include limits and the extent of exclusive rights. Section 107 allows for the “*equal use of a copyrighted piece of work, including by duplication of copies or films, or by any other means*” defined in that section, “*Notwithstanding the provisions of exclusive rights in copyrighted works²⁴ and rights to assignment and dignity of particular authors*”.²⁵ It is not a breach of copyright for purposes such as critics,²⁶ opinion, news reports, teaching (including several classroom copies), scholarship, or analysis. The dynamics for considering the work a fair use shall include:²⁷

- (1) Intention and extension of the use, including whether the use is trade or charitable education.
- (2) Nature of copyrighted work.
- (3) Volume and substantiality of the work.²⁸

It also says that if such conclusions are made on the basis of all the above considerations, the fact that a work is unfinished does not preclude its own finding of fair use.

In *Addison-Wesley Publishing Co. v. New York University*,²⁹ the publishers filed a suit against the university and its professors for unauthorized photocopying of their copies without taking permission from the publishers etc. As per the facts, the photocopy Center was ordered to pay the plaintiffs an amount equal to its profits from the distribution of the works. Therefore, it can be observed USA is prone towards the pro-author regime despite doctrine of fair use in its laws.

²⁴US Copyright Act, Pub. L. No. 94-553, 90 Stat, art. 106 (1976).

²⁵*Id.*

²⁶*See id.*

²⁷*See id.*

²⁸*See Bramwell v Halcomb* (1836) 3 My & Cr.

²⁹*See* 1983 WL 1134 (S.D. N.Y.).

C. Fair Dealing in the United Kingdom Regarding Photocopy

Under Sec. 29(1C) of the Copyright, Designs and Patents Act, 1988, the UK accepts fair dealing, which notes that fair dealing with a literary, dramatic, musical or artistic production for private research purposes would not infringe any copyright in the work. Section 29 (3) therefore prohibits fair dealing and specifies that copying by an individual other than the researcher or student himself is not fair dealing.³⁰

D. Fair Dealing in India

The Indian government's duty to offer education to the citizens of the world is now a fundamental right under the Indian constitution. But the implementation of the same is indeed under way as it is difficult to grasp and comprehend the problems confronting education in India without setting the total costs of education in context. There is a widespread misunderstanding that books in India are at an inexpensive price. Prices of books utilizing a comparative buying power study may not show otherwise. The high expense of science and technological books to developing countries stands in the way of their distribution, which could be greatly decreased if they were freely reproduced and translated by underdeveloped countries. With government's acknowledgement of education's value, the high cost of instructional materials in the developed world, and the proliferation of piracy, copyright law is important. Developing countries must organize their copyright policies in ways that optimize the supply of low-cost books, educational institutions' access to digital content, and the capacity of distance learning services to operate without prohibitively large royalty rates. One of the most successful ways to foster equal access in the field of education is by requiring copyright legislation contain robust fair-use protections that encourage fair use. Extenuating conditions or restrictions will go one of two ways: by legislative licensing and equal dealing clauses. In India the legislative fair dealing framework as given under section 52, the Copyright Act, 1957, needs interpretation before reviewing the jurisprudence of the same.

³⁰See COPINGER & SKONE JAMES ON COPYRIGHT 208 (Kevin Garnett et al. eds., 12th ed. 1980).

In *McMillan v. Khan Bahadur Shamsul Ulama Zaka*,³¹ the English Copyright Act, 1842 was held to be valid in India by the Bombay High Court. The Copyright Act, 1914 was enacted to regulate to the rights of creator. Also, the concept of Fair dealing was first adopted into this statute. The reproduction of the work specified that the copyright will not be infringed by 'any fair dealing of any work for the purposes of private analysis, examination, critique, examination or newspaper summary'. In addition, the Indian Copyright Act, 1957 was enacted as an "independent and self-contained law".³² Section 52, which constitutes fair dealing, has been revised thrice since 1957. The first small change made to Section 52 was the Copyright Amendment Act, 1983 (23 of 1983), which contained an explanation under sub clause (ii) of clause (b). However, the section was revised comprehensively by the 1994 Copyright Reform Act. Under such cases, practices such as private study and working with computer programming and their duplication by a lawful user were included in the clause and sound recordings of any literature, dramatic and musical works were declared to constitute reasonable dealing. The most current addition of Section 52 was created in 1999.³³

The concept of fair dealing was defined by Lord Denning in *Hubbard v Vosper*³⁴ as:

"It is impossible to define what is 'fair dealing.' It must be a question of degree. You must consider first the number and extent of the quotations and extracts. . . Then you must consider the use made of them. . . Next, you must consider the proportions. . . Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression."

Apart from above the other vital questions were raised in *Eastern Book*

³¹ (1895) I.L.R. Bom. 557, 567.

³² See Ayush Sharma, *Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda?*, 14 J. OF INTELL. PROP. RTS. 523 – 31 (2009).

³³ See Ashish Kumar Lammata, *photocopying and doctrine of fair dealing: an analysis*, 4 INT'L J. OF L. & LEGAL JURIS. STU. 157 (2017).

³⁴ (1972), 2 QB 84 (94).

companies v. DB Modak.³⁵ First, whether the defendant's copying of copy-edited decisions as written in the plaintiff's law report amounted to a violation of copyright? Secondly, whether the copy constitutes fair dealing pursuant to Section 52(1) (q) Sub clause (IV) of the Statute? The SC adopted the judgment as held in the case of *CCH Canadian Ltd v. Law Society of Upper Canada*,³⁶ the Canadian Supreme Court explicitly rejected the "sweat of the brow" doctrine (which refers that copyright exists on works if there is time, resources, ability and labor are spent, *i.e.*, originality of skill and labour), and held that every work has to be original in the context that it included pre-existing data through collection, organization or arrangement. The Court states that the two severe positions of 'a sweat of the brow' and 'modicum of imagination' were very high, but it supported the higher bar of 'modicum of creativity' rather than 'sweat of the brow'.

Another query was raised in the fair dealing of Reproduction work in an education sector which according to Section 52 (1)(h) of the Copyright Act are that reproduction of work by any teacher in the course of instruction or questions answered in examination does not amount to infringement. Moreover, section 52(1)(i) also allows the performance, during the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution if the audience is limited to such staff and students, the parents and guardians of the students.

In *E.M. Forster v. A.N. Parsuram*,³⁷ "A Passage to India" is the piece of literature of an English writer, *E.M. Forster*. Certain privileges in this project were granted to by Mr. John Foster by an arrangement in March 1924. The University of Madras used 'A Passage to India' as a textbook in 1955-56. In 1954, Parsuram released a guidebook on the novel. A lawsuit has been brought against Parsuram by Forster and Company. Consequently, the judge of the case held that Parsuram's work was not a re-worded edition of the novel and that his works were individual literary contributions. The Court eventually rejected the lawsuit owing to these conclusions. Because much of this book is reflection

³⁵AIR 2008 S.C. 809.

³⁶2004 1 S.C.R. 339.

³⁷AIR. 1964 Mad. 331 at 331 & 333.

upon the fiction novel, indicating that this is actually a commentary upon the novel. The aim of this work is to allow the B.A students to learn efficiently. On any of the two possible concepts of substantial replication or qualitative reproduction, there has been no violation of the copyright.

The Court lighted upon the important phenomenon such as '*research and scholarship*' in *Kartar Singh Giani v. Ladha Singh*³⁸

“All laws which put a restraint upon human activity and enterprise must be construed in a reasonable and generous spirit. Under the guise of copyright, a plaintiff cannot ask the Court to close all the avenues of research and scholarship and all frontiers of human knowledge”.

In the case of "*The Chancellor, Masters & Scholars of the University of Oxford & Ors. V. Rameshwari Photocopy Services*,"³⁹ (also popularly known as 'DU photocopy case') the legal war started in 2012 when the complainant filed a complaint over the breach of their copyright by RPS and Delhi University by photocopying the proprietary content by compiling student course material that is used while teaching. The Delhi High Court ruled that the course packs in India is legal for the purpose of education which was upheld by Supreme Court of India on 9th May 2017. The very basis of this case that the Supreme Court has taken into consideration the socio-economic conditions of India, the realities of the education system and above all affordability of students due to growing modern technology in the education system. The Court held that the extent or quantity of the material used does not matter as long as it is reasonably necessary to use the same for the purpose of educational instruction.

And the scope of words 'in the course of instruction' as per the interpretation of the Court, isn't merely limited to classroom lectures but includes any activity that falls within the ambit of providing educational instruction, both prior and post the actual act of lecturing.

Under copyright law, the purpose of providing fair use of copyrighted content is

³⁸487 F.2d 1345 (1973).

³⁹(2017) 69 PTC 123.

to ensure a compromise between personal and public interests. There are further allowances for pro-user India. In the latter scenario, the Fair Dealing portion must be understood with respect to the 3-step test as discussed earlier in respect to the Berne Convention. This reduces the motivation of academic organizations to buy many versions of the same book.

Section 52 of the Copyright Act of India deal with the concept of Fair Dealing where some exception for use of copyrighted material is allowed, where the user need not to obtain consent from author to use such copyrighted work for the purpose mention in the provision from section 52(a) to 52(za) as such use not amount to infringement. It includes private or personal use including research, for advertisement purposes short passages from published works, performance of copyrighted work in front of limited audience of students and staff and reproduction of work by teacher for educational purposes only.

The rationale behind the decision in DU Photocopy case is that India being a developing country, the purchasing power of student is low and it is not feasible for the student to buy books for each topic so photocopy of books allowed without any limitation on to what extent it allow to photocopy from particular book, even court held it is immaterial who profit from it and how much till it is for the part of course of instruction.

Besides above, the preamble of the first statute of copyright law also demonstrates the objective of ‘The Statute of Anne’ as “*an act for the encouragement of learning, by vesting the copies of the printed books in the authors or purchasers of such copies*”. It is evident from the first statute of copyright law that learning by the usage of books is promoted. It is correct that copyrights were issued only for the first release until the first level of copyright law amendments, and later they become property public domain and all others are entitled to use the content for such particular purposes. General exceptions to the usage of patented content for instructional purposes are authorized under copyright legislation. In their national copyright legislation, developed countries may be entitled to preserve or implement broad exemptions for educational, academic and library purposes.

IV. CONCLUSION

Copyright law strives to achieve a balance between the two contrasting goals of incentives and access. To promote creativity, law aims at providing exclusivity to the owner of a work, which in turn results in creating a monopoly. Because of the price increase, not many people are able to afford the copyright owner's work. However, price is not the rationale for granting fair-dealing exceptions, although the effect of fair dealing may be to allow higher access to works. Primarily fair dealing operates where works do not enter into economic competition. This in turn creates a dead weight loss on the society. Apart from it, there is no strong distinction between market testing and research for review. The exceptions to time-shifting and format shifting are not apparent. The judicial descriptions of the terminology and reviews have several times been unable to explain the term fair use. Moreover, India's position on fair dealing has been explored extensively through cases. The restricted scope of Section 52(1) (a) serves as an impediment in an environment where there is constant growth in technology. This is quite visible in the recent decisions of the Delhi High Court in the Delhi University Photocopying case. Only a final resolution by the Supreme Court could resolve the issues which may be expected in future.

A CRITICAL ANALYSIS ON APPLICATION OF ARTIFICIAL INTELLIGENCE: A SOCIO-LEGAL STUDY

*Areena Parveen Ansari & Gautam Gupta **

ABSTRACT

Artificial Intelligence is gradually penetrating human lives, and is evolving with intellectual advances. It would not be out of place to mention that AI has brought it with itself a salvo of legal challenges, and has led to new ways of working of the society. The objective of this article is to capture the legal aspects of AI qua human lives. In order to do so, the article is divided into five parts. The opening part is the introduction to the research, the following part is an incursion into the conceptual wirings of the AI. Third part delves into the AI induced societal changes, and the fourth part studies the specificity of AI with respect to the legal field. The last part comprises final reflections.

I. INTRODUCTION

Artificial Intelligence (AI) is now a universal phenomenon, the application of which is progressing every day. This innovative era is somehow full of intelligence literacy, scientific and technological advancement, which not only analyses the information but provides a rationale behind it, develops it, explores it. It has the capacity to utilize innovation in a dependable way based on science and technology. The concept of AI has gone to another level considering the current scenario. AI includes capabilities in image recognition, problem solving, logical reasoning and many other functions that generally exceeds those of humans. So, AI significantly, has the potential to rework production processes, business, producing, healthcare, cyber security, education etc.

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AI can take up numerous task that only human was capable of doing.¹ The establishment of AI has not only eased the process involved but also has benefited the society at large and extensive use of AI has an influential impact on the economic development.

This advanced age is an utter example of the human-made world that we live in today. Man is the creator, molder of his environment² and in some cases a destroyer too. It is quite evident that these advanced technologies are on one side providing boons but on the other side it consists of some banes too. In this way, the AI systems unfold not only has a major implication for particular sections of the society but society as a whole.

The analysis required to be made on how policy issues are addressed in a proper manner, ethical conflicts are reconciled appropriately, legal realities relatively are resolved and how much transparency along with accountability is required in AI and how we can enhance the data analytic solutions to minimize the errors to make the process more accurate, are the areas to work upon.³ For example, through internet, you can make trade thousand miles away but there's risk of theft which is involved and which is dangerous to the security of human, excessive use of technology ultimately has a negative impact on the Human Environment. Therefore, to utilize the custom of technological literacy in Social and environmental aspects, requires a uniform regulation for that, the legal analysis is imperative. One has to be attentive of the impact that it may and may not consist of, including both positive and negative in terms of upcoming development in the AI era. The appropriate policies, legislation in this regard to protect the society and environment interests, are vital element. The interest of the society and their rights required to be protected at all cost, it is the duty of

¹See Scott Uhl, *Legal Technology Tips, Tricks, & Treats 2019*, UNIV. OF MINN. L. SCH., <https://libguides.law.umn.edu/c.php?g=884434&p=7068598>.(last visited May 30, 2021).

²See generally UNITED NATIONS (UN), REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, A/CONF.48/14/Rev.1, Stockholm, (Jun. 5 – 16, 1972), https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.48/14/REV.1.(last visited May 30, 2021).

³See generally Levi Tillemann & Colin McCormick, *Roadmapping a U.S.-German Agenda for Artificial Intelligence Policy*, NEW AMERICAN FOUNDATION (Mar. 2017).

the government and as well as the legislators to introduce and promotes such technology which balanced the three pillars of the Sustainable Development.⁴

II. CONCEPT OF AI

AI is a quite vast subject. Somewhere around the first half of the 20th century, science fiction introduced and familiarized the entire world with the concept of artificially intelligent robots, so this was the first development then by the year 1950s, several studies made by scientists, mathematicians, and philosophers further enhanced the concept of AI. One of such example was Alan Turing, who was a young British polymath, he has explored the mathematical possibility of artificial intelligence.⁵ He suggested that humans has the capability to use available information and reason the same in order to solve the problems, based on which they make decisions, in the same a machine why can't machine do the same?⁶ The term artificial intelligence was first coined by John McCarthy in 1956 when he held the first artificial intelligence academic program, presented at the Dartmouth Summer Research Project on Artificial Intelligence (DSRP AI) conference⁷ on the same subject. However, the journey to understand if machines can truly think began much before that,⁸ however, since the 1956 study made by John McCarthy had flourished AI. He has also divided the sub field of AI as Machine Learning (ML). ML is a method to teach a computer to answer a yes or no or question about something.⁹ The fundamental requirement

⁴See generally U.N., Johannesburg Declaration on Sustainable Development, U.N. Doc. A/CONF.199/20, para. 5 (2002), <http://www.un-documents.net/jburgdec.htm>. (last visited May 30, 2021).

⁵See Rockwell Anyoha, *Can Machine Think?*, HARV. UNIV. BLOG, <http://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/> (last visited May 30, 2021).

⁶See generally A.M. Turing, *Computing Machinery and Intelligence*, 49 MIND 433 – 60.

⁷John McCarthy et al., *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence August 31, 1955*, <http://www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.html> (last visited May 30, 2021).

⁸See CHRIS SMITH ET AL., THE HISTORY OF ARTIFICIAL INTELLIGENCE (2006) <https://courses.cs.washington.edu/courses/csep590/06au/projects/history-ai.pdf>. (last visited May 30, 2021).

⁹See Mary Atamaniuk, *13 Surprising Facts About Internet Privacy and Security*, CLARIO BLOG (Apr 28, 2020), <https://clario.co/blog/internet-privacy-and-security-facts/> (last visited May 30, 2021).

of development of AI was the demand for automation to deal with complex and critical problems.¹⁰

The basic definition of AI is “*a branch of computer science dealing with the simulation of intelligent behaviour in computers*” or the capability of a machine to imitate intelligent human behaviour.¹¹ The definition of the term AI varies; relative concepts differ based on the industry structure. AI is sometimes defined as the simulation of human thought processes in a computerized model. At times the concept of AI means teaching computers to mimic human behaviour and thoughts in order to find the most relevant and accurate results, saving legal professionals time without sacrificing confidence, the idea of predictive coding used by various organization to ease the process.¹² Other than this automated cars, machines, robots etc. are the various further examples of AI.

However, there is no legal definition of AI has been introduced so far, therefore, the proper application and requirements are still not well developed in the legal arena, the burden is on the policy makers for the purpose of appropriate and ethical channelization, they are required to establish a stringent regulation or certain parameters¹³ the ethical use is must for the smooth transitioning of AI tools.

Speaking of legal framework, the Legal interest in AI seems to be traced back in the late 1950s, and early 1960s, when journals such as MULL: Modern Uses of Logic in Law¹⁴ were publishing reports on conferences akin to the Law and Electronics Conference. Focusing specifically between the years 1956-1974, one can identify that some of the published journals in Jurimetrics included digital

¹⁰ See Priya Barua, *Artificial Intelligence and Law*, L. TIMES J. (Feb. 24, 2019), <http://lawtimesjournal.in/artificial-intelligence-and-law/> (last visited May 30, 2021).

¹¹ *Artificial Intelligence*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/artificial%20intelligence> (last visited May 30, 2021).

¹² THOMSON REUTERS WESTLAW, *The meaning of artificial intelligence for legal researchers*, LEGAL.THOMSONREUTERS.COM (last visited May 30, 2021).

¹³ See Jonas Schuett, *A Legal Definition of AI*, GOETHE UNIVERSITY FRANKFURT, (Sep. 4, 2019).

¹⁴ The MULL: Modern Uses of Logic in Law journal, dating from 1959, became known as the Jurimetrics Journal in 1966, and was later renamed Jurimetrics in 1978.

legal research.¹⁵ During this period, one of the earliest comprehensive reflections on the impact of AI on legal reasoning was authored by Bruce Buchanan and Thomas Headrick¹⁶ later on as the application of AI became widespread and the extensive use of AI in legal field has given a birth to Digital Legal Studies.¹⁷ Even national research policies of India include the Online and Digital Education: Ensuring Equitable Use of Technology,¹⁸ especially considering the technological advancement, we can foresee a wide range of AI equipment in the legal filed as well.

III. IMPACT OF AI ON SOCIETY

In India, like any other country the application of AI is growing every day. It has taken a different form; it continues to evolve exponentially in the upcoming era. On one hand, the giant organizations, businesses, industries are widely using AI and gaining huge profit through the application in all the fields, a full and responsible implementation of AI has not only opened a novel economic opportunity but it has been prolific for the society too¹⁹ on the other hand, unethical. There are numerous ways in which AI affects the society positively and as well as negatively. The proportion of negative effects is more than the positive one if not carried out strategically.

A brief analysis on the impact the use of AI could be traced in several domains. First, and foremost is the privacy concern. We are aware that AI and its

¹⁵See Philip Slayton, *Electronic Legal Retrieval – A Report Prepared for the Department of Communications of the Government of Canada*, 15 JURIMETRICS J.108 (1974).

¹⁶See Bruce G Buchanan & Thomas E Headrick, *Some Speculation about Artificial Intelligence and Legal Reasoning*, 23 STANFORD L. REV.40 (1988).

¹⁷See generally Catalina Goantaet.al, *Back to the Future: Waves of Legal Scholarship on Artificial Intelligence*, in TIME, LAW, AND CHANGE: AN INTERDISCIPLINARY STUDY 327 – 46 (Sofia Ranchordás & Yaniv Roznai eds., 2020).

¹⁸MIN. OF HUM. RES. DEV., GOV'T OF INDIA, NATIONAL EDUCATION POLICY 2020 3 (2020),

https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf.

“With various dramatic scientific and technological advances, such as the rise of big data, machine learning, and artificial intelligence, many unskilled jobs worldwide may be taken over by machines, again resulting in the need for new skilled labour, particularly in biology, chemistry, physics, agriculture, climate science, and social science.”

¹⁹See Priya Dailani, *The Significant role of AI in India, analytic insights*, ANALYTICS INSIGHT (Nov. 6, 2020),<https://www.analyticsinsight.net/the-significant-growth-of-artificial-intelligence-in-india/> (last visited May 30, 2021).

applications are a part of everyday life, especially with the introduction of various assistance apps such as Alexa, Siri, and Bixby etc. All in all, from social media newsfeeds to mediating traffic flow in cities, from autonomous cars to connected consumer devices like smart assistants, spam filters, voice recognition systems, and search engines. These have surely benefitted and served the purpose by providing assistance to the human beings. However, the AI-powered consumer commodities and autonomous systems are typically fitted with sensors that produce and collect data galore without the knowledge or consent of those in its proximity. AI tools are being used to identify people who intend to stay unidentified; to infer and generate sensitive information about people from the available non-sensitive data; to profile people based upon population-scale data; and to make ensuing decisions using the data so generated, some of which profoundly impact people's lives.²⁰ Thus, grave harm can be done by tempering with the data.

Second, it is the employment concern. The AI process requires a small number of humans, which means that an industry, such as, manufacturing, agriculture, food service, retail, transportation and logistics, and hospitality, etc., earns profit by shredding down the number of workers in the organization. Therefore, the large businesses by decreasing the labours gets more benefit and the business runs smoothly by feeding command, the wise use of AI by the organization is for the purpose of elimination of labour and replacing the worker with automation technology.²¹ Humans won't be protected from hostile environments, through AI various dangerous tasks can be handled, such as exploration means mining and digging fuels that would otherwise be hostile for humans or installation of any hazardous devices and processes that could injure or kill human beings can be dealt with the automated tools. Basically, AI replaces humans in repetitive, tedious tasks and in many laborious places of work, therefore society enjoys some benefits of its application. However, the

²⁰ See Thomas Hawk, *Artificial intelligence work, Privacy international*, PRIVACY INTERNATIONAL, <https://privacyinternational.org/learning-topics/artificial-intelligence>. (last visited May 30, 2021).

²¹ See Nicolas Dent, *Impact of AI on Unemployment*, TECHNOLOGY.ORG (Dec. 17, 2019), <https://www.technology.org/2019/12/17/the-impact-of-artificial-intelligence-on-unemployment/> (last visited May 30, 2021).

oppressed class doesn't get benefitted at all out of this process, as it causes severe recession, both skilled and unskilled labourers lose their jobs, the economic interest surpasses the social interest. Needless to say, the AI tools are quite expensive and organizations prefer to invest in the machine rather than engaging the human for the business.

Third, Mental Healthcare-AI has great potential to re-define diagnosis and understanding of mental illnesses, AI in demonstrating the potential of using machine learning (ML) by applying the algorithms to address mental health questions, and which types of algorithms yield the best performance also identify by the AI, it is currently being used to facilitate early disease detection, enable better understanding of disease progression, optimize medication/treatment dosages, and uncover novel treatments.²² Use of AI increase the potential of detecting the numerous forms of diseases and overcoming the same. However, on the same note these mental issues arising, due to excessive use of technology, economic imbalance, social and political pressure on adopting the automated mechanism causing unemployment, poverty, digital illiteracy etc. and all these factors several times affects the mental condition of the individuals.

Fourth, the Data Capacity- AI is highly adopted for the purpose of computation, risk assistance, financial assistance etc. large numbers of data are gathered and stored, digital transformation of data and accessibilities are the requirements for the generation purposes, these benefits at times impose a threat to the data stored for the organization and as well as of individual. Incapacity of the system and the steady speed of enforcements leads to the leakage of data business and personal data.²³ The data governance at times not achieved by the legislation in place and several incidents regarding data misuse occurs. Thus, lack of knowledge, absence of appropriate policies and lack of implementations of suitable law, becomes a source of inability.

²²See Sarah Graham, *Artificial Intelligence for Mental health and sickness*, 21(116) Curr. Psychiatry Rep. (2019), https://escholarship.org/content/qt9gx593b0/qt9gx593b0_noSplash_d814b6b41c76cb874050695d2bf30ced.pdf.(last visited May 30, 2021).

²³See Nick Martindale, *The True Impact of AI on Society*, ICAEW, <https://www.icaew.com/insights/features/2020/mar-2020/the-true-impact-of-artificial-intelligence-on-society>.(last visited May 30, 2021).

Fifth is the Manifestation of Errors since the AI-powered machines is known to be accurate, efficient and effective and works with precision, it provides its assistance in not only recognizing the error but also rectifying the same²⁴but the cognitive level of human surely differs from machine, undoubtedly a machine can solve hefty number of problems in a fraction of second, but at times a problem can only be solved by human without the interference of machine. At times given commands to a machine can lead to dangerous consequences, if we aren't clear with the instructions we set for the AI machines, then it could not be able to serve the purpose and chances of error will increase. For instance, a command to "Get me to the airport as quickly as possible" might have dire consequences. Thus, a human can only articulate based on its understanding but a machine will not be able to do so, as the machine won't be able to follow the rules of the road even specifying the same. So, a machine could quite effectively accomplish its purpose, that to get you to the airport as quickly as possible and do literally what you asked, but could lead to consequences.²⁵Just like these there can be different errors that can occur by not taking work form machine only without human involvement.

Lastly, AI has already been applied to numerous environmental problems. Various technologies have been adopted to monitor endangered species non-invasively. This tool analyses the images of footprints of cheetahs, rhinos, and other endangered species to identify them, track them, and determine what threatens them. So, Advanced AI and vision techniques can help biologists detect animals and other endangered species, in pictures through camera traps to study their distributions.²⁶ The knowledge of AI is significant for the advancement of biological research with regard to tracking, gathering the whereabouts of the animals, birds and other species. Knowing the patterns of animals and what conditions they thrive in aids humanity in adapting its needs to alter the environment to meet safe standards for these animals, directly

²⁴ See *Artificial Intelligence: Boon or Bane?*, EDUREKA BLOG (Aug. 9, 2019), <https://www.edureka.co/blog/pros-and-cons-of-ai/>.(last visited May 30, 2021).

²⁵See Mohammed Ahmed Ali, A Brief Introduction on Artificial Intelligence ,6(2) INT,L J. OF ADV. RES., IDEAS & INNOVATIONS IN TECH. 257 (2020).

²⁶See Sam Wilson, *UAVs and AI to Protect Wildlife*, WILDTRACK,<https://wildtrack.org/>.(last visited May 30, 2021).

supporting the chain of life in an ecosystem. We have observed the development of computers and its convenient innovation throughout history, which has resulted in less utilization of paper work. A considerable number of colleges and institutions have shifted towards electronic methodology, it made a lot of things handy and easy to discover, gather, store, and explore the information and easy to keep a duplicate for record purposes. All these have turned out to be extremely stress-free for all of us. AI is more expansion to this progression.²⁷ New Researchers is an evident example of how technology tackles materials and substances with the help of AI and upgraded databases and is helping to curtail dependencies in product that are harmful to the environment, like plastics, metals etc. In terms of aiding the climate change and assuring applications of AI and data sciences claimed to be developed to explore the huge data and disseminate it across sectors for better monitoring the planet's resources. As per another claim, AI systems carry the potentiality to divorce the economic growth from rising carbon footprint and environmental decay. AI as a stack of data, learning algorithms and sensing devices can help with both impact and resource decoupling.²⁸

However, more technological advancement and the evolution of the industries has always affected the environment in more of a negative way. The growing global technologies has an insatiable appetite for electricity. With increase of electronic gadgets and equipment the more electricity consumption will occur, Greater adoption of the existing and upcoming technology, gradual shift towards computation-heavy high societies will lead to more data. The storage of data, particularly the processing, calculating etc. to train algorithms, to channelize computer energy consumption in each stage is really high. For one algorithm to train itself on whether an image shows a cat, for instance, it needs to process millions of cat images.

AI, on one hand, enables us to better manage the problems that we are facing

²⁷See JOHN BUYERS, *ARTIFICIAL INTELLIGENCE – THE PRACTICAL LEGAL ISSUES*6 (2018).

²⁸See Sandra lane, *AI And Climate Change: The promise, the perils and pillars for action*, CLIMATE KIC(Nov. 5, 2020),[https://www.climate-kic.org/opinion/ai-and-climate-change-the-promise-the-perils-and-pillars-for-action/#:~:text=AI%20for%20climate%20action%20has,don't%20see%20or%20understand.\(last visited May 30, 2021\).](https://www.climate-kic.org/opinion/ai-and-climate-change-the-promise-the-perils-and-pillars-for-action/#:~:text=AI%20for%20climate%20action%20has,don't%20see%20or%20understand.(last%20visited%20May%2030,%202021).)

and on the other hand it tends to cause negative impacts on climate change too. It has been witnessed that interference from electronics and radio signals can upset the internal magnetic compasses of migratory birds.²⁹ We are aware of the facts that the extensive use of electric gadgets and equipment in spectrum of applications has resulted in the germination of mounting levels of electronic waste – locally, nationally, regionally and globally. Currently, there is no standardization of approaches for the purposes of handling, dismantling, and the processing of e-waste to recover valuable resources. Inappropriate and unsafe practices produce additional hazardous compounds and highly toxic emissions as well. Extensive use of electric and electronic equipment as a result of extensive research in AI, is a threat to the environment, with the vast majority of AI application, it will get worse.³⁰

AI is estimated to contribute \$15.7 trillion to the global economy by the year 2030, more than the current output of China and India combined³¹ the AI-based applications largely have been driven and owned by the private sector and the primarily focus is the consumer goods and to generate an excessive profit out of the same. The market condition, emergent sale of the products and implications thereof, out of the AI technology, makes it imperative for the policymakers to take notice and channel the healthy competition.³²The concern is that whether the Indian society and the policy makers are willing to further make commitments for the enhanced AI technology.

It is quite difficult for the Indian society to switch to machine labour rather than manpower, considering the unemployment level and doom of economy. The machine in any way won't be able to replace human values, behaviour and priorities. In addition to this, such technologies are highly expensive. AI though

²⁹ See Svenja Engles et al., *Anthropogenic electromagnetic noise disrupts magnetic compass orientation in a migratory bird*, 509 Nature 353 – 56 (2014).

³⁰ See Lucy Mcallister, *The Human and Environmental Effect on E-Waste*, PRB.ORG (Apr. 4, 2013), <https://www.prb.org/e-waste/>(last visited May 30, 2021).

³¹ See generally ANAND S. RAO AND GERARD VERWEIJ, *SIZING THE PRIZE: WHAT'S THE REAL VALUE OF AI FOR YOUR BUSINESS AND HOW CAN YOU CAPITALIZE?*, PWC GLOBAL (2017), <https://www.pwc.com/gx/en/issues/analytics/assets/pwc-ai-analysis-sizing-the-prize-report.pdf>.(last visited May 30, 2021).

³² See Sashi Shekhar Vempati, *India and AI Revolution*, CARNIE INDIA (Aug. 11, 2016), <https://carnegieindia.org/2016/08/11/india-and-artificial-intelligence-revolution-pub-64299>.(last visited May 30, 2021).

has found its base on every spectrum of the society, from the significant luxury to the day-to-day regular life. AI, as established, is a science that sets out computational technologies. Numerous sectors such as Car business, healthcare, Data Interpretation companies etc. have quite implemented the AI tools and have started acquiring hefty benefited out of this but the problem with this technology is that it requires wise and ethical use by all the stakeholders as technology somewhat leads to misguidance, many potentially harmful paths, prudent use of which can make wonders and unprincipled application can result into destruction of society. Keeping this into perspective, the fundamental concern here is that each and every necessary innovation has to be made socially preferably and justifiable, the ultimate impact a particular technology is going to cause, and need to be addressed by the policymakers, legislators and administrators, for every section of the society.

The major drawback of AI is that, people are getting replaced by a machine, they are unemployed due to automated technology (which requires less manpower) in such cases the civil society usually blames the government and questions the law, events like these not only strain the entire system but also disturbs the peace. So the technological advancement is relevant, where the law will not have to struggle to fit in, the society is able to adjust easily in that scenario and almost everyone is getting benefitted, to keep up with the pace and to strike a balance between the development of economy and social development, the policymakers and companies (especially Multinational and international Companies) are required to not only to follow the legal norms but social norms too. The issues related to AI use and advancements need to be resolved with the collaboration of all layers of the government and the advancement of the society is prerequisite. The idea here is that the technologies invented to make routine life easy and smooth for the people, therefore serving their interest is an essential element. Since, numerous experiments are occurring that transform the world of technology swiftly with a variety of computers, machines and robots, replacing simple human activities and enhancing skills that only humans possess, are designed to be employed in robots, as per the future plan of scientists. However, the essential of AI was to somehow perform the similar task of human by using computers to understand human intelligence, so

that it can, not only assist human in many ways but also makes an attempt to developed enhanced skills that can sorts the problems of human.³³

The relevant progress can be made with the apt use of AI, which requires the government's commitment towards innovation, organize tactics, funds and development, a well-planned framework to govern the public and private sector, harmonizing the interest of the society, and supporting environmentally sound technologies. The way AI has effective in the areas such as in the healthcare sector, the advance AI has provided a great advantages for human health, E-commerce sector that has given the market required boost by increasing internet, smartphones and other assistance devices, Robots can be used for the defence that has helped in the national security, etc.³⁴ there are various developments has been taken place that has been quite effective but the serious threat that has ignited is the fear of data privacy, data storage, necessity of computers and other equitable devices, financial inability, people's fear in the adjustment of technological society, the sustainability if the ecosystem, there are many cons as compare to Pros, the laws are not stringent to deal with all these issues, the implementation of the laws, inability of the government and the enforcement of the established laws on the Indian society have always been a part of criticism. AI, considering the current condition of the Indian economy investing too much on technology could hamper the productivity of the weaker section of the society and not to mention that too much e-waste, radioactive waste and other waste won't be beneficial for the environment also. AI was supposed to deal with human problems but somehow it seems that AI itself is becoming one.

IV. APPLICATION IN THE LEGAL FIELD

Since AI is an interdisciplinary concept, its requirement is spread in almost every field, so the impact of AI in the legal field is inevitable. The concept of AI has always been controversial, but the application of AI in the legal field can be

³³See generally Pallavi Gupta, *Artificial Intelligence: Legal Challenges in India*, 3(1) HEB 133 – 41 (2019).

³⁴See Divjot Singh et al., *AI Machine learning and Big Data Law & Regulations 2021*, GLOBAL LEGAL INSIGHTS, <https://www.globallegalinsights.com/practice-areas/ai-machine-learning-and-big-data-laws-and-regulations/india> (last visited May 30, 2021).

transformed into a threat or can be a help, how, it's on the policy maker to decide. AI does have many capabilities, *e.g.*, doingan extensive research without manpower, multitasking, legal analyses, due diligence, aiding the legal field – it can do wonders but on the other hand predictive coding, auto- augmented tools can be buzz killers too, that create haphazard for the society.

AI application in terms of legal education plays a vital role. The National Education Policy 2020, supports the notion of applying the new technology in the field of legal education.³⁵ The upgraded education policy includes many upgradations of the national plans as real-time text to speech and text translation systems, Biometric authentication, Chatbots, Automated grading,³⁶ etc. The digital revolution not only offers a significant number of opportunities but also provides an assistance for education to low-income people and communities.³⁷ Legal research systems incorporating AI are built as a turn-key system by loading a corpus of source material. Whether in a law firm, a private enterprise, or a law school incubator program, this involves loading files of public domain legal authority that are easy to access for which the legal applications of AI systems require constant feeding of current and relevant information³⁸ due to licensing restrictions it is easy to keep a track on the person using the information.

The AI techniques has been effective during the time of Pandemic (as what we have witnessed), therefore, proper use of AI not only helps in the spreading the education level but seems to be beneficial in the adverse situation as well, AI has made research process smooth by introducing different tools and software's

³⁵MIN. OF HUM. RES. DEV., *supra* note 18, *para.* 20.4: Legal education needs to be competitive globally, adopting best practices and embracing new technologies for wider access to and timely delivery of justice. At the same time, it must be informed and illuminated with Constitutional values of Justice - Social, Economic, and Political - and directed towards national reconstruction through instrumentation of democracy, rule of law, and human rights.

³⁶See Abhijay Arora, *Indian Education and AI*, NITI AYO, <https://niti.gov.in/indian-education-sector-ripe-disruption-artificial-intelligence> (last visited May 30, 2021).

³⁷See generally A. Lakshminath & Mukund Sarda, *Digital Revolution and Artificial Intelligence: Challenges to Legal Education and Legal Research*, 2(1) BHARATI L. REV.9-15 (2013).

³⁸See Mary Ann Neary & Sherry Xin Chen, *Artificial Intelligence: Legal Research and Law Librarians*, 21 (5) AALL SPECTRUM 16 – 20 (2017), <https://core.ac.uk/download/pdf/83100938.pdf>.(last visited May 30, 2021).

where the accuracy of the research can be detected in form of plagiarism or grammar check and legal analyses etc. can be carried out hassle-free and it is making educators job easier. Yet, many prefer the traditional method of teaching and many educators are afraid of excessive interference of AI in their field, as it not only creates unemployment but the rational understanding is missing from the concept of AI equipped classrooms. Also, the AI technologies are expensive, it is not feasible for all the institutions to adopt the same for the teachers and as well as for the students. Therefore, AI in terms of research is quite effective but in terms of providing guidance in the legal field, at low-cost, can be deceptive.

Next, AI has changed the landscape for Legal Profession- AI companies on a daily basis introducing new technologies for the purpose of smooth transitioning with improved swiftness and accuracy. In the legal profession it has helped many law firms, lawyers, clients and researchers. Some Foreign Law firms, companies, LPOs,³⁹ etc., have already started using the AI tools, such as predictive coding, legal analysis, due diligence, document automation, electronic billing etc.⁴⁰

AI application in the court can fulfil different roles for different case types/disposition, such as structuring information, advising, predicting, profiling etc. AI in the courts can be used for helping people looking for information, for lawyers, clients and parties of a case and judges, by providing the structured information, and if legal information is enriched, it can further advise and suggest. Some countries have started using this technology such as Legal Services Alabama created a comprehensive tech assess and develop strategy, whereas the Legal Services of Greater Miami has Enhance Florida's state wide

³⁹Legal Process Outsourcing (LPO) is process in which legal firms, publishing or corporate houses hire an onshore or offshore legal firm or a legal service provider company for their in-house legal works which are voluminous, reiterating, taxing and routine. Avni Tiwari, *Artificial Intelligence in Legal Process Outsourcing*, INT'L J. OF RES. (2020), <https://internationaljournalofresearch.com/2020/06/08/artificial-intelligence-in-legal-process-outsourcing/>.

⁴⁰See Brandy Jea Lee, *Artificial Intelligence in Legal Profession*, ACADEMIA, https://www.academia.edu/38005214/artificial_intelligence_ai_in_the_legal_profession (last visited May 30, 2021).

online client intake and legal triage system.⁴¹ Advisory system was introduced by the Idaho Supreme Court with the help of technology for the pro-se litigants to provide personalized legal services and civil aids, specifically for those with low income level, by creating an automated legal portal so that the online dispute resolution can be done. Various told for the same has been adopted such as Rule-based reasoning, case-based reasoning and machine learning.⁴²

The international courts have adopted the Legal Judgment Prediction (LJP), which is basically a task of automatically predicting or generating a law case's judgment results, by providing a text describing its facts, this system can be considered an excellent prospect in judicial assistance systems and convenient services for the public. Basically, a proper use of AI in the judiciary will surely help in minimizing the influence of extraneous factors and it will bring transparency and accountability. A decision-making will eliminate pendency of suits, mundane judicial process, expenses and other different human-made structural biases that originate from the legal system.⁴³

Many courts in India have to an extent have embraced replacement technologies, such as e-call overs, e-filing, video conferencing, online dispute resolution and e-Courts etc. These are dramatically transforming every other day. This use of technology has an effect of reducing the amount of time required to process cases. Yet the question is that will the use of AI enhanced techniques such as predictive legal judgment, pro-se advice system be beneficial considering the Indian structure? The practical aspect of this process can be confusing, the charges can be wrongly framed, because law cases applicable to similar law articles are easily misjudged. In this regard, understanding the AI's reasoning can be crucial for the acceptance of the technology.

Establishment of a legal regime to control the activity is of utmost priority. The

⁴¹See Kate Norton, *Artificial Intelligence as a Path to Closing the Justice Gap: Electronic Civil Gideon* (Presentation slides), DUQUESNE UNIV., https://www.duq.edu/assets/Documents/law/legal-research/_pdf/Norton%20Presentation.pdf (last visited May 30, 2021).

⁴²See John Zelekniwhow, *Can Artificial Intelligence and Online Dispute Resolution enhance efficiency and effectiveness in Courts*, 8(2) INT'L J. FOR COURT ADMIN. 34–35 (2017).

⁴³See Thomas Julius Buocz, *Artificial Intelligence in Court, Legitimacy Problems of AI Assistance in the Judiciary*, 2(1) SPRING 44–48 (2018).

absence of proper law in place will create havoc. Courts and legal aid providers should also be looking at hybrid legal services systems that integrate human and automated assistance. For example, legal services and court programs in California have had great success using LHI ⁴⁴(Law Help Interactive), which is an Internet-based application. LHI applications have been designed to support domestic violence clinics and help litigants submit pleadings in eviction proceedings. The applications substantively will reduce the time needed to complete court forms.⁴⁵

To deal with all the issues arising due to the advanced application of AI techniques the Computational Law need to be established to Computational law, it is an approach to automated legal reasoning focusing on semantically rich laws, regulations, contract terms, and business rules in the context of electronically mediated actions.⁴⁶ Computational law systems can empower individuals with legal self-help: understanding how laws and regulations govern their behavior, and assisting in structuring and planning electronic transactions to bring about individual goals. While certain activities necessarily require the assistance of attorneys, many transactions complicated by overlapping, complex sets of rules can be clarified and executed with the assistance of a computational law system.⁴⁷

The Indian legal system is yet to accustom with the appropriate use of AI, but is gradually making progress in this field too. Some processes such as due diligence, data analyses, predictive coding etc. have already been adopted by several countries such as, the USA, the UK; several law firms and judiciaries have also initiated in these processes. It definitely a cost-effective solution for

⁴⁴Law Help Interactive a.k.a. LHI is a national nonprofit entity that believe in technology to increase for the purpose of access to justice. They help in poverty law and court access-to-justice programs to create online documents projects. They work on a project of Pro Bono Net, in cooperation with Ohio State Legal Services Association. They are funded by the Legal Services Corporation and state courts in California and New York. LAW HELP INTERACTIVE, <https://lawhelpinteractive.org/>.

⁴⁵ See Claudia Johnson, *Online Document Assembly Initiatives to Aid the Self-Represented*, in INNOVATIONS FOR SELF-REPRESENTED LITIGANTS 105 (Bonnie R. Hough & Pamela C. Ortiz eds., 2011).

⁴⁶See NATHANIEL LOVE & MICHAEL GENESERETH, COMPUTATIONAL LAW 4 (2005).

⁴⁷See L. K. Branting, *Advisory systems for pro se litigants*, ICAIL '01: Proceedings of the 8th Int'l Conference on Artificial Intelligence and Law 139–46, New York, NY, USA, (2001).

the lawyers, clients, researchers, it functions various tasks such as pointing out the legal infirmities in the judgments, it provides assistance in drafting any contractual documents, it does due diligence, legal analytics etc.⁴⁸

Hon'ble Justice Chandrachud has also suggested using AI to translate contents of FIRs, "where FIRs are not in a particular language, let's ask to ICJS (Integrated Criminal Justice System) and Artificial Intelligence to translate the contents. He further added that *"Use of AI to translate all judgements of High Courts into regional languages. Let us make the language of the courts available at the doorstep of the litigant by using information technology"*.⁴⁹

Also, in the recent opinion of Hon'ble Chief Justice of India SA Bobde, asserted that the Supreme Court has proposed to put in place a system of AI that would enable better administration of justice. However, he made it sufficiently clear that people should form the impression that the AI would ever replace the judges. He further added that *"machines cannot replace humans, specifically the knowledge and wisdom of judges. The deployment of the AI system will help reduce pendency and expedite judicial adjunction"*.⁵⁰

The Indian constitution structure based on the democracy, considering the Indian population and the economic and social condition, the advanced AI can't fill the gap in the justice delivery system. Due to the pendency of litigation, paucity of time, low-cost features, insufficiency of judges and other relevant factors suggests that use of AI in the justice delivery system would definitely be a significant transformation but it can only be so when it's handled with great responsibility.

⁴⁸ Ananth Kini, *Artificial Intelligence and the Legal Profession: An 'intelligent' way ahead?*, BAR AND BENCH (Jun. 3, 2020), <https://www.barandbench.com/columns/artificial-intelligence-and-legal-profession-an-intelligent-way-ahead#:~:text=The%20growth%20of%20AI%20in,contractual%20and%20other%20legal%20documents.> (last visited May 30, 2021).

⁴⁹ Virtual courts are citizen centric, says SC judge, OUTLOOK (Jun. 15, 2020), <https://www.outlookindia.com/newscroll/virtual-courts-are-citizen-centric-says-sc-judge/1866958> (last visited May 30, 2021).

⁵⁰ Smriti Srivastava, *Supreme Court to use Artificial Intelligence for Better Judicial System*, ANALYTICS INSIGHTS (Nov. 27, 2019), <https://www.analyticsinsight.net/supreme-court-use-artificial-intelligence-better-judicial-system/#:~:text=Supreme%20Court%20to%20Use%20Artificial%20Intelligence%20for%20Better%20Judicial%20System.> (last visited May 30, 2021).

V. CONCLUSION

AI ushering in an era of progressive technologies, digitalization that is faster, adaptable, enhanced, and efficient and making the world more digitally connected. AI, like any other technology, not only provides us the assistance but benefits the society as a whole. How we use the available technology, how we transform it from an idea into a solution or a problem that is completely based on the individual approach. Technology per se is neither good nor bad, the use of the same matters. It's time to start thinking about enhancing AI in a more economic, social and environmental-friendly way, so that we can adopt more of such inventions vis-a-vis taking care of economic and social development.

Besides the commonly prevailing fears of AI that the market players are aware of, jeopardizing the economy, environment of many countries, leaving millions jobless, addictive towards the technology, increased e-waste, created loss of human efficiency and making the world overly dependent on machines, there's various terrifying assumption that are there with the future of AI. It depends on the many economic, legal and social factors that whether the advancements of AI will create a man hem or it will exist symbiotically with humans and serve the purpose of the greater good. Whatever the outcome is, we should get updated when a new technology is on its way and we should try to find the solutions in all the cases. One can't isolate humans from technology. All the inventions have been made by man as, man being the creator, moulder and destroyer possess the ability to act accordingly. AI is best labelled as harmonizing human intelligence with that of machines. Recognizing the vast patterns, graphs, algorithms are too tedious for the human eye, they can't keep these stored in their brain.

Therefore, they have to work with each other, not without each other. In a study involving 1,500 companies, it was found that the most significant performance improvements were made when humans and machines worked together.⁵¹ As AI has now been considered as one of society's greatest assets as

⁵¹James Wilson & Paul R. Daugherty, *Collaborative Intelligence: Humans and AI Are Joining Forces*, HARVARD BUSINESS REVIEW (July-August 2018), <https://hbr.org/2018/07/collaborative-intelligence-humans-and-ai-are-joining-forces>.

it's especially helpful for solving critical problems that seem larger than life. If any problems arise in the AI system, then again it is to be fixed by humans and problems of humans too can be solved by AI. When it comes to saving the interest of the people then technology may even be the most important factor, if adopted and promoted wisely.

Generally speaking, despite having numerous advantages that AI has brought in the legal system, AI is not much employed well in the Indian legal industry as it should be compared to other sectors or other countries. The suitable application of AI requisites is vast on many levels, it demands a comprehensive legal database, maintenance and smooth authorization for access, considering the population, work culture, education factor, drawback in the integration of continuously developing information, equipment and digitalization of the same is a complex process.

Therefore, the expansion of AI doesn't actually seem to be that adequate in its application in India. Needless to say, every technology has its own pros and cons, along with a section of people retaliating against its implementation in a positive and negative manner based on their estimated benefits. The central notion behind all is that we have to critically analyze what we want, what we need and what we desire, AI has a lot to offer in almost every field but in terms of augmenting the Indian legal system it has comparatively less chances of exploring the area. The key problem is the simplified "access to justice" in the Indian, this simplification lies in the collaborative efforts lies in the societal norms. In the face of this dire reality, the potential of technology to help meet this challenge is a rare source of optimism, where society is running after economic development and at times neglects social development. It is on the policymakers to decide and control the severe impact of AI while balancing the three pillars of sustainable development.

WTO DISPUTE SETTLEMENT MECHANISM AND THE ROLE OF THE APPELLATE BODY: A CRITIQUE

*Farah Hayat**

ABSTRACT

The most notable feature of the dispute settlement mechanism of the World Trade Organization (WTO) is its two-tiered dispute settlement mechanism that comprises of dispute settlement Panels and an Appellate body to entertain appeals from rulings rendered by the Panels. With only one member left in the Body, it has now become dysfunctional, for being short of the quorum of minimum three members necessary to adjudicate upon any dispute. Through this article, the author has made an attempt towards analyzing the functioning of the WTO dispute settlement mechanism, particularly, the role played by the Appellate Body in adjudicating upon disputes. Furthermore, the author has examined the pressing issue of dysfunctionality of the Appellate Body, the role played by the USA in the same and the challenges it has given rise to. The author has also put forward certain possible solutions to address this dilemma.

I. INTRODUCTION

The world as we see today is at an aggressive stage of globalization with economic interdependence among nations so deep, that it's hard to imagine countries to be solely and sufficiently dependent on their domestic resources and production capabilities to sustain their population. Inter-country trade allows the expansion of domestic markets to international goods and services. Competition in the market leads to further increase in the number of choices available to the consumers with market players offering competitive prices for the same. In this deluge of products and services, the consumer benefits from choosing the ones

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offered at the cheapest prices. Hence, it may not be wrong to say, that all trade, domestic or international, is hinged on the consumer, his needs and wants.

For a multilateral trading system to function smoothly and flourish, the countries involved must adhere to a certain set of rules and agreements and a mutual trust that no country will act in bad faith against another. The General Agreement on Tariffs and Trade, 1947 (GATT) was the first such body of rules.¹

In a global trading system, since a number of countries are involved, with their own set of economic goals and priorities, conflicts are bound to occur. To resolve these conflicts, many a times, one on one negotiation and consultations may not be enough. A unilateral action by the violated country may further exacerbate the conflict. This makes a competent neutral dispute settlement mechanism of utmost importance. But GATT had a number of loopholes due to which it couldn't sustain. One of its main lacunae was its flawed dispute redressal mechanism. There weren't any fixed timetables or clearly defined stages of dispute, it was easier to block rulings and a large number of cases dragged on for an indefinite period of time.²

Ever since the WTO was established in January 1995 replacing the GATT 1947, one cannot overstate the role it has played in resolving trade disputes between and among nations through its two-tier dispute settlement mechanism. The WTO's *modus operandi* emphasizes upon the rule of law, while also aiming at making the global trading system more secure and predictable for all stakeholders involved.³The dispute resolution mechanism of WTO has been a radical departure from the dispute settlement system that existed during the era of GATT, 1947. WTO rectified what was amiss in GATT's dispute resolution system by making the system bound by clearly defined rules and the dispute redressal faster with set timetables for each stage of the dispute. It is also more efficient as rulings of the Panel or if there is an appeal that of the Appellate Body of the WTO, are binding on the parties and cannot be blocked by the

¹ GATT 1947, 55 U.N.T.S. 194.

² See *Understanding the WTO: Settling Disputes, A Unique Contribution*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm#appeals. (last visited May 30, 2021).

³ See *id.*

losing party unilaterally. This has been beneficial for members, strong and weak, in getting their grievances resolved speedily with an assurance that the decision of the Panel or the Appellate Body shall be strictly enforced.

In December of 2019, term of two of the last three Appellate Body members expired, thereby making it short of the minimum number of three members required to hear a matter and thus rendering it dysfunctional. It has created much fear all over the world that this could be the beginning of the end of the WTO regime and a move in the direction of pre-WTO era when GATT 1947 prevailed. Although the fear is valid, nonetheless, it could be inaccurate to equalize a perhaps temporary return to the dispute redressal mechanism that was practiced during the GATT era, with the fall of a rule-based multilateral trading system altogether.⁴

This article is an attempt to discuss the major questions this crisis has slammed in the face of individuals and governments alike, such as how did it come to this in the first place and now that it has, what is the road ahead.

II. DISPUTE SETTLEMENT SYSTEM UNDER THE WTO

WTO members are bound by the tenets of the WTO law laid out in 1994⁵ which is a modified version of GATT 1947; Trade Related Aspects of Intellectual Property Rights (TRIPS)⁶ and General Agreement on Trade in Services (GATS)⁷ apart from more than 50 other agreements that the WTO oversees.

If a WTO member takes a trade-restrictive action which is against the WTO rules, aggrieved WTO member has the option of taking their dispute to the Dispute Settlement Body (DSB). The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)⁸ is the main body of rules under WTO for settling disputes. Initially, parties at conflict have to settle their

⁴See generally Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What To Expect? What Choice to Make?*, 22(3) J. OF INT'L ECON. L. 297 – 321 (2019).

⁵GATT 1994, 1867 U.N.T.S. 190.

⁶TRIPS, 1869 U.N.T.S. 299.

⁷GATS, 1869 U.N.T.S. 183.

⁸DSU, 1867 U.N.T.S. 190.

disputes by way of consultations among themselves. The Director-General of WTO may also act as a mediator on the request of the parties at conflict. If consultations fail, a Panel is established to hear the case on the basis of agreements cited. If there is no appeal, the DSU may adopt the report. If either or both parties decide to appeal the decision of the Panel, they may do so in the Appellate Body which is like the scaffolding of the dispute settlement system. An Appellate Body is a permanent body with seven members having a four-year tenure although they can be reappointed once.⁹ They are appointed by the DSB in such a manner that the range of WTO membership is broadly represented, and each appeal is heard by a minimum of three members. Article 17, clause 1 of the DSU has provided that Appellate Body members shall serve in rotation.

Although an appeal can only be on a point of law and no new issues can be introduced or old evidence re-examined at this stage, the Appellate Body can uphold, modify or reverse the findings of the Panel. Unlike GATT where it was easier for the losing party to block a ruling as rulings could only be adopted by consensus, rulings by the WTO Appellate Body are binding on the parties to the conflict. For a ruling of the Panel or the Appellate Body to be rejected, a consensus is required of the entire DSB which consists of all the WTO members. If a single member objects to the rejection, the ruling shall stand. Hence, the decisions rendered by the Appellate Body are final and are adopted by the DSB within a period of 30 days. Another remarkable feature of the conflict resolution system under WTO is that sanctions can be imposed if a member State shows non-compliance with the decision given by the Appellate Body.

The Panels as well as the Appellate Body of the WTO have successfully issued rulings over a plethora of diverse issues involving goods such as cotton, tuna, shrimp-turtles, bananas, etc. as well as trade remedies such as countervailing and anti-dumping measures, zeroing methodology, etc.¹⁰

⁹*See id.*, art. 17cl. 2.

¹⁰D. Ravi Kanth, *Why has the U.S. crippled the functioning of the WTO?*, THE HINDU, Jan. 5, 2020, at 14.

III. THE CURRENT DILEMMA AROUND THE APPELLATE BODY

APPOINTMENTS

Although every member of the WTO has equal power to nominate a name for the Appellate Body but three members, namely, the U.S., the European Union and Japan always have a representative on the Body. Rotation is generally between nominees of rest of the members. Also, if any serving judge shows the willingness to serve again, he is reappointed automatically. But lately, these unwritten traditions seem to have been facing endangerment.¹¹ It's easy to notice that there is now a certain politicization of the process by which new Appellate Body members are selected which puts at risk the authority of the Body as it calls into question the Body's judicial independence.¹²

Since members of the Appellate Body are appointed by the DSB as a whole, even if a single member country blocks an appointment, it can't go through. Similarly, although reappointments are quite normal and uncontroversial, still every member of WTO has the power to block a reappointment. This is for the reason that the decisions by the DSB have to be taken by consensus as has been provided in the DSU.¹³

The last time when the Appellate Body was fully composed of all its seven members was in June of 2017 as the United States government has been blocking the appointment of new members in the Appellate Body. The first instance when the reappointment of a serving judge of the Appellate Body was blocked was in 2011 during the Presidency of Barack Obama when United States Trade Representative blocked the reappointment of Jennifer Hillman without giving any explicit cause or explanation. This was a clear indication of the United States' dissatisfaction with her performance. When Gary Hufbauer of the Peterson Institute for International Economics wrote a blog post regarding

¹¹Gary Clyde Hufbauer, *WTO Judicial Appointments: Bad Omen for the Trading System*, PIIIE.COM (Jun. 13, 2011), <https://www.piie.com/blogs/realtime-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system>.

¹²Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 L & CONTEMP. PROBS.271 (2016).

¹³See DSU, art 2 cl. 4.

this, he called it “*a bad omen*” for both the WTO and the United States.¹⁴

Three years later in 2014, the United States obstructed an initial appointment, this time of James Gathii who teaches law at the Loyola University in Chicago and was nominated by Kenya.¹⁵ This move by the U.S. government was vehemently resisted by other member States, so much so that it caused a deadlock in the appointment process which ended when Kenya withdrew Gathii’s candidacy.¹⁶

Another incident when USA blocked the reappointment of a serving member was of Seung Wha Chang in 2016.¹⁷ The reason given by the U.S. was its disagreement with a number of cases in which Chang sat on the respective Panels. The U.S. alleged that Chang “*overstepped*” the scope of the Appellate Body’s authority. The list of cases include the respective Appellate Body reports in the case of *Argentina-Measures Relating to Trade in Goods and Services*,¹⁸ *India-Measures Concerning the Importation of Certain Agricultural Products*,¹⁹ *United States Countervailing Duty Measures on Certain Products from China*,²⁰ and *United States-Countervailing and Anti-dumping Measures on Certain Products from China*.²¹ Interestingly, the U.S. was a party to only some of the cases that it cited claiming that the United States did not oppose Chang’s reappointment just because he sat on Panels that issued decisions that were not in favour of America’s interests. This decision of the United States had garnered massive condemnation, particularly by Chang’s home State, South Korea.²² It had expressed its sharp disapproval in the following words:

This opposition is, to put it bluntly, an attempt to use

¹⁴See Hufbauer, *supra* note 11.

¹⁵See Shaffer et al., *supra*note 12.

¹⁶ Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 72 (2016).

¹⁷*US body blow to DSU, creating systemic crisis*, THIRD WORLD NETWORK (May 20, 2016), <https://twon.my/title2/wto.info/2016/ti160514.htm> (last visited May 31, 2021)

¹⁸WTO Doc. WT/DS453/AB/R (adopted Apr. 14, 2016).

¹⁹W TO Doc. W T/DS430/AB/R (adopted Mar. 20, 2015).

²⁰WTO Doc. WT/DS437/AB/R (adopted Dec. 18, 2014).

²¹WTO Doc. WT/DS449/AB/R (adopted July 7, 2014).

²²See *United States Blocks Reappointment of WTO Appellate Body Member* 110 AM. J. INT’L L. 573 (2016).

reappointment as a tool to rein in Appellate Body members for decisions they may make on the bench . . . Its message is loud and clear: “If AB members make decisions that do not conform to U.S. perspectives, they are not going to be reappointed”.²³

In 2018, the U.S. government blocked the reappointment of Shri Baboo Chekitan Servansing, a trade judge from Mauritius who was first appointed in September 2014. Eventually, when two of the last three remaining members, Thomas Graham and Ambassador Ujal Bhatia from India retired on December 10, 2019, the Body lost its functionality. This means that any Panel ruling that is appealed against, its adoption by the DSB will get blocked by default since Article 16 clause 4 of the DSU prohibits the DSB from adopting a Panel report if a party to the dispute has notified its decision to file an appeal. This is especially worrisome when the Panel report is in the favour of a weaker member against a stronger member, as it will make enforcement harder for the weaker nation.

Ambassador Ujal Bhatia who was a Chair of the Body in 2018, described the crisis around the Appellate Body appointments rather aptly in a 2019 speech when he was still a member of the Appellate Body, in the following words:

The transformation of the AB from ‘crown jewel’ to a problem child in urgent need of reform in the space of a few months has been as dramatic as it is mystifying . . . In the next few weeks and months, WTO Members face critical choices regarding the future of the multilateral trading system. Let us be clear– the crisis of the AB is the crisis of trade multilateralism . . . The choices that are made will define the prospects for international cooperation in trade for the next decades.”²⁴

²³ Alex Lawson, *WTO Members Clash over Appellate Body Reappointment*, LAW360(May 23, 2016), <https://www.law360.com/articles/799169/wto-members-clash-over-appellate-body-reappointment>. (last visited May 30, 2021).

²⁴ Ujal Singh Bhatia, ‘*Speech*’ (*Launch of the WTO Appellate Body’s Annual Report for 2018*), WTO, (May 28, 2019), https://www.wto.org/english/tratop_e/dispu_e/ab_report_launch_e.htm. (last visited May 30, 2021).

The United States government has claimed to have concerns with respect to the functioning of the WTO due to which it has been blocking appointments to the Appellate Body. The United States’ “systemic concerns” focus on Appellate Body’s “overreaching and disregard for the rules set by WTO Members”. Firstly, the U.S. government has issues with the rulings of the Body with regard to substantive questions under WTO law which as per the U.S. government “have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.”²⁵

Secondly, the United States government has issues with the Appellate Body going beyond the “*agreed dispute settlement rules*”, such as, the Appellate Body making “*advisory opinions on issues not necessary to resolve a dispute*”, reviewing “*panel fact-finding (in particular, on the meaning of domestic law) despite appeals being limited to legal issues*”, propounding that “*panels must follow its reports although Members have not agreed to a system of precedent in the WTO*”, and “*continuously disregarding the 90-day mandatory deadline for appeals*”.²⁶

Moreover, as a consequence of the trade war between China and the U.S., China has already filed three cases in the WTO against the import tariffs levied by the U.S. government worth billions of dollars while imposing retaliatory tariffs on American products *with WTO’s permission*. This might have further inflamed the antipathy that the U.S. government has towards the WTO.²⁷

²⁵*Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, Geneva, (Jun. 24, 2019), <https://geneva.usmission.gov/2019/06/25/statements-by-the-unitedstates-at-the-june-24-2019-dsb-meeting/>. (last visited May 30, 2021).

²⁶*See id.*

²⁷*See Ana Swanson, W.T.O Allows China to Impose Trade Sanctions on U.S. Goods*, NEW YORK TIMES (Nov. 1, 2019), <https://www.nytimes.com/2019/11/01/business/wto-china-us-trade.html>. (last visited May 30, 2021).

67%²⁸ of all rulings by WTO panels are appealed against in the Appellate Body and currently there are 14 appeals²⁹ pending in the WTO (including two involving India). Thus, it's a problematic situation since more appeals maybe added to the current list of pending appeals from ongoing cases which are currently at consultation stage or being heard by Panels. This crisis surrounding the Appellate Body appointments has created a huge stir among nations and the relevance of a multilateral system itself is being questioned now. Hence, a system based upon the spirit of economic cooperation among nations is on shaky grounds. The tradition that was practiced since the inception of WTO wherein countries came together to debate and discuss in a conducive environment to come to a solution to global issues, now seems to be declining rapidly. This could be because there is unnecessary focus on protectionism, nationalism and sovereignty by bigger and economically more stable countries.³⁰

IV. WHO ARE THE BIGGEST SUFFERERS?

The collapse of WTO's Appellate Body may directly and indirectly affect smooth functioning of trade all over the world. Countries may feel tempted to go back to the state of affairs the way they were in pre-WTO times. The governments of powerful countries may not feel obligated to solve trade disputes amicably by peaceful means of negotiations and consultations or resorting to the dispute settlement mechanism of an international trade body. However, it may have more serious repercussions for member States that are economically and politically weak as well as for consumers all over the world.

²⁸See generally WORLD TRADE ORG., ANNUAL REPORT FOR 2018, WTO, https://www.wto.org/english/tratop_e/dispu_e/ab_anrep_2018_e.pdf. (last visited May 30, 2021).

²⁹WORLD TRADE ORG., *Dispute Settlement: Appellate Body, Current Appeals*, WTO, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm. (last visited May 30, 2021).

³⁰See Aarshi Tirkey, *The WTO's appellate body crisis: Implication for trade rules and multilateralism*, ORF ONLINE (JAN 13, 2020), <https://www.orfonline.org/expert-speak/the-wtos-appellate-body-crisis-implication-for-trade-rules-and-multilateralism-60198/> (last visited May 30, 2021).

A. Economically and Politically Weaker Nations

When the WTO was established, it ushered in an era of rules-based trading system which was a departure from the power-based system that existed during the GATT era. Ever since then, not only has it provided a level-playing field in international trade relations to small, developing nations, but it has also provided them with a platform where they can challenge unfair trade measures taken by bigger, developed nations.³¹ That is why, it has often been commented that in WTO, “right preserves over might”.³²

The *US-Underwear* case which was brought before the WTO by Costa Rica against the U.S. is a striking example of how the dispute settlement mechanism of the WTO inculcated confidence among economically and politically weaker members that they can challenge a stronger member’s trade measures and obtain relief as well.³³ But now, the absence of a functional appellate mechanism is an enormous loss for a large number of WTO members that lack the political and economic clout required to enforce their rights and protect their interests.

B. Consumers

Moreover, the WTO also has the responsibility to protect rights of consumers by ensuring that they fully reap the benefits of competition such as increased choices and lower prices.³⁴ Governments must be mindful of the impact to consumers when there is a failure among nations to work together. These failings take the shape of trade wars, like in the case of USA and China currently.

Any trade war between countries involves imposition of tariffs, quotas and other restrictions and it is never the consumers of only the countries directly involved

³¹See R. RAJESH BABU, REMEDIES UNDER THE WTO LEGAL SYSTEM 367 (2012).

³²See Julio Lacarte-Muro and Petina Gappah, *Developing countries and the WTO Legal and Dispute Settlement System: A View from the Bench*, 3(3) J. OF INT’L ECON. L.401 (2000).

³³*United States-Restrictions on Imports of Cotton and Man-Made Fibre Underwear (US-Underwear)*, Panel and Appellate Body Report, WT/DS/24R and WT/DS24/AB/R of Feb. 25, 1997.

³⁴See generally WORLD TRADE ORG., ANNUAL REPORT FOR 2019, WTO, https://www.wto.org/english/res_e/booksp_e/anrep19_e.pdf. (last visited May 30, 2021).

in a particular trade war impacted by them. Since in this era of aggressive globalization, there is economic interdependence and interconnected supply chains among multiple countries, consumers all over the world may suffer. These may not directly affect the consumers, at least initially when corporations are in the position to absorb the inflated prices. But over a period of time, the consequences of these impositions trickle down in the form of disrupted supply chains, higher cost of goods and shortage of supply of essential commodities and the consumers have to bear the brunt.

Trade wars could also have great impact on public health. The U.S. administration's import tariffs on medical goods coming from China may have contributed towards shortages and costlier vital equipment when there is a worldwide health crisis created by the COVID-19 pandemic. In the last two years, China was forced to sell medical products such as protective gear for medical personnel, high-tech equipment for monitoring patients, to markets other than the United States. The U.S. has been facing trouble importing these medical necessities from other countries in a time when almost all countries of the world are struggling to meet their own health crisis created by the COVID-19 pandemic.³⁵

Trade wars can be settled through the WTO dispute redressal mechanism. If consultations and trade talks fail, Panel rulings and ultimately Appellate Body rulings bind the violating country to correct its misdeeds. If unfair trade barriers like high import tariffs by one country are retaliated by even higher tariffs by the responding country and if these are challenged in the WTO and the Panel rulings are appealed by the losing party or both parties for that matter, then in the absence of a functioning WTO Appellate Body, the appeal will go into a void for an indefinite period or till at least two new members are appointed to the Appellate Body. Since the Panel rulings do not bind the losing party if it goes to appeal, it may continue to violate its obligations under the WTO law.

³⁵See Chad P. Bown, *Trump's trade policy is hampering the US fight against COVID-19*, PIIIE BLOG (Mar. 13 2020) <https://www.piiie.com/blogs/trade-and-investment-policy-watch/trumps-trade-policy-hampering-us-fight-against-covid-19>(last visited May 30, 2021).

V. THE ROAD AHEAD AND POSSIBLE SOLUTIONS

Nations, big and small and economies, developed and developing, together form the membership of the WTO. Rule of law runs through the entire fabric of the WTO mechanism and all member countries are equal as members of this colossal organization. It has, so far, been able to keep power politics at bay in rendering decisions impartially. However, in the past few years, the very pillars on which the entire WTO regime stands, have begun to shake and the Appellate Body of the WTO losing its functionality as of now, is a huge blow to the WTO dispute redressal system. There have been cases of non-compliance of Appellate Body reports but to deal with that kind of situation the DSB is responsible and has enforcement mechanism in place.³⁶ Also, the dysfunctional Appellate Body may not mean that WTO members might feel less obligated to adhere to the principles that are the foundation of WTO. Nevertheless, a dysfunctional Appellate Body may lead towards increased blockages of Panel reports and escalating retaliations. This could be problematic for governments, corporations, manufacturers, service providers and consumers, to some or the other degree, in the future, near or far. If the multilateral trading system has to be prevented from collapsing into pre-WTO times, certain possible solutions may be offered.

Firstly, an unlikely solution shall be that the current (or future, if there is a change) United States government decides to unblock the new appointments to the Appellate Body if there are reforms made in the functioning of the WTO system that are in the best interest of not only the U.S. but world trade as a whole.

Secondly, the DSU provides for a minimum of 60 days and maximum of 90 days' time period for the Appellate Body to circulate its report, starting from the date on which the party makes a formal notification of its decision to appeal.³⁷ So in the absence of a full quorum of Appellate Body members to review the Panel ruling, it may be taken to have the effect of being automatically adopted by DSB at the expiry of 90 days.

³⁶ DSU, art. 21.

³⁷ DSU, art. 17 cl. 5.

Thirdly, parties may sign a Non-Appeal Pact (hereinafter referred to as NAP) before disputes arise and when a winner or loser has yet not been identified.³⁸ In the case of *Indonesia – Safeguard on Certain Iron or Steel Products*, the three parties to the conflict, namely, Vietnam, Chinese Taipei and Indonesia had concluded a NAP and paragraph 7 of their “sequencing agreement” provided as follows:

The parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, and they will not appeal that report under Articles 16.4 and 17 of the DSU.³⁹

Even if this cannot be the beginning of a standard practice, it can still be resorted to when both parties mutually decide in this direction.

Fourthly, countries may start relying on regional and bilateral trade agreements providing for arbitration as an alternative means of dispute settlement pursuant to Article 25 of DSU. This could act as an “interim solution” and parties may agree that till the time new Appellate Body members are not appointed, appeals under Articles 16.4 and 17 of the DSU shall not be filed. A draft text providing for appellate procedure similar to that as under WTO on the basis of a dispute-specific bilateral agreement between the two disputing parties was circulated by the European Union in 2019.⁴⁰ Arbitration is already the most accepted dispute settlement alternative to litigation in cases of commercial disputes currently, both in domestic and international sphere, by most developed and developing countries.

Lastly, it is important to bridge the increasing divide between developed and developing countries for the multilateral trading system to function, especially in the light of claims made by countries like the United States that WTO gives

³⁸See generally Pauwelyn, *supra*note 4.

³⁹See WTO Doc. WT/DS490/13, 15 April 2019 and WTO Doc. WT/DS496/14, Mar. 27, 2019.

⁴⁰ See *The EU draft proposal*, JOB/DSB/1/Add. 11, WORLD TRADE LAW, <https://worldtradelaw.typepad.com/files/eu-ab-proposal.pdf>.(last visited May 30, 2021).

preference to developing and least developed countries, and thereby assist in industrialization and development, which means that they are exempted from liberalization obligations, as agreed under the WTO.⁴¹ This could go a long way in breaking the impasse somewhere responsible for the death of the WTO Appellate Body and may aid in its resurrection.

⁴¹ Kirtika Suneja, *Trump targets developing countries, wants WTO to end “unfair benefits” in 90 days*, THE ECONOMIC TIMES (Jul. 27, 2019), <https://economictimes.indiatimes.com/news/economy/foreign-trade/trump-targets-developing-countries-wants-wto-to-end-unfair-benefits-in-90-days/articleshow/70410938.cms?from=mdr>. (last visited May 30, 2021).

THE POTENTIAL RELEVANCE OF UBER TECHNOLOGIES INC. V HELLER IN ASSESSING UNCONSCIONABLE ARBITRATION CLAUSES

*Nubee Navid**

ABSTRACT

The problem of one-sided arbitration clauses cloaked within a lengthy standard form contract impedes the process of dispute resolution and the Indian courts are yet to provide clarity regarding the same. The case comment juxtaposes the Canadian Supreme Court's decision in Uber Technologies Inc. v Heller (2020) with the existing Indian jurisprudence on this issue. It highlights similar principles that the Indian courts have relied upon in deciding problems akin to Uber and aims to present its germaneness to potentially comparable issues that may arise in the Indian context.

I. INTRODUCTION

When a person downloads a mobile application, it is rare that he or she goes through the entire standard form contract (SFC) which governs the relationship between him and the company offering him services. In doing so, a user often neglects the legal remedies available to him through the conditions governing dispute resolution between the parties. In Canada, an Uber driver sued his employer, arguably the biggest transport rental company in the world, for imposing a highly unfair arbitration clause through its standard form contract. The case known as *Uber Technologies Inc. v Heller*¹ is one of the biggest arbitration cases to come out of Canada in 2020. The Supreme Court of Canada therein assessed an arbitration agreement (hereinafter "Agreement") which had failed to balance the unequal bargaining power of the contracting parties. The court did so while expanding the doctrine of unconscionability with regards to arbitration clauses in SFCs.

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¹2020 SCC. 16, 447 D.L.R. 4th 179 (Can.).

In a time where big data and gig economies are booming around the world, it is important that consumers and workers in India are protected from unfair SFCs. Especially in cases where Companies restrict their users with unconscionable arbitration clauses. Indian courts in this regard have not extensively dealt with the interplay between SFCs and arbitration agreements. It is therefore necessary that we look for solutions from our foreign counterparts and *Uber* may present a robust case for the same.

In the first part of this case comment, the author provides a brief factual background of the case and deals with its jurisdictional issues. In the second part, he proceeds to highlight the important issues regarding the disputed arbitration clause in the case while simultaneously laying down the legal position in India concerning such issues. Lastly, the author concludes by pointing out the possible takeaways from the decision for Indian courts which account for its potential relevance.

II. FACTUAL BACKGROUND

David Heller provided food delivery services in Toronto, Ontario by using Uber's software application, Uber EATS. In order to work as a driver for Uber, one has to accept the company's standard form services agreement. The terms of the agreement provided for dispute resolution through either mediation or arbitration in the Netherlands under the International Chamber of Commerce (ICC) Rules. The entire process compelled a party to advance any claims under the clause to pay upfront filing and administrative fees of US\$14,500, along with legal fees and other miscellaneous costs of participation. Heller, whose annual income was in the range of US\$21,000 to \$31,000 faced the prospects of spending the majority of his income on such a claim.

Aggrieved by the financial complexities of the arbitration clause, Heller started a class action proceeding against Uber in Ontario for violations of employment standards legislation.² Uber, on the other hand, relied on the arbitration clause while bringing a motion to stay the class action in favor of arbitration in the

²Employment Standards Act, S.O. 2000, c 41 (Can.).

Netherlands. Heller contended that the arbitration clause was invalid due to its unconscionable nature, but the Motions judge rejected this contention, issued a stay order, and ruled in favor of an arbitral referral in the Netherlands. The fundamental rationale behind the decision was that arbitrators are competent to decide such jurisdictional issues. Heller then moved to the Ontario Court of Appeal which allowed the appeal and set aside the motion judge's order. It held that Heller's objections to the arbitration clause did not need to be referred to an arbitrator and could be dealt with by a court in Ontario. While dealing with the validity of the arbitration clause, it held the same to be unconscionable, based on the principle of inequality of bargaining power between the parties and the improvident cost of arbitration.

Uber then moved to the Supreme Court of Canada, arguing that the Courts in Ontario do not have jurisdiction with regards to arbitral referrals involving international agreements. Furthermore, it contended that the threshold comparing the imbalance between the two parties was set too low by the Court of Appeal. The primary issues before the Court were whether the validity of the Agreement be decided by the arbitrator or the Court and whether the Agreement was unconscionable. The judgment for the majority was delivered by Abella and Rowe JJ. While concurring with the majority, Brown J. decided the issues on different legal principles. The dissenting opinion was delivered by Côté J.

III. JURISDICTIONAL ISSUES

Unlike the Indian arbitration regime, Commercial Arbitration in Canada is primarily governed at three separate levels, *i.e.*, territorial, provincial, and federal levels. Provinces have the autonomy to enact legislation that governs both domestic and international arbitrations. Different aspects of the UNCITRAL Model Law and the New York Convention have been incorporated into the arbitration laws of various provinces. The present dispute arose in Ontario which has the Arbitration Act, 1991 (hereinafter 'AA') governing domestic disputes involving parties based in Ontario. The province also has the International Commercial Arbitration Act, 2017 (hereinafter 'ICAA') which

governs disputes involving international commercial arbitration agreements and awards³ with at least one party based in Ontario. It is important to note that the Model Law forms the centerpiece of the legislative scheme of ICAA. Both AA and ICAA are mutually exclusive and if one governs an agreement, the other cannot govern the same.⁴

The first issue revolved around the applicability of ICAA and AA with regards to the nature of the Agreement. The Superior Court had held that the applicability of ICAA depends upon whether the agreement is international and commercial. The issue here however was not whether the agreement is international but whether it is “commercial” in nature. The same would have called for scrutiny between the relationships between the parties. The Court observed that it would be logical to assess the nature of the dispute between the parties rather than making fact findings regarding the nature of their relationship. Diving deep into the dynamics of such a relationship instead of examining the pleadings of the parties would unnecessarily slacken the arbitration process.

The second issue revolved around whether David Heller was an employee of Uber and if so, would such a dispute be covered under the provincial arbitration laws. According to the majority, employment disputes were different from that of the “commercial” nature of disputes covered under ICAA. The question as to whether a person is an employee or not is vital to an employment dispute and the same could not be covered under ICAA.⁵ This observation allowed the Court to analyze the Agreement through the lens of AA which usually directs the motions court to stay judicial proceedings in case an arbitration agreement exists between the parties.⁶ The provision is similar to Section 8 of the Arbitration Act, 1996 which calls for arbitral referral where an arbitration agreement exists between the parties. However, the same can be denied in case the arbitration

³See International Commercial Arbitration Act, S.O. 2017, c. 2, ss. 5(1)-5(3) (Can.)

⁴Arbitration Act, S.O. 1991, c 17, s. 2(1)(b) (Can.).

⁵See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 309 (2nd ed. 2014)

⁶See Arbitration Act, S.O. 1991, c. 17, s. 7(1) (Can.).

agreement is invalid.⁷ The same principle allows the Canadian motions courts to refuse a stay on judicial proceedings in case the arbitration agreement is invalid.⁸ Taking this provision into account the Court moved forward to examine the validity of the agreement between Uber and Heller.

IV. THE NATURE OF UNCONSCIONABLE ARBITRATION AGREEMENTS

The Canadian courts usually rely on the “prima facie” analysis test while assessing arbitration agreements.⁹ The test states that the court must defer the dispute to arbitration unless the arbitration agreement is tainted by defect, rendering it invalid or inapplicable, and such a defect should be uncontestable.¹⁰ According to the majority, the Agreement raised an issue of inaccessibility which demanded a departure from the general rule of arbitral referral to cure the defect. In instances where the arbitration fee is too high to begin proceedings or the plaintiff cannot physically reach the location of the arbitration, it is difficult to ignore the issue of access to arbitration.

The agreement between the two parties was a standard form contract and The Canadian Supreme Court had previously held that arbitration clauses under such contracts are better dealt with through the doctrine of unconscionability.¹¹ Its purpose is the protection of vulnerable parties in the contracting process from loss or improvidence.¹² This sense of protection emanates from the inequality of bargaining power between the parties, stemming from one party’s weakness.

⁷See *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v Northern Coal Field Ltd.*, (2020) 2 SCC 455 (India).

⁸See *Arbitration Act*, c 17, s. 7(2) (Can.).

⁹See *Dell Computer Corp. v. Union des consommateurs*, (2007)2 S.C.R. 801 (Can.); See also *Rogers Wireless Inc. v. Muroff*, (2007)2 S.C.R. 921 (Can.); *Seidel v. TELUS Communications Inc.* (2011)1 S.C.R. 531 (Can.).

¹⁰See *Alberta Medical Association v. Alberta*, (2012) A.B.Q.B. 113 (Can.); *Trainor v. Fundstream Inc.*, (2019) ABQB 800 (Can.).

¹¹See *TELUS Communications Inc. v. Wellman*, (2019)2 S.C.R. 144. (Can.) .

¹²See *Doucez v Facebook* (2017)1 S.C.R. 751 (Can.).

The majority relied on British jurisprudence in this regard¹³ and highlighted a common defect wherein the weaker party is so dependent on the stronger one that its failure to agree to a contract result in severe repercussions. The inability of David Heller to negotiate the contractual terms that he had agreed to, was a testament to the imbalance between him and Uber.

Uber, on the other hand, argued that the imbalance in the bargaining power should be overwhelming and should exhibit a clear intention on part of the stronger party to take advantage of the weaker party's position. The Court however rejected this argument as it unduly narrowed the doctrine making it more formalistic and less equity-based.

Dismissing the appeal, the majority reflected upon the significant hurdle that lay between Mr. Heller and the relief that he sought through the mechanism of dispute resolution. He could not have been expected to appreciate the implications of agreeing to arbitrate under the ICC Rules and will fully agree to pay \$14,500 to initiate the proceedings. The said cost was never expressly mentioned in the arbitration agreement nor could one expect a food deliveryman to search for these terms and conditions himself. These costs were disproportionate to the size of an arbitration award which could have been foreseen at the time the contract was entered. Furthermore, the agreement made it clear to Mr. Heller that he had to travel to the place of arbitration i.e. The Netherlands on his expenses and any representations to the Arbitrator would have to be made after the payment of fees. The arbitration clause subjected Heller to the improvident preconditions of travel, initiating the arbitration, getting the award in his favor, and then get his rights enforced through a court in Ontario. No reasonable person could have been expected to agree to such an arbitration agreement muddled in a long, dense, and difficult to read SFC.

The Indian courts extensively substantiated the doctrine of unconscionability during the 1980s and 1990s. While dealing with employment contracts, The Supreme Court observed that improvident employers may tempt employees

¹³See *Janet Boustany v. George Pigott Co (Antigua and Barbuda)*, (1993) U.K.P.C. 17, *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.*, (1985)1 W.L.R. 173 (appeal taken from Eng.).

through standard form contracts, exposing them to oppressive terms and conditions. In such cases, it was important to scrutinize the bargaining power between the parties.¹⁴ The Court in *Central Inland Transport Corporation Limited v. Brojo Nath*¹⁵ observed that the doctrine of unconscionability will apply in cases of great economic disparity between the contracting parties. Where a weaker party does not have an option but to accept the terms and conditions imposed upon him by the stronger party, the doctrine is applicable. However, the approach of the courts has been careful while dealing with such questions. Where unconscionability does not shock the conscience of the court¹⁶, it may not interfere with the enforceability of the contract. Therefore, there may be numerous factors that may be gauged in such cases. The court may assess the bargaining power between the parties in “dotted line contracts” which have a “take it or leave it” structure.¹⁷ In a case where the apparent inequality between the parties is evident from the lack of mutuality in an arbitration clause then the clause becomes unenforceable.¹⁸

More recently, the Supreme Court held that an arbitration clause that mandates a compulsory deposit of a percentage of the claim amount to initiate arbitration would be invalid.¹⁹ The disputed clause compelled the claimant to furnish a deposit for a total of ten percent of the total amount claimed. In case, the award was to be passed in the claimant’s favor, the deposit would be refunded to the claimant in proportion to the amount awarded with respect to the award claimed. The clause also necessitated a forfeiture of the remaining balance to the other party. The Court observed that the clause was unjust, unfair, and arbitrary as it may result in a huge potential loss for a losing party in the arbitration. The

¹⁴See *Superintendence Company of India (P) Ltd v. Sh. Krishan Murgai*, (1980) 3 S.C.R. 1278 (India).

¹⁵See *Central Inland Transport Corporation Limited v. Borjo Nath*, (1986) 2 S.C.R. 278 (India).

¹⁶See *Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board and Anr.*, (1993) 3 S.C.R. 199 (India).

¹⁷ See *Life Insurance Corporation of India v. Consumer Education and Research Centre*, (1995) 5 SCC 482 (India).

¹⁸See *Bhartia Cutler Hammer Ltd. v. AVN Tubes*, (1995) 33 D.R.J. 672 (India).

¹⁹See *ICOMM Tele Ltd. v Punjab State Water Supply and Sewerage Board & Anr.*, (2019) 4 SCC 401 (India).

reason being that such a party would have to forfeit such part of the deposit as falls proportionately short of the amount awarded as compared to the sum claimed.²⁰ The decision reflected the Court's clear aversion to arbitration clauses which disturb the contracting equilibrium between the parties. Especially in a case where the fundamental objective is to settle the matter through a dispute resolution process which is not supposed to be cumbersome. In other words, it should not restrict access to arbitration.²¹ It is an observation similar to Brown. J.'s concurring opinion in *Uber* where he highlights the importance of access to justice through arbitration.

V. THE COST OF JUSTICE

Brown J. while concurring with the majority stated that the doctrine of unconscionability was needlessly expanded by his colleagues. He accentuated upon the principle of access to justice and how the arbitration agreement undermined the rule of law by denying Mr. Heller the only mode of dispute resolution available to him. In doing so, the agreement contravened the general principle of public policy applied in contract and arbitration law²². It was observed that arbitration is an alternative to civil litigation as it provides for fair means of resolving the dispute. However, an arbitration clause which provides for such means but simultaneously precludes a party from enforcing it naturally dissolves the considerations which promote the curial respect for arbitration. It is in such cases where the principle of public policy in arbitration operates. The Agreement caused undue hardship for Mr. Heller as the cost of pursuing the claim was disproportionate to the quantum of disputes likely to arise from the Agreement itself. Lastly, Brown. J. noted that due consideration should be given to the attempts made by parties to tailor any undue limits placed on dispute resolution through arbitration clauses. Such clauses may be altered to allow parties with stronger bargaining powers to pay a higher portion of upfront costs

²⁰ See *id.*

²¹ See *id.*

²² See *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, (2010)1 S.C.R. 69 (Can.); See also *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, (2014)3 S.C.R. 31 (Can.).

or allow weaker parties to exclude certain claims. However, the Agreement, in this case, covered all disputes that Mr. Heller may have had against Uber and required him to pay all upfront costs to advance a claim.

There is indeed no doubt about the fact that arbitration is an alternative to court litigation and the essence of Brown J.'s observations has been previously upheld by the Indian courts. The Delhi High Court held that a clause that restricts a party's right to an alternative form of dispute resolution i.e. arbitration would amount to an agreement in restraint of a legal proceeding.²³ Such a clause would necessarily be a "one-way clause" and would violate the element of mutuality in a valid arbitration agreement.²⁴ The Supreme Court has also held that while construing the validity of an arbitration agreement, it should be considered whether such an agreement provides the parties with a substitute to court litigation.²⁵ Therefore, we do see comparable similarities in the observations of both Indian and Canadian Supreme Courts in interpreting arbitration clauses which impede access to dispute resolution.

VI. UNDERSTANDING THE CONUNDRUM

While dissenting, Côté J. stated that the stay on proceedings should be granted on the condition that Uber advances the funds needed to initiate the arbitration under ICAA. In doing so, she laid out an interesting point on the majority's claim regarding difficult to read SFCs. She stated that assessing such clauses on the basis of difficulty faced by a person in SFCs sets the threshold so low that it may be open to abuse and place sweeping restrictions on arbitration clauses. Such contracts are vital to a growing sector of big data economies and should be best left to the legislature to ponder upon.

Côté J.'s observation implies a valid question that, both Indian and Canadian courts have to ask themselves, *i.e.*, how does one balance the contracting power between two parties in an arbitration clause while drafting simpler SFCs? In

²³See *Lucent Technologies v. ICICI Bank*, (2009) SCC 3213 (India).

²⁴*See id.*

²⁵See *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and others*, (2013) 1 SCC 641 (India).

India, the Supreme Court has observed that an arbitration agreement can be valid in any form provided it reflects the mutual intention of parties to enter into such an agreement.²⁶ While the decision follows the statutory conditions in Section 7 of the 1996 Act, it does little to provide clarity on the issue.

Uber caters to the discussion around such contracts in several ways. It allows the legal regime to look at app users through multiple lenses. They may be consumers or even employees, as in the case of David Heller, but would they be able to understand what mode of legal remedies are at stake? WhatsApp for example, states that users of the app are subject to state laws of California, for all disputes with the Company.²⁷ Zomato provides for the applicability of the Food and Standards Act, 2006 for all its users but the statute itself does not provide for a dispute resolution mechanism for consumers.²⁸ The terms and conditions of the app further remain silent on any potential disputes with its employees. Finally, Spotify, a music streaming app, subjects its users in India to the same ICC rules on Arbitration which were applied to David Heller.²⁹ It is clear that Indian users are susceptible to unfair arbitration clauses in SFCs but it is yet to be seen how a potential legal action plays out when they realize the bargain that they have agreed to.

V. CONCLUSION

The decision can be relevant in interpreting arbitration agreements in SFCs, especially where there is a stark difference in the bargaining power of the contracting parties. There are several factors, including unconscionability and access to justice, which may aid the courts in doing so. It may also encourage parties to review arbitration clauses under SFCs and opt for arbitral institutions that equip them with more accessible and flexible mechanisms for dispute

²⁶See *Mahanagar Telephone Nigam Ltd vs Canara Bank*, (2019) SCC 995 (India).

²⁷See WhatsApp, *Terms of Service: Dispute Resolution*, WHATSAPP, <https://www.whatsapp.com/legal/client> (last visited May 31, 2021).

²⁸See Zomato, *Terms of Service, cl. XIII(E)(c)*, ZOMATO, <https://www.zomato.com/conditions> (last visited May 31, 2021).

²⁹See Spotify, *Terms and Conditions of Use, cl. 24.3.3.*, SPOTIFY, <https://www.spotify.com/in/legal/end-user-agreement/> (last visited May 31, 2021).

Resolution. While the jurisprudence in India has been developing well in terms of the relationship between contracts of adhesion and their potential impact on parties. We still need to see how the courts interpret the relationship between SFCs and the arbitration clauses that exist within them. The terms and conditions laid down by companies like WhatsApp, Spotify, or Zomato point towards a potential problem that may exist across the board i.e. big data consumers and gig economy employees in India are unknowingly consenting to unconscionable arbitration clauses in SFCs. When any action regarding such clauses is initiated in India, the courts may find the observations put forward in *Uber* relevant in scrutinizing arbitration clauses which more or less defeat the purpose of fair and swift dispute resolution between two parties.

POLICING THE POLICE THROUGH CCTVS: ANALYSIS OF *PARAMVIR SINGH SAINI V. BALJIT SINGH*

Anirudh Vijay and Vaibhav Sharma *

ABSTRACT

Recently, the Supreme Court in the significant case of Paramvir Singh Saini v. Baljit Singh issued exhaustive directions for mandatory installation of CCTV cameras inside the police station. The present paper is a case commentary to analyze the aforesaid ruling. The paper argues that Supreme Court was right in issuing such exhaustive directions; however, it left a host of shortcomings through the ruling. The authors have also provided suggestions to resolve such shortcomings. Throughout the paper, the authors have followed doctrinal form of research methodology. The objective of the paper is to understand the interplay between CCTVs, police reforms and criminal law.

I. INTRODUCTION

Since its discovery and arrival in our society, closed-circuit television (CCTV) has been quite instrumental in acting as a watchdog to safeguard the interest of the person or authority who has installed it. Police also being an important part of the society is responsible for ensuring smooth functioning and order in the society without any kind of anti-social or immoral activity acting as a hindrance. However, in recent times the police station itself became a repository of these kinds of activities in the form of custodial torture leading to deaths. There was an immediate need to induct any mechanism like CCTVs ensuring vigilance on these acts to discontinue them.

Notably, at the culmination of the year 2020, the Apex Court passed a significant ruling in the case of *Paramvir Singh Saini v. Baljit Singh* (hereinafter

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‘*Paramvir Singh*’),¹ which pertains to directions on mandatory installation of CCTVs in police stations. Ancillary to police stations, the court also directed the identical installation in various central probe agencies which carry out interrogation and have power of arrest like Central Bureau of Investigation (CBI), Enforcement Department (ED), National Investigation Agency (NIA), etc. The Court held that victims of human rights violations have the right to get the copy of CCTV footage of interrogation. The questions that arise here are whether this ruling has the potential to uphold the human rights in police station by putting the brakes on custodial torture and whether its stringent directions would dilute its execution on ground. The present paper will answer the same by analyzing this *Paramvir Singh* directions and put forth suggestions based on the overall perusal.

II. BACKGROUND AND FACTS

A Special Leave Petition (SLP), against the judgment passed by Punjab & Haryana High Court,² was filed by one Paramvir Singh Saini which raised questions on the video-audio recording of the statements and the installation of CCTV cameras in the Police Station. This was done to explore the measures that can be taken to curb police brutality. The Apex Court³ on July 16, 2020 had issued a notice in the instant SLP to the Ministry of Home Affairs on the question of audio-video recordings as provided by proviso to Section 161(3) of Code of Criminal Procedure, 1973,⁴ and on the installation of CCTV cameras in police station.

On September 16, 2020, the bench of R.F Nariman, Navin Sinha and Indira

¹ 2020 SCC Online SC 983.

² *Baljit Singh v. State of Punjab*, 2016 SCC Online P&H 18931.

³ (2020) 7 SCC 397.

⁴ CODE CRIM. PROC., sec. 161. Examination of witnesses by police. . . (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Provided that statement made under this sub-section may also be recorded by audio-video electronic means. . .

Banerjee JJ., decided to implead all states and union territories in the matter to seek their responses on the exact position of installation of CCTV cameras. Reliance was placed on *Shafhi Mohammed v. State of H.P* (hereinafter '*Shafhi Mohammed*'),⁵ wherein the Apex Court had already issued a notice to the government by listing down the steps to be taken by the appropriate government relevant to the current matter in concern like introduction of videography in investigation and other related stages in the process for actuating rule of law. However, the government was not able to put forward a satisfactory response before the court in their compliance affidavits on November 24, 2020.

Therefore, the court in furtherance to these directions added a few more directions, which include the constitution of two 4-member Committees, *i.e.*, State Level Oversight Committee (SLOC) and District Level Oversight Committee's (DLOC). SLOC consists of Secretaries of Home and Finance Department, Inspector General of Police and a Member of State Women's Commission. On the other hand, DLOC comprises Divisional Commissioner, District Magistrate, Superintendent of Police of District and Mayor or Sarpanch.⁶

The SLOC shall manage the budgetary allocation for purchase and installation of CCTVs, in carrying out regular inspections for maintenance of CCTVs and its peripheries. SLOC will also address concerns related to malfunctioning of equipment's along with the ones submitted by DLOC's monthly reports. The court also affirmed on constituting a DLOC with duties like supervision and maintenance of CCTVs. It will also interact with Station House Officer's (SHO) pertaining to the working of CCTVs as well as examine CCTVs footage containing human rights violations.⁷

Additionally, the court ordained the installation of CCTVs equipped with night vision and audio-video footage. It would be the responsibility of states/ union territories to ensure a decent connectivity of internet/electricity near police stations. Further, the court directed the Union government to update it on

⁵(2018) 2 SCC 801.

⁶See *Paramvir Singh*, paras. 10 – 11.

⁷See *id.* para. 12.

constituting and functioning of Central Oversight Body (COB) by affidavit. Court also ordered the installation of CCTVs in the offices of various agencies governed by the Central government having power to interrogate and arrest like CBI, NIA, etc.⁸

The court instructed to install CCTVs having the storage capacity of at least one year and extending to 18 months on the basis of availability in the market. The court further illustrated about places where it would be obligatory to install CCTV systems like all entry and exit points; main gate of the police station; all lock-ups; all corridors; lobby/the reception area; outside (not inside) washrooms/toilets; all verandas/ outhouses etc. As per the court, SHO is duty bound and responsible for working, maintenance and recording of CCTVs of the police station concerned.

Ultimately, the court directed all the appropriate governments in states, Centre and union territories to send a compliance affidavit within 6 weeks, elaborating upon the methodology that would be adopted for the implementation and execution of this order.

III. CRITICAL ANALYSIS OF JUDICIARY'S ROLE IN SAFEGUARDING HUMAN RIGHTS

As per National Crime Records Bureau (NCRB) Report, 85 people died in police custody in 2019 but only 23 police personnel were arrested and none of them were convicted⁹. Consequently, there was an urgent need to institute an effective mechanism which could thwart such ongoing incidents. Notably, the Court in *Shafhi Mohammed* directed the state to install CCTVs in police stations, as it is not convenient for the victim and his representatives to adduce substantive evidence against any official on ground of custodial torture.¹⁰ In majority of cases, the material witnesses are officials from the same police

⁸See *id.* para. 19.

⁹See generally NAT'L CRIME RECORDS BUREAU, MIN. OF HOME AFF., GOV'T OF INDIA, CUSTODIAL CRIMES & COMPLAINTS AGAINST POLICE PERSONNEL, CRIME IN INDIA 992-93 (VOL. 3) (2019).

¹⁰See *Shafhi Mohammed*, para. 13.

station to which the accused belongs, creating a personal bias among them.¹¹ In *Paramvir Singh*, the court has managed to resolve this issue by making victims explicitly accessible for CCTV footage related to human rights violations.¹²

To ensure collection of evidence in propriety, the court in *Paramvir Singh* authorized the SLOC & COB to give directions to all police stations, investigative/ enforcement agencies to display their offices and concerned premises in coverage by CCTV. The prime objective being that no place is left veiled for effective implementation of the use of photography and videography of the crime scenes.

The state always tends to make excuses whenever it is directed to incorporate any kind of infrastructural change in police stations. In the course of hearing, the Supreme Court impleaded all the States and Union Territories to find out the exact position of CCTV cameras in each Police Station. On receiving the response, the court was highly dismayed as none of the states filed an affirmative action plan.¹³ The state argued on ground of paucity of funds for installing CCTVs. Refusing to accept any flimsy excuses, the Supreme Court put its foot down and directed the states to file affidavits mentioning about the firm action plan with an exact timeline for compliance of order within 6 weeks.¹⁴

In *Paramvir Singh*, the court has tried to implant transparency in the functioning of police station by constituting an oversight committee both at the state as well as district level. These committees have been provided with different powers and functions with an objective of enforcing *Paramvir Singh* directions. The DLOC has also been given plenary power to review the footage stored in CCTVs of various Police Stations with the purpose of checking for any human rights violation. In addition to this, DLOC is directed to submit monthly reports

¹¹Rahul v. State of Haryana [CRM-M-31490-2020 (O&M)].

¹²See *Paramvir Singh*, para. 20.

¹³See *id.* para. 21.

¹⁴Neeleshwar Pavani, *Remarkable Judgment that Reclaims Human Rights by Use of CCTV in Interrogation*, THE LEAFLET (Dec. 19, 2020), <https://www.theleaflet.in/remarkable-judgment-that-reclaims-human-rights-by-use-of-cctv-in-interrogation/>. (last visited May 30, 2021).

related to CCTV recordings and its equipment to SLOC. On the basis of which, SLOC can make regular inspections to address grievances mentioned in the report.¹⁵

A similar view was also taken in *D.K. Basu v. State of West Bengal* (hereinafter '*D.K. Basu*'),¹⁶ where the Supreme Court constituted an oversight committee with the duty to publish periodical reports of its observation on camera footage of CCTV. For promoting transparency in the functioning, the Standing Committee also recommended its Report for the constitution of committee consisting of both public and government members. It was also recommended to install GPS system in Surveillance Cameras at strategic locations for regular monitoring by committee members.¹⁷

Additionally, in case of non-functioning of CCTVs, it is mandatory for the concerned SHO to inform the DLOC about arrest/ interrogations carried out in the police station during the said period and to forward the said record to DLOC. *Paramvir Singh* also ordained to install CCTVs with night visions and audio-video footage with the motive of being able to detect the wrongs committed during dark in an intrigue manner. It is made obligatory for the governments to set-up internet systems providing clear image resolution and audio.¹⁸

Apart from transparency, *Paramvir Singh* also emphasized on accountability. As accountability is an indispensable quality inherent in functioning of any organization or department. It would ensure manifestation of allegiance and integrity from the side of personnel employed towards the position held by him. *Paramvir Singh* made SHO duty bound and responsible for data maintenance, working and recordings of CCTVs.¹⁹ Likewise, in *Wajid v. The State of Maharashtra*,²⁰ the Bombay High Court verified the authenticity of the submission that CCTV system in a concerned police station was not working on a particular day by calling for registers maintained by the official responsible for

¹⁵See *Paramvir Singh*, para. 12.

¹⁶(2015) 8 SCC 744.

¹⁷RAJYA SABHA, REP.NO.167, pt.4.1.1, at 21(2013).

¹⁸See *Paramvir Singh*, para. 14.

¹⁹See *Paramvir Singh*, para. 15 – 17.

²⁰Crim. W. P. No. 1111 of 2020.

registering the records related to the CCTVs.

The directions of the court in *Paramvir Singh* have been strict, exhaustive and uncompromising for ensuring proper implementation on ground. Through this ruling, the Court directed to install CCTV systems at all entry and exit points; outside (not inside) washrooms/toilets; main gate of the police station; all lock-ups; all corridors; etc.²¹ Previously, the court had also directed to install CCTVs with rotating cameras²² in every part of the police station for continuous coverage of 24 hours in a day. Analogous to this, the Apex Court also instructed state to install CCTVs with recording systems having the storage capacity at least 1 year to maximum of 18 months, depending upon the availability in the market.²³ Consequently, *Paramvir Singh* directions ensure that each and every technicality related to CCTV is explicitly provided to minimize the scope of arbitrariness.

Thus, with mandatory installation of CCTVs, the Court has managed to incorporate an alternative to halt the custodial torture by stimulating transparency and accountability through its efficacious directives. Although, the Apex court has rightly upheld the human rights of victims, yet it fails to address many shortcomings. The shortcomings have been addressed below.

With SHO being named as the person responsible for CCTV recordings in a police station, the court has created a certain extent of perplexity. The court has abstained from modifying the investigation procedure leading to high level of apprehension and creating an opportunity for an investigator from the same police station to shield his colleague by fabricating the video footage in order to safeguard the prestige of his department. Therefore, this particular direction is in defiance of the principle of natural justice rule against bias and independent investigation.²⁴

Secondly as a state, India is still looking for an express description about ‘torture’ as neither the country has ratified the United Nation Convention against

²¹See *Paramvir Singh*, para. 16.

²²See Leonard Xavier Valdarisv. Office-In-Charge, 2016 SCC OnLine Bom 14855.

²³See *Paramvir Singh*, para. 17.

²⁴See *generally* Meenglass Tea Estate v. Workmen, AIR 1963 S.C. 1719.

Torture,²⁵ nor has any explicit legislation relating to it.²⁶ Due to this, it becomes improbable to charge a person liable for custodial death with the punishment of murder, as most of the time he is convicted for grievous hurt comparatively much milder offence. As it is creating an unnecessary dichotomy between two offences with the same outcome, which is discriminatory for the victim of custodial torture, reason being the dearth of any specific legal framework to regulate these kinds of inhuman acts.

Thirdly, it has been accepted in the report as well that Police manpower alone is not sufficient to curb crime, maintain law and order, traffic management, internal security and other policing requirements.²⁷ Therefore, they are required to be supplemented with modern facilities and gadgets like computers, CCTV cameras etc. to enhance their effectiveness and efficiency. At the national level only 1, 40,482 computers, 1,681 servers and 13,232 laptops are available with State/UT police to manage 1.3 billion population.²⁸ Also, they mentioned data about 4,60,220 CCTV cameras, 2,144 speedometers and 24,278 breath analysers in the whole country which is not very much satisfactory.²⁹

Fourthly, it is not the first time that the courts have called for the deployment of CCTVs in police stations. As the directions passed in *Paramvir Singh* related to CCTVs are a supplement to the recommendations passed in the judgments of *D.K. Basu* and *Shafhi Mohammed* the display of unsatisfactory implementation of the directions has forced the court to reiterate them again with more description. It was pointed out by the court during the course of hearing in *Paramvir Singh* that it had been two and half years since the recent order related to CCTVs had been passed by it but no state was able to clarify on the execution process substantially. Therefore, from the ordeals it could be deduced that the states would be reluctant in implementing the. Concerned order by abating it which have become customary for them.

²⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. art.4, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 112.

²⁶ Dr. Ashwani Kumar v. Union of India & Anr., 2019 SCC On Line SC 1144.

²⁷ BUREAU OF POLICE RESEARCH & DEV., MIN. OF HOME AFF., GOV'T OF INDIA, EQUIPMENT TO FACILITATE POLICING, DATA ON POLICE ORGANIZATIONS (2020).

²⁸ See *id.* at 190.

²⁹ See *id.* at 191.

Lastly, it becomes imperative to mention that the installation of CCTVs in police stations will only have its efficacy on the human rights violations happening within its four walls. This is only 15 in number analogous to total human rights violations for which police personnel is held responsible i.e., 49 as per annual data released by NCRB.³⁰ The data reflects that most of the human rights violations happen outside the realm of police stations. An arrested person may be tortured at any other place other than the police station which is a matter of great concern. This would become a habitual exercise from the side of police to foreclose the objective of CCTVs.

Additionally, there is an identifiable lacuna which could be detected if we evaluate the judgement on the yardstick of right of privacy propounded in the landmark case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*.³¹ The judicial interpretation of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. The scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others; the same cannot be the basis for compelling a person “to impart personal knowledge about a relevant fact”. The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of ‘personal liberty’ under Article 21. Hence, the understanding of the ‘right to privacy’ should account for its intersection with Article 20(3). Furthermore, the ‘rule against involuntary confessions’ as embodied in various provisions of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting.³²

IV. CONCLUSION AND SUGGESTIONS

In view of the above analysis, the ruling is instrumental and unprecedented in its own realm. While pronouncing the order, Apex court observed the latent

³⁰*Supra* note 5 at 994.

³¹ (2017) 10 SCC 1.

³²*See id.* paras. 1038 – 39.

rationale of the dictum being the “*force used at police stations resulting in serious injury and/or custodial deaths*”. Therefore, it is a reform made by the court in keeping with constitutionally guaranteed right under Article 21, which calls to protect the right to life and personal liberty by safeguarding the interests of citizens suffering, directly and indirectly through custodial torture or any other brutality from the violation of rights by the guardians of law.

However, the Supreme Court order to install CCTVs in all interrogation centres is well-intentioned, but it has created a sense of uncertainty on the practicability of the idea. On account of the lacunas that we have attempted to highlight, could hamper the favourability of the directives, if put into effect. There is an instantaneous need to fill up the gaps left by the court. This could be surmounted if following suggestions are applied and included within the directions:

1. In order to manifest the principle of natural justice, the directions could have appointed an SHO other than the concerned police station for working, maintenance and recording of CCTVs. This will assure an independent probe and eliminate any apprehension of personal bias.
2. Either the state can introduce a descriptive law on torture or it can amend the Indian Penal Code, 1860 by including a chapter on torture with the purpose of mitigating the anomaly related to punishments analogous to other grave offences like murder.
3. Prioritizing budget allocation for proper resource allotment would lead to betterment of police stations deprived of adequate modern facilities and gadgets.

Strict penalties should be imposed proportionate to the amount of delay over the allotted time on the states accountable for abating the implementation process.

THWARTING THE MIGHT OF STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION: *GRIEVANCES REDRESSAL OFFICER, M/S. ECONOMIC TIMES INTERNET LTD. V. M/S. V. V. MINERALS PVT. LTD.*

Akshay Luhadia*

“If journalism is good, it is controversial, by its nature.”

– Julian Assange, the Wikileaks founder

ABSTRACT

Journalism, by its very nature, exposes, awes, and shocks the common citizen. To do so, the media and press require elbow room to publish their stories. This space has time after time been abridged in India through various restrictions on freedom of speech, with public personalities and corporations using the judicial system as a silencing tool. Fortunately, Justice G.R. Swaminathan in ‘M/S Economic Times Internet Ltd’ has worked in the opposite direction. Through the shrewd application of existing doctrines, he has single-handedly provided journalistic speech with space and protection against undue censorship.

I. INTRODUCTION

Strategic Lawsuits against Public Participation (SLAPPs) have been gaining attraction in India. These suits may be classified as vexatious and frivolous, filed only to intimidate and silence critics and journalists who voice their opinions. Such suits are frequently used by prominent persons, politicians, and corporates who want to stifle any person or organization standing against them. These suits originated in the United States of America (USA) and are notorious for producing a ‘chilling effect’ on public participation in political discourse.¹ With reference to SLAPPs, New York Supreme Court Judge J. Nicholas Colabella has

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¹See George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation*, 7 PACE ENTL. L. REV 16 (1989).

even gone on to say, “short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.”²

SLAPPs are not filed to win but rather to drain the defendant of his time and resources in court. This situation is exacerbated in India where court cases drag on for years and can even surpass decades if the matter is appealed, creating a situation where the procedure is the penalty. In India, the foremost method of filing SLAPPs is the country’s defamation laws, both civil and criminal. Civil defamation is not codified in India and opens a plateau of opportunities for the claimant to rely on foreign cases and doctrines. Whereas criminal defamation, a public remedy for a private wrong, entails imprisonment and a fine under the Indian Penal Code (IPC).³ Thus, it acts as the perfect deterrent for people wishing to speak out.

In *Grievance Redressal Officer, M/S. Economic Times Internet Ltd., and Others v. M/S V.V. Minerals Pvt. Ltd* (hereinafter ‘M/S Economic Times Internet Ltd’),⁴ the complainants invoked criminal defamation under Section 500 of the Indian Penal Code against the petitioners. This paper briefly examines this judgment and analyses it in the context of SLAPPs and freedom of expression accorded to the press.

II. BACKGROUND OF THE CASE

The petitioners, in this case were accused of committing offence of criminal defamation under Section 500 of IPC on the file of the Judicial Magistrate No.1 Tirunelveli.⁵ The respondents had filed a private complaint against an official publication in an issue of the Economic Times Magazine, titled “Scam on the Shores.” The issue reported that the respondents were conducting illegal beach sand mining of atomic minerals like monazite across the southern coastline of Tamil Nadu. They further alleged that the mining was occurring in monumental

²Gordon v. Marrone, 590 N.Y.S. 2d 649, 656 (N.Y. Sup. Ct. 1992).

³INDIA PEN. CODE, sec. 499/500.

⁴*Grievance Redressal Officer, M/S. Economic Times Internet Ltd., and Others v. M/S V.V. Minerals Pvt. Ltd.*, 2020 SCC Online Mad. 978.

⁵See *id.* para. 1.

proportions. Mrs. Sandhya Ravishankar, the third petitioner and author of the publication, had based the article on public interest litigation filed before the Madras High Court. The report also further alleged, due to this illegal mining, the local residents had been exposed to serious health hazards.⁶

In response to this report, the respondents sent a legal notice to the petitioners refuting the publication's allegation. The respondents further alleged that the report had been written out of malice and ill-will for the company. They based their allegation on the fact that the respondents had earlier rejected a job application from the author's husband to work for the company. The respondents demanded a retraction and a publicly published apology from the newspaper, which was not complied with. In response, the respondents filed a private complaint before the Judicial Magistrate of Thirunelveli. The Magistrate after examining the evidence and witness found a *prima facie* case under Section 500 read in conjunction with Section 109 of IPC.⁷ The petitioners in return filed a Criminal Original Petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC)⁸ to quash the case before the Madras High Court.

III. DISPUTED ARGUMENTS AND QUESTIONS

The learned counsel for the petitioners relied on their previous claims set out in their memorandum and various precedents for the impugned proceedings to be quashed. The learned counsel for the respondents, on the other hand, argued that the report published was defamatory and it caused irreparable damage to the respondents by harming their reputation. He further argued that the writing was actuated by malice because the wife was exacting revenge on the respondents for rejecting her husband's employment application.⁹ The petitioners contended

⁶*See id.*

⁷INDIA PEN. CODE, sec. 109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.

⁸CODE CRIM. PROC., sec. 482. Saving of inherent powers of High Court. – Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

⁹*See id.* para. 3.

that the report published fell within the third exception of Section 499 of IPC.¹⁰ To that, the respondent's counsel argued that such a defence was factual in nature. Hence, in this case the judge did not have the authority to go into such matters on account of these proceedings being brought under Section 482 of the CrPC. Lastly, the learned counsel went on to allege that the report was based on a Public Interest Litigation (PIL) filed by the renowned Geologist, Thiru Victor Rajamanickam, who was acting on behalf of a business rival of the respondent.

IV. THE JUDGMENT

The Court first answered the question of whether the report had actually been published out of hatred and malice. The Court thoroughly denied this claim. There was no material placed before the court to accept such a claim. Further, the Court reasoned that the author was an independent freelance journalist, and if the claim was accepted, it would amount to undermining the agency of the woman. The Court rejected the assumption that the author lacked personal autonomy, but rather had the capacity to act on her own will and choice. The Court further quoted, "*I cannot assume that the third petitioner was a pawn or tool at the hands of her husband.*"¹¹ Hence, the fourth petitioner (her husband) was removed from the array of people accused.

Justice G.R. Swaminathan then went on to discuss the need for free speech and its relationship with defamation laws. Relying on defamation precedents, Swaminathan, J. noted that the landmark case, *New York Times v. Sullivan*¹² had previously been cited in *R. Rajagopal v. Tamil Nadu*¹³ with major consensus. Building on that, he read the Sullivan principle into the Exceptions to Section 499 because the freedom of the press was an issue before the court. The Sullivan principle was held by the Supreme Court of the United States in a case involving the police commission and prominent civil rights leader, Martin Luther King Jr.

¹⁰ This deals with conduct of any person touching any public question. IND. PEN. CODE, 1860, sec. 499.

¹¹ See *Economic Times Internet Ltd.*, para. 9.

¹² *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹³ *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 S.C. 264.

The Court in a unanimous decision held that speech criticizing the government could be “caustic or offensive.”¹⁴ The need to protect speech about public issues and officials which was in public interest outweighed the seldom ‘erroneous’ statements made about a public official.

The Court went on to hold that the standard for courts was not whether the statement was true or false, but rather whether the statements were published with ‘actual malice’ by the publisher. Actual malice was defined as publishing the statement with knowledge that it was false or with reckless disregard of whether it was false or not.¹⁵ Justice Brennan, who delivered the judgment noted the requirement of ‘breathing space’ for free speech to thrive in a democracy.¹⁶ Breathing space was the space needed to commit errors, which he noted, were bound to occur in a free debate. Hence, it was required that this speech be protected.

Hence, holding that the press always had a margin of error, the width of such a margin would vary from case to case depending on the facts and circumstances. He further went on to hold that the media had the option of availing this defense regardless of whether the complainant was a public official or a private entity. Swaminathan vehemently held that “*mere inaccuracies in reporting cannot justify the initiation of prosecution*”.¹⁷ The Court read the Sullivan principle into Exceptions 2 and 3 of Section 499. Exception number 3 refers to the conduct of a person regarding a public question.¹⁸ This was understood to mean by the court as “*an issue in which the public or the community at large has a stake or interest*”.¹⁹

Further, it was argued by the respondents that Exceptions were based on facts and therefore the court did not have the jurisdiction, and the matter would have to be relegated to a trial court. The Court rejected this argument. The accused in criminal defamation matters have the remedy to move to the High Court under

¹⁴*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁵*See id.* at 280.

¹⁶*See id.* at 272.

¹⁷*Economic Times Internet Ltd.*, para. 14.

¹⁸*See supra* note 10.

¹⁹*Economic Times Internet Ltd.*, para. 15.

Section 482 CrPC, a provision for the inherent powers of the High Court to end injustice. The Court argued that under this provision, courts had a duty to not only exercise it but also exert itself a bit, due to the courts' 'ethical imperative'. Hence, since Constitutional Courts had the onus to be proactive for the protection of fundamental rights, they were obliged to examine the defense of the accused. Thus, if one of the defenses fell under the Exceptions to defamation, the Court had the imperative to dismiss it there on the point, instead of relegating the matter to the trial court.

The Court, upon examination, found mistakes within the report which although were later rectified. Further, noting that the original PIL was filed by Thiru Vaikundarajan, it was converted into a *suo moto* PIL, the Court also placed reliance on Article 51(A) (i) which states that it is the duty of every Indian to safeguard public property.²⁰ Hence, since the matter pertained to mining public beaches for sand minerals, the Court found that the statement fell under Exception 3 of Section 499 of IPC.

In accordance, the court found the complaint was an abuse of the process of the court and justice would only be served by quashing the proceedings, which the court went on to do.

V. ANALYSIS OF THE JUDGMENT

Quashing a criminal defamation case is not easy in India. This is because, under Section 499 of IPC, the offence of defamation is entertained with the existence of a defamatory imputation, wherein the accused had the knowledge or intention that it was likely to cause harm to the complainant.²¹ Although Section 499 provides Exceptions, these can only be availed once the trial has begins. Hence, an imbalance is attained wherein the cost to silence and intimidate is

²⁰INDIA CONST., art. 51(A)(i).

²¹See Gautam Bhatia, *A Sullivan for the Times: The Madras High Court on the Freedom of Speech and Expression*, May 16, 2020, <https://indconlawphil.wordpress.com/2020/05/16/a-sullivan-for-the-times-the-madras-high-court-on-the-freedom-of-speech-and-criminal-defamation/>. (last visited May 31, 2021).

exceptionally low. But the cost of free speech and expression bears a heavy price, including a tedious and protracted lawsuit in addition to the possibility of being incarcerated. These are the essentials of SLAPPs. Where a lawsuit is filed with ease, in an effort to censor and subjugate, but the defendant suffers not because of losing the case, rather due to the costs associated with successfully defending himself in the drawn-out court case, involving his time, resources, and energy. Hence, the procedure is the penalty for the defendant.

Therefore, the fact that Swaminathan, J. proceeded to quash the proceedings in a summary proceeding based on Exceptions to Section 499 of IPC is a pivotal point for defamation cases and SLAPPs. The feat, he based on two key points. He first, interpreted previous defamation landmark cases in India and followed up on a logical conclusion.²² The Sullivan principle was first incorporated in Indian jurisprudence in the Supreme Court case of *R. Rajagopal*.²³ The Supreme Court here applied the principle in civil defamation cases, wherein ‘breathing space’ was provided to journalistic speech, and the rule of ‘actual malice’ was incorporated. Subsequently, in *Petronet LNG Ltd. v. Indian Petro Group and Anr.*,²⁴ the principle’s application was extended from public officials to cases that involved matters of ‘public interest’. Hence, although the decision was a victory for free speech in India, it left a gap in Indian laws because this enabled civil defamation to have more barriers and safeguards than criminal defamation. Where in the latter entailed a prison sentence.

This argument was raised in the case *Subramaniam Swamy v. Union of India*.²⁵ Unfortunately, the argument was shot down by the Supreme Court, which in turn augmented the right to reputation as a part of Article 21 of the Indian Constitution. The Court further declined the reading of Sullivan principles into the exceptions of Section 499, holding it as an alternative “reading down” of Section 499. This case cemented the avenue of criminal defamation for petitioners because of the added element of ‘reputation’ as a fundamental right and in consequence, exacerbated the chilling effect.

²²See *id.*

²³See *supra* note 13.

²⁴*Petronet Lng Ltd v. Indian Petro Group*, (2009) 158 D.L.T. 759.

²⁵*Subramaniam Swamy v. Union of India*, (2016) 7 SCC 221.

Opportunely, Swaminathan, J. in this case took a different path than the Supreme Court. By placing reliance upon previous landmark cases and extending their principles, he held that Exceptions 2 and 3 of Section 499 which involved comments on public servants' public conduct and public questions already concealed the Sullivan principle. Hence, since the Sullivan principle was already incorporated by previous laws, Swaminathan J. shrewdly added the doctrines of 'breathing space' and 'actual malice' to the Exceptions of Section 499. He noted, journalistic speech for public issues should always contain a margin of error. This margin could be decided from case to case depending on the facts and circumstances.²⁶ Swaminathan's incorporation of the Sullivan principle into Section 499's Exceptions further brought equilibrium between civil and criminal defamation by bringing the latter up to mark with the former.

Hence, by applying actual malice to Exceptions 2 and 3 of Section 499, the previous existing imbalance has been thwarted. Actual malice relies upon the intent with which the statement was made. The burden of proving such intent is on the person claiming to have been defamed. The onus of establishing intent is a difficult one and thus decreases the chances of holding a person liable under this standard. Even if a person profited through the publication of such statements, it is completely inconsequential to the 'actual malice' standard. Actual malice can only be established if it can be proved that the statements were made with reckless disregard of the truth and knowledge that was false. Any unintentional errors do not fulfil the standard. Thus, the incorporation of actual malice completely changes the dynamics of the Exceptions of Section 499 and further increases the difficulty of proving defamation before the Court.

The second issue pertained to the powers of the Court in summary examinations brought under Section 482 CrPC. The issue before the Court was whether it had the power to entertain exceptions to Section 499 in the summary examination or only at the stage of the trial. Justice Swaminathan allowed the former by noting that under India's Constitution, the right to free speech was the 'default' and entailed restrictions only as exceptions. He held for this to be read into Section 499 and entertaining matters under Section 482 CrPC. Hence, the petitioners if

²⁶*Economic Times Internet Ltd.*, para. 14.

able to bring their statements within an exception would not have to return to trial. He noted, “*Such an activist role will have to be played by the higher judiciary because it is a matter of record that criminal defamation proceedings have become a tool of intimidation. . .*”²⁷

It is well settled in law that Section 482 CrPC can only be exercised when there exists no other remedy for the litigant and where no specific remedy has been provided by the statute. In the case *State of Karnataka v. Muniswami*,²⁸ the court envisaged three reasons for exercising the court’s inherent jurisdiction, namely “*to give effect to an order under CrPC, to prevent abuse of the process of the court and to secure the ends of justice*”.²⁹ Keeping this in mind, Justice Swaminathan’s application of Section 482 to avoid the trial stage is completely within the realm of the court’s inherent jurisdiction. In *Romesh Thappar v. State of Madras*,³⁰ the court held that the freedom of expression included the freedom of press as well, this included the power to publish and circulate. Although, defamation suits filed against the press are frequently frivolous and meritless which only go on to abuse the process of the court and burden the defendant. Further, the prolonged cases are arduous and painstaking on the defendant who bears the litigation costs. The phrase, justice delayed is justice denied, aptly fits here and thus, shortening the time period of cases by allowing exceptions to be invoked before the trial stage certainly secures justice for the defendant.

Thus, single-handedly Justice Swaminathan served a blow to SLAPPs by shortening the period of a lawsuit. Wherein the procedure is the penalty, shortening the procedure will also shorten the penalty. Moreover, public participation is also bound to increase because people now find a clear route available if they are accused of defamation. Lastly, and most importantly, due to the incorporation of the Sullivan principle, people will not err on the side of caution which ultimately leads to self-censorship. The ability to commit errors without being penalized not only allows breathing space for journalistic speech but also reduces the breathing space available to public officials and

²⁷*Economic Times Internet Ltd.*, para. 20.

²⁸*State of Karnataka v. Muniswami*, AIR 1977 S.C. 1489.

²⁹*Id.* para. 7.

³⁰*Romesh Thappar v. State of Madras*, AIR 1950 S.C. 124.

corporations who now have higher scrutiny on themselves and lesser opportunities to intimidate those who scrutinize them.

VI. CONCLUSION

Justice Swaminathan in his judgment has provided a victory for the fundamental rights enumerated in the Constitution of India. He cannot be deemed as an “activist” judge as he balanced the equation between freedom of speech and its restrictions. The availability of criminal defamation as a readily available tool to harass and intimidate critics was a misuse of the restrictions under Article 19(2) of the Indian Constitution. This low cost on restrictions led to easily filed SLAPPs which were vexatious and meritless and had a dire impact on public participation. Justice Swaminathan in return has restored balance by determining free speech as the default and holding restrictions as the exceptions. Based on Section 482, he provided Constitutional Courts the powers to hold whether the accepted facts, based on the complainant’s best case, could attract the exceptions. This significantly expedites the process by shortening the time period of a case, which in turn consequently protects journalist speech due to the reduced burden on the defendant.

Justice Swaminathan further drew a logical conclusion to the confusion attached with previous defamation landmark cases. The Sullivan principle was first incorporated in *R. Rajagopal*, but its application was only limited to the civil defamation case, which led to a paradox where civil defamation was more protective than criminal defamation. Justice Swaminathan has incorporated it in criminal defamation. Not only has this reduced the burden on the defendant but also has provided journalistic speech the opportunity to commit mistakes without facing heavy repercussions.

Thus, Justice Swaminathan in one short judgment has balanced the powers of freedom of speech against its restrictions, solved the paradox between criminal and civil defamation, shortened the time period of criminal defamation cases, and most importantly, thwarted SLAPPs by providing journalistic speech with its long-deserved ‘breathing space’.

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