R M L N L U

LAW REVIEW

ISSN: 0975 - 9530

2023

Volume 13

JOURNAL COMMITTEE

DR. RAM MANOHAR LOHIYA NATIONAL LAW UNIVERSITY

Subscription Details

Inland	Abroad
Rs. 250.00	US $ 20.00
	UK £ 10.00

Annual Subscription

Subscriptions may be sent via Demand Draft in favour of *Finance Officer, Dr. Ram Manohar Lohiya National Law University* to the following address:

RMLNLU Law Review
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Sector - D1, LDA Colony, Kanpur Road Scheme
Lucknow – 226012
Uttar Pradesh, India.
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RMLNLU LAW REVIEW

Volume XIII, 2023

Student Editorial Board

The issue shall be cited as (2023) 13 RMLNLU LR <Page>

EDITORIAL

It is essential for law students and professionals alike, to be conversant with the happenings in the legal field. Determining what piques one's interest and merits investing time is a difficult task considering the plethora of literature available on every possible aspect of law. The Thirteenth Volume of the RMLNLU Law Review, by collating a variety of well thought out and impeccably researched articles, ensures that there is something for everyone's liking.

Natural law has a lengthy history and distinct connotations for different individuals. Analysing its relationship to positive law, application, and the term 'natural' is necessary to comprehend its development. *Deepa Kansra,* in *Conceptualising and Contextualising Natural Law,* talks about how natural law has endured for ages despite being exclusive, even among jurists who support legal positivism and explores the growth and application of natural law and explains its numerous dimensions.

Ridhi Aggarwal, in *Ecocide: Re-Initiating the Debate of Ecocentric vs Anthropocentric and Civil vs Criminal,* delves into two major approaches to conceiving environmental protection, anthropocentric and ecocentric, with the former focusing on preserving humans and the latter on environmental preservation. The author further puts forward four approaches to environmental law and has ranked them from lowest to highest deterrence regime based on the severity of punishments and necessary legislative prerequisites.

The establishment of Algeria's exclusive economic zone (EEZ) in 2018 has encountered resistance due to concerns over conflicting territorial boundaries and disagreements. In *Instituting an EEZ is anything but easy: Evolution of Maritime disputes as a consequence of the Algerian exclusive economic zone, Ahan Gadkari* explores these disagreements and confrontations, as well as the comparatively assertive political actions made by states to protect their EEZs. The paper talks about the unique factors in the Mediterranean region, the crucial need to plan for the best possible energy security strategies carefully and the way forward.

Through *My Reputation is My Reputation, None of Your Reputation: Unfurling Celebrity Rights, Nandini Biswas* explores the concept of celebrity rights. Renowned individuals often

encounter situations where their name, image, or likeness is distorted or used without permission to promote items, falsely implying their endorsement, which harms both their reputation and finances. He delves into the workings of John Locke, who endorses reaping the rewards of one's work. The paper makes an effort to compile in one place the development, characteristics, justifications, legal framework, and jurisprudence surrounding celebrity rights.

Anshul Dalmia, in his paper *'Relevant', 'International', and 'Standards' under the Technical Barriers to Trade Agreement: Three sides of a Golden Triangle,* addresses the issue of an undefined term 'relevant international standards' within the Technical Barriers to Trade (TBT) agreement and how the absence of clarity around the term leads to uncertainty and hampers effective implementation. The paper aims to navigate the jurisprudential underpinnings of the undefined term and attempts to contextualise them using interpretative tools.

Sayan Dasgupta in '*Something New and Something Borrowed': Interplay of Fanfictions and Copyright Law in India* seek to offer a deep insight into the transformative world of fanfiction and copyright laws. He highlights how fanfictions writers devote time, energy, and love to creating works that can be longer than conventional novels, despite the fact that their legal status is unclear. Plagiarism in fanfiction is frequently ignored, and there is little oversight in the fanfiction community. The study emphasises the legal safeguards accessible to fanfiction writers and the regime that may or may not grant fanfiction copyright protection.

Despite advancement on a global scale, Indian laws regarding foreign custody jurisprudence still remain ambiguous. *Prof (Dr) Ghulam Yazdani* and *Syed Mujtaba Athar,* in their paper *The Need for Recognition and Enforcement of Foreign Custody Orders in India in the Context of International Parental Child Abduction,* discuss this issue and imply that the problem might be solved by rule-based norms with regard to the best interest of the child. The paper examines the current deadlock in international custody law and suggests solutions.

We hope that the readers of the journal find the articles as interesting and helpful as the editing team did.

Happy Reading

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CONCEPTUALISING AND CONTEXTUALISING NATURAL LAW

- **Dr. Deepa Kansra***

ABSTRACT

The idea of natural law has a long history. It has had different meanings for different people and continues to occupy intellectual engagements as to the connotations of the expression 'natural law' in diverse and differing contexts. This requires delving deep into the hoarypast and analysing the gradual development of the idea of natural law through the ages. Understanding natural law necessitates exploring its relation with positive law, its application, and, notably, the import of the word 'natural' in the expression 'natural law'. Be that as it may, there is no denying the fact that there is an element of exclusivity about natural law that has kept it alive and going across generations. Even some of the jurists that adhered to the principles and tenets of legal positivism have shown an inclination towards the principles of natural law, especially as regards the relation between law and morality. It has survived the tests of time. The present paper seeks to explicate the various dimensions of natural law and explores its growth and application.

Keywords: Natural Law, Positive Law, Good Conduct, Jus Cogens, Human Rights

INTRODUCTION

To Paton, natural law has always meant different things to different people. "*Its true meaning is still a matter of controversy today*".[1] To Boucher, "*the idea of natural law has a long and intricate history.*"[2] It has been used as a weapon against oppressors, combining reason, emotion, knowledge, and passion. Despite many meanings and interpretations, natural law has considerably influenced the development and evolution of law. Its philosophical explorations and practical applications in law (domestic and international) have been particularly notable.

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[1] G W Paton, *A Textbook of Jurisprudence* (Oxford University Press 1964) 94.

[2] David Boucher, *The Limits of Ethics in Internationial Relations: Natural Law, Natural Rights, and Human Rights in Transition* (OUP 2009) 19.

To date, the progression of natural law into the working of legal and other institutions fascinates and drives the legal imagination of many.[3]

This paper sheds light on a few philosophical takes on the subject. Also included is a discussion on the application of natural law across three specific areas of law, namely (1) universal/human rights theory, (2) jus cogens norms in international law, and (3) constitution law and interpretations. Each of the three areas of law involves serious engagement with the idea of natural law. A combined reading of its philosophical meanings and practical enunciations is likely to enable an enriched understanding of one of the most curious areas of law and philosophy.

THE IDEA OF NATURAL LAW

Bearing in mind the richness of natural law in terms of its philosophical meanings, an informed discussion on it can be centered around five major themes, including (1) natural law as good conduct, (2) natural law as morality, (3) natural law and positive law, (4) reading natural law, and (5) natural law representing the dignity of life.

NATURAL LAW AS GOOD CONDUCTOR

Jus natural or natural law was originally the stoic philosophical conception of a universal ideal of good conduct. Few asserted that all laws should be founded on this ideal and that they ought not to be overridden by any other laws however made. The most significant contributions from many jurists include, first, the linking of *jus naturale* as law based on natural reason, i.e., it is discoverable by reason and immutable (unchangeable).[4] In other words, natural law exists in nature before it exists in human judgment. Second, natural law is superior to the law created by the state and its existence is independent of men. According to Davies, it is something that may be said to exist whether or not any person, judge, or legislature has ordained what the law is.[5] Third, natural law is universal in nature applying to everyone irrespective of geographical limitations. In the words of Judaeus,[6]

[3] Julia Klaus, 'The Evolution of the Prohibition of Genocide: From Natural Law Enthusiasm to Lackadaisical Judicial Perfunctoriness - And Back Again?' (2021) 11(1) Goettingen Journal of International Law <www.gojil.eu/issues/111/Klaus_Final.pdf> accessed 2 July 2022.
[4] H H Marshal, *Natural Justice* (Universal Law Publishing Co Pvt Ltd 1998) 6.
[5] Margaret Davies, *Asking the Law Question* (Law Book Company 2008) 73.
[6] M J Sethna, *Jurisprudence* (Bombay: Lakhani Book Depot 1959) 71.

> The natural law is…not an ordinance made by this or that mortal, corruptible and perishable law, a lifeless law written or lifeless parchment, or engraved on lifeless column; but one imperishable and impressed by immortal Nature on the immoral land.

Another feature of natural law has been its role in creating intersections between law and morality.[7] The main claim of natural law theorists is "*what naturally is, ought to be*".[8] According to Murphy, the central claim of natural law jurisprudence is that there is a positive internal connection between law and decisive reason for action, and a strong motivation backs law for action. Based on this understanding, social, personal, and political matters concerning abortions, homosexuality, same-sex 'marriages', and marital infidelity have on different occasions been tested on the principles of natural law. [9] In this regard, Cotterrell writes;[10]

> Throughout its long history, natural law theory has postulated the existence of moral principles having validity and authority independent of human enactment and which can be thought of as a "*higher*" or more fundamental law against which the worth or authority of human law can be judged. This fundamental 'natural law' is variously seen as derived from human nature, the natural conditions of existence of humanity, the natural order of the universe, or the eternal law of God. The method of discovering it is usually claimed to be human reason. Natural law thus requires no human legislator. Yet it stands in judgment on the law created by human legislators.

A part of its understanding is that natural law includes both the laws of the physical world and the laws which govern human thought and behaviour.[11] Years ago, Cicero observed;

> True law is right reason in agreement with Nature. It is of universal application, unchanging and everlasting….it is a sin to alter this law, nor is it allowable to repeal a part of it, and it is impossible to abolish it entirely…there will not be

[7] Alexander Passerin D'Entreves, *Natural Law* (First Published 1994, Routledge 2017) 116.
[8] Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (OUP 2006) 1.
[9] Michael D A Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 2014) 83-90.
[10] Roger Cotterrell, *Politics of Jurisprudence* (OUP 2003) 115.
[11] K K Mathew, *Three Lectures* (Eastern Book Company 1983) 36.

> different laws in Rome and at Athens or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times.

To Bix, Cicero introduces four core premises of traditional natural law including (1) Natural law is unchanging over time; (2) It does not differ in different societies; (3) Every person has access to the standards of this higher law; and (4) Every person has access to it by use of reason.[12]

NATURAL LAW AND POSITIVE LAW

Natural law is the sum total of all those norms which are valid independent of, and superior to any positive law. In other words, these norms of natural law owe their dignity not to arbitrary enactment. On the contrary, they provide the very legitimation for the binding force of positive law.[13] According to Hart, there are certain principles of human conduct awaiting discovery by human reason, with which man-made law must conform if it is to be valid.[14] According to Crowe, there are two elements subsumed in Hart's description of natural law. First, specific objective ethical principles are "*accessible to all humans by their rational capacities*." Second, it is impossible to fully determine a law's validity without having reference to these fundamental ethical ideas. In this context, Friedmann states that the most important and lasting natural law theories have undoubtedly been inspired by the two ideas of a universal order governing all men and the individual's inalienable rights.[15]

All in all, a belief in the existence of objective moral principles is a necessary prerequisite for a tenable natural law theory. And this very aspect of the natural law tradition has been explored time and again. According to Gardner,[16]

> Natural law, in the tradition of that name, is not the same thing as human law. Natural law is the same thing as morality. It is the higher thing to which human law answers. We may regret that members of the tradition seem to feel a need

[12] Brian Bix, *Jurisprudence: Theory and Context* (Carolina Academic Pr 2006) 66-67.
[13] Max Weber, *Law in Economy, and Society* (Harvard University Press 1959) 287-288.
[14] HLA Hart, *The Concept of Law* (Clarendon Press 2007) 186.
[15] W Friedmann, *Legal Theory* (Sweet & Maxwell 2016) 96.
[16] Brian Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism' (2000) 75 Notre Dame LawReview <https://academia.edu/27186091/On_the_Dividing_Line_Between_Natural_Law_Theory_and_Legal_Positivism> accessed 2 July 2022.

> to present morality as a kind of law, which it is not. For a start, morality is not a system (and is not made up of systems) and nor does it make claims, pursue aims, or have institutions or officials, all of which features are essential to the nature of law. Nevertheless, even as we resist the idea that morality is a kind of law, we should endorse the idea that morality is entirely natural. It binds us by our nature as human beings, while law binds us, to the extent that it does, only by the grace of morality.

To date, the relation between natural law and positive law or man-made law has been one of the fascinating aspects of natural law. According to MacCormick, "*For long the leading jurisprudential image of natural law theory presented it as defined by the thesis that unjust laws are necessarily non-laws*".[17] On the validity of positive laws, Murphy elucidates through the prism of a "*weak natural law thesis*" and "*strong natural law thesis*". The "*weak natural law thesis*" holds that law unbacked by decisive reasons for compliance is defective precisely as law. The "*strong natural law thesis*" holds that law unbacked by decisive reasons for compliance is no law at all. And common to both is the premise that positive law or man-made law must conform to natural law.

READING NATURAL LAW

The larger-than-life canvass of natural law sometimes leaves students of natural law bemused, often questioning how and from where to start reading it. A.P. d'Entréves, in the prefatory chapter of his book *Natural Law* deals with this question. He writes,

> In my opinion what really calls for attention on the part of the modern student is the function of natural law rather than the doctrine itself, the issues that lay behind it rather than the controversies about its essence.

Another matter is that natural law as a part of ethics and politics is intrinsically different from the notion of the law of nature, which the scientists elaborated.[18] In the domain of ethics and politics, there is something *sui generis* about it, which has kept it alive and going in the realm

[17] Robert P George, *Natural law Theory: Contemporary Essay* (Oxford University Press 1992) 106.
[18] HLA Hart, *The Concept of Law* (Clarendon Press 2007) 186.

of jurisprudence. In this regard, Gurvitch[19] identifies the six different uses of the term natural law, including:

1. As a moral justification of all laws
2. As the prior element of the law
3. As an ideal by which existing positive law can be judged
4. As referring to immutable and not variable rules
5. As "autonomous" law is valid because it is based on an ideal
6. Droitspontane as opposed to law fixed by the state.

According to Paton, these six divisions seem to overlap significantly, making the study of natural law complex. Further, one may also consider additional categories representing other natural law aspects, namely:

1. Ideals that guide legal development and administration
2. An essential moral quality in the law that prevents a total separation of the 'is' from the 'ought.'
3. The method of discovering perfect law
4. The content of perfect law deducible by reason
5. The conditions *sine quibus non* for the existence of law.

Such conceptual fuzziness or open-endedness is undoubtedly an obstacle to a proper and clear understanding of what natural law means or connotes. Nevertheless, a student of natural law ought to find some golden thread that runs through the above conceptual maze. This golden thread can be that foundational idea that has been the bedrock of the various theories of natural law in some form or other at some point in time. The starting point for such efforts must be through the multiple meanings, and interpretations applied.

DIGNITY OF LIFE

Part of the pursuit is to determine what natural law has meant to society. Verdross writes, "*natural law is the sum of rationally discernible principles of social ordering which comport*

[19] Georges Gurvitch, *L'Expérience Juridique Et La Philosophie Pluraliste Du Droit* (A Pedone 1935) 103.

with the dignity of human beings and are required to make possible their co-existence in society." To Paton, "*dominating all the doctrines of natural law is the thought that law is an essential foundation for the life of man in society and that it is based on the needs of man as a reasonable man and not on the arbitrary whim or a ruler*." Soltan introduces concepts like conflict prevention, justice, power, etc. He writes,[20]

> Principles of natural law transform power into authority. We can speak here of the sovereignty of justice, or of certain kinds of good ends, discoverable by a science of good ends, and enforceable in courts. These are good ends, then, which are relevant to the resolution and prevention of conflict.

Bringing in an element of constitutionalism, Cranston writes, the concept of 'due process' draws its nourishment from natural or higher law so also the concepts of 'reason' and reasonableness' draw the juice for their life from the law of reason which for the common law lawyer is nothing but natural law.[21]

In sum, natural law theories propose to identify the fundamental aspects of human well-being and fulfillment, i.e., basic human goods and norms of human conduct.[22]

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DEVELOPMENT OF NATURAL LAW

The history of natural law is a tale of humankind's search for absolute justice. In the last 2,500 years, natural law has appeared in some form or other as an expression of the search for an ideal higher than positive law. The notions of natural law have changed and evolved with changing social and political environments, with one constant at its center; an appeal to something higher than positive law. The constant i.e., "*something higher than positive law*," responds to the question of what makes a theory a "*natural law theory*", given that many theories of natural law have developed over a long period after natural law emerged in Greek philosophy?

In several works, an examination of natural law generally begins with Antigone's unwritten laws and then stoics. Cicero enters briefly and is accompanied in "*cameo appearances*" by

[20] Karol Soltan, 'Natural Law, Universal Human Rights and Science' (2003)12 The Good Society <https://muse.jhu.edu/article/171429/pdf> accessed 2 July 2022.
[21] Maurice Cranston, *What are Human rights*? (Bodley Head 1973).
[22] Keith E Whittington and R Daniel Kelemen (ed), *The Oxford Handbook of Law and Politics* (OUP 2008) 399.

Aquinas, Grotius, and Blackstone.[23] According to Mathew, natural law is a heritage of the Greek[24] and Christian thought. It goes back to Grotius and before him to Suarez and Francisco de Victoria and further back to St. Thomas Aquinas and still further back to St. Augustine and Church fathers. It even goes further to Cicero, the Stoics, the great moralists of antiquity, and its great poets, particularly Sophocles. From the Stoics until the eighteenth century, Western ethical thought has, in one way or another, revolved around some version of natural law.[25] The seventeenth and eighteenth-century thinkers understood natural law was prominent in ancient and medieval thought. However, it acquired a new role with the division of Christianity and the emergence of modern statehood in their eyes. On this, Haakonssen observes:

> At the turn of the eighteenth century we have… a major discussion across Protestant Europe that can be said to be a three-cornered contest between, first, a variety of traditional confessional standpoints according to which morality has its basis in revelation; second, the new, provocative voluntarism started by Hobbes and Pufendorf and continued by Thomasius; and, third, a rationalist and realist view of natural law that had significant debts to scholastic, especially Thomistic, theory and is typified by Clarke, Leibniz and Christian Wolff. The interaction between these intellectual currents was, however, exceedingly complex.

The classical natural law of the seventeenth and eighteenth centuries was a legal by-product of the forces that transformed Europe due to the Protestant revolution. However, it does not convey that classical natural law marked a break or detachment from medieval and scholastic legal theory. Many "*links and influences*" connected Aristotelian and scholastic thinking with the doctrines of the classical law-of-nature philosophers, especially those of the seventeenth century. Notwithstanding the "*influences and links,*" characteristics associated with the classical natural law set it apart from the medieval and scholastic natural law. A somewhat universalistic view on the origins of natural law comes from Ratnapa la;[26]

[23] Costas and Gearey, *Critical Jurisprudence* (Hart Publishing 2005) 16.
[24] Stephen James, *Universal Human Rights: Origins and Development* (LFB Scholarly Publishing 2007); S Buckle *Natural Law A Companion to Ethics* (1999).
[25] Ana Marta González, *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept* (Routledge 2008) 16.
[26] Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2009) 119.

> The idea of a higher moral law that positive human law must not violate has a long and continuous history in both Western and Eastern thinking. It is found in Greek philosophy at least from the time of Heraclitus of Ephesus (c. 535–475 BC). It has a central place in Judeo-Christian doctrine as set out in the writings of Augustine, Thomas Aquinas and the Scholastics. It lived in the natural rights discourses of Grotius, Hobbes, Locke, Pufendorf and others. In Vedic (Hindu) philosophy the moral law of governance is revealed in the Dharmasastra. In traditional Sinic culture, Confucian philosophy subordinated law to ethics. The religious *Sharia*is a powerful influence on the law of Islamic nations. In our age, basic human rights are posited as universal higher norms binding on nation states. In Western philosophy such higher moral law is commonly known as natural law.

NATURAL IN "NATURAL LAW"

Hume long ago wrote that the word *natural* is commonly taken in so manysenses and is of loose signification. According to Bix, there was a certain ambiguity in the works of Cicero and other related remarks of Greek and Roman writers regarding the reference of natural in natural law. The prevalent ambiguity was primarily because of the lack of clarity about whether standards were "*natural*." Finnis raises a question;[27]

> What does the mainstream of natural law theory intend by using the word "*natural*" in that name for the theory?

According to Davitt, if the word "*natural*" means anything, it would be the nature of a man. And when used with "*law*," "*natural*" must refer to an ordering that is manifested in the inclinations of a man's nature and to nothing else.[28] Simply put, it is natural because it is discoverable by reason. Modern natural law theorist Maritain believes that the first principles of natural law are known not rationally or through concepts but by an activity that Maritain, following Aquinas, called "*synderesis*". Thus, "*natural law*" is "*natural*" because it reflects human nature and is known naturally.[29] According to Boyle, "*the fundamental prescriptions of*

[27] *Stanford Encyclopedia of Philosophy* (2020 edn).
[28] Murray N Rothbard, 'Introduction to Natural Law' (*Mises Daily Articles*, 2021) <https://mises.org/library/introduction-natural-law> accessed 2 July 2022.
[29] *Stanford Encyclopedia of Philosophy* (Fall edn 2001).

natural law are held to have sense and reference, and indeed to be truths of a kind".[30] In the present age, these truths hold immense value in individual and institutional minds within systems across the world.

NATURAL LAW AND ITS APPLICATION

The expression "application of natural law" invites two contexts: the first concerns using natural principles in law-making and reforms. The second concerns the extent to which law or legal judgment has relied upon the principles of natural law. Scholars have given a diversity of views on the application of natural law in general. Olivecrona writes, natural law is a system of norms and principles suitable for guiding the conduct of free agents.[31] According to Hittinger, natural law can be reserved for an important but narrow problem, i.e., the articulation of some basic human goods or needs that any system of positive law must respect, promote, or in any case protect. On that premise, "natural law would disclose the overlap of law and morality requisite for legislation and the public and legal vindication of individual rights."[32]

In the domain of domestic and international law, three frameworks have most closely been tied to the idea of natural law. These include (1) the universal/human rights frameworks, (2) jus cogens norms in international law, and (3) constitutional law and interpretations. Each of the three have played a vital role in securing and advancing natural law principles.

UNIVERSAL/HUMAN RIGHTS

The phrase universal human rights implies that human rights are universal standards which apply to all human societies. The universal rights theory is viewed as an extension of natural law theory. In other words, modern conceptions of human rights have their origin in the idea of natural rights. The concept of natural rights essentially connotes those conditions which enable the attainment of moral ends shared by all human beings. For natural rights theorists, these rights are objective as long as the ultimate human end is objectively true and not in question. Since the human legal order must not be contrary to men's ends, a law contrary to the

[30] Joseph Boyle, 'Natural law and the Ethics of Traditions' in Robert P George,(ed), *Natural law Theory: Contemporary Essays* (Clarendon Press 1994) 4.
[31] Karl Olivecrona and Thomas Mautner, 'The Two Levels in Natural Law Thinking (2010) 1 Jurisprudence.
[32] Russell Hettinger, 'Natural law and Virtue: Theories at Crossroads' in Robert P George (ed), *Natural law Theory: Contemporary Essays* (Clarendon Press 1994) 42.

natural right is no law. It may be enforced, but it lacks legitimacy. Thus, the theory of natural rights implies moral objectivism and value monism, i.e., the belief that moral values represent objective truths that are not in conflict but are harmonious or hierarchically ordered.[33] According to Maron;[34]

It has been assumed that in order to classify a specific constitutional human right or freedom as a natural right the literal reference to it as "natural" or "inherent" will be decisive. Both these terms reveal a supra-positive source of origin for a given human right, i.e., the binding force of this right is not derived from a normative act. The constitution-maker, speaking about the natural or inherent nature of a particular right, thus communicates that he is not its creator, but only he confirms and guarantees this right.

In light of his investigations into seventeenth-century natural law theory, Olivecrona finds that the "sacrosanct character of the natural person" is at the heart of modern natural law theory. This feature explains the nature of the wrongdoing, the justifiable use of force, and the creation of rights and obligations.[35] On the connections between natural law and universal rights, Weinreb writes, "This connection, properly understood, respects natural law's enduring tradition and, at the same time, reflects the contemporary analysis of the concept of rights. It takes seriously the task, essential for a full theory of rights, of establishing the independent reality of rights, rather than deriving them dependently from obligations or posited rules". According to Weinreb, natural law is a philosophy of rights.[36]

[33] Gunnar Beck,'The Idea of Human Rights between Value Pluralism and Conceptual Vagueness' (2007) 25 Penn State International Law Review.
[34] Grzegorz Maroń and Przegląd Prawa Konstytucyjnego, 'References to Natural Law in the Constitutions of Modern States' (*Research Gate* 2020) 27 <www.researchgate.net/publication/348448102_References_to_Natural_Law_in_the_Constitutions_of_Modern_States> accessed 2 February 2022.
[35] ibid [201].
[36] Lloyd L Weinreb, 'Natural Law and Rights' in Robert P George (ed), *Natural law Theory: Contemporary Essays* (Clarendon Press 1994) 298.

JUS COGENS NORMS OF INTERNATIONAL LAW

In international law, *jus cogens* norms are superior or compelling norms, which are to be adhered to by all members of the international community. On the status of *jus cogens* norms, Article 53 of the Vienna Convention on Law of Treaties (1969) provides:[37]

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.
>
> For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 26 (Compliance with peremptory norms) provides:[38]

> Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

According to Janis, *jus cogens* norms have a distinctive character in international law.[39] In *Jus Cogens*: *Compelling Law of Human Rights,* Parker refers to *jus cogens* as being developed as a natural law concept while being incorporated as part of legal positivism and modem international law. He further writes, "*jus cogens is an attribute of natural law*".[40] The following qualities of *jus cogens* norms further illuminate on the importance of "*higher norms*" in international law;

1. *Jus cogens* norms are non-derogable.

[37] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[38] International Law Commission, *Responsibility of States for Internationally Wrongful Acts, with commentaries* (A/56/10, 2001).
[39] Mark Weston Janis, 'The Nature of Jus Cogens' (1988) 3 Connecticut Journal of International Law 359, 361.
[40] Karen Parker, 'Jus Cogens: Compelling the Law of Human Rights' (1989)12 Hastings International and Comparative Law Review 411, 414.

2. They are fundamental norms.

3. They provide validation to rules of law.

4. They represent principles of natural law.

5. They have universal application and validation, i.e., they represent the interests of the international community and humanity. According to Parker, an aspect of the universality of *jus cogens* is its presence in national legal systems regardless of the type of national legal system.

6. They inform positive laws including the substantive and procedural aspects. According to Parker, there are judicial advantages of *jus cogens*, they provide legal standing and allow for the assumption of universal jurisdiction.

There are several works of international, regional, and domestic institutions that establish the importance of *jus cogens* norms. These include the works of the International Law Commission, the human rights treaty bodies, the International Court of Justice, the regional human rights courts, the domestic courts, etc. In 2022, the International Law Commission adopted the *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)*. The Commission, in its Report, identifies norms (non-exhaustive list) that constitute *jus cogens* norms. These include the (a) the prohibition of aggression, (b) the prohibition of genocide; (c) the prohibition of crimes against humanity, (d) the basic rules of international humanitarian law, (e) the prohibition of racial discrimination and apartheid, (f) the prohibition of slavery, (g) the prohibition of torture, and (h) the right of self-determination.[41] The Commission also noted the use of *jus cogens norms* in the working of international and regional courts, national courts, States and other actors. The Report of the ILC is of particular importance in determining the legal jurisprudence on the subject matter. *Jus cogens* norms, according to the ILC, perform a dual function of reflecting and protecting the fundamental values of the international community.

On that note, the application of *jus cogens* in the advancement of legal reforms has been noted on several occasions. This can be understood in light of the recent efforts to reform the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

[41] International Law Commission, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), with commentaries* (A/77/10, 2022).

or Punishment (UNCAT, 1984) to include acts of torture committed by private persons. In its present form, the UNCAT covers within its scope acts of torture committed by State actors. In this regard, Emilie Pottle speaks for expanding the scope of the Pottle states,[42]

> In my view, the protection of the inherent dignity of the person is the rationale which underpins, or in the case of the UNCAT, ought to underpin, the rules prohibiting torture. Torture represents the most serious violation of the right to physical integrity. Though typically conceived of as the mistreatment of (male) detainees by their captors, it encompasses sexual violence and has evolved into a jus cogens norm.
>
> The need to protect the inherent dignity of the person is also evident in the legal instruments which express the prohibition. The preamble to the UNCAT states that the parties to the Convention recognise the 'equal and inalienable rights of all members of the human family' and 'those rights derive from the inherent dignity of the human person'. The preambles to the so-called 'general human rights treaties' — the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) — contain declarations in similar terms. This rationale means that it is necessary to protect human beings from torture whether the perpetrator is a public official or not. If what matters is that the victim has suffered a serious violation of her rights, then the status of the perpetrator as a public or private actor is not relevant.

Another illustration is the use of *jus cogens* in the interpretations of regional human rights courts. The Inter- American Court on Human Rights, for instance, in its Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants (2003), while addressing the nature and scope of anti-discrimination laws raised some pertinent questions:[43]

> What is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general

[42] Emilie Pottle, 'What is Torture? Making the Case for Expanding the Definition to Include Private Individuals as Perpetrators' (2021) 19 Journal of International Criminal Justice 407.
[43] Li-Ann Thio, 'Equality And Non Discrimination in International Human Rights Law' (*The Heritage* Foundation, 31 December 2020) <https://heritage.org/sites/default/files/2020-12/SR240.pdf> accessed 2 February 2022.

> international law and, in this context, can they be considered to be the expression of norms of *jus cogens*?
>
> Can an American State establish in its labor legislation a distinct treatment from that accorded legal residents or citizens that prejudices undocumented migrant workers in the enjoyment of their labor rights, so that the migratory status of the workers impedes per se the enjoyment of such rights?

In response, the court mentions:

> …States have the general obligation to respect and ensure the fundamental rights. To this end, they must take affirmative action, avoid taking measures that limit or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right. That non-compliance by the State with the general obligation to respect and ensure human rights, owing to any discriminatory treatment, gives rise to international responsibility. That the principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international law and domestic law.
>
> That the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*.
>
> That the fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals. That the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person.
>
> That States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.

The above studies and cases provide insights on the application of natural law in various institutional settings, particularly in the deliberations on matters of immense importance to the international community and individual legal systems. These instances substantiate on the timeless quality and present-day relevance of natural law.

CONSTITUTIONS AND CONSTITUTIONAL INTERPRETATIONS

To many scholars, applying natural law theory in domestic constitutions is an exciting research area. In the book References to Natural Law in the Constitutions of Modern States, Maroń undertakes a comparative study on different constitutions of the world, particularly the countries out of 193 countries of the world.[44]

In this regard, the case of the Indian constitution is particularly illuminating. The Indian constitutional jurisprudence is centered on a natural law philosophy, revealing its dependence on its value and depth for establishing legal arguments and rules. About India, it has a constitutional history of more than fifty years. It has been witnessed to many constitutional upheavals and epochal moments. The transitions it has made through judicial decisions of the highest judicial court are appreciated and lauded. In light of Article 21 of the Indian Constitution, the court's seminal natural law-based interpretations have been seen.[45] Article 21 states;

> No person shall be deprived of his life and liberty except according to the procedure established by law.

Under the provision, one of the central themes of discussion has been the "*due process clause*". The concept of 'due process' draws its nourishment from natural or higher law and encompasses the rights of "*personal security*" and of "*personal liberty*."[46] In the case of *Maneka Gandhi* v. *Union of India*,[47] Chief Justice Beg noted:[48]

> I am emphatically of opinion that a divorce between natural law and our Constitutional law will be disastrous. It will defeat one of the basic purposes of our Constitution…the "*idea of a natural law as a morally inescapable postulate of a just order, recognising the inalienable and inherent rights of*

[44] Grzegorz Maroń and Przegląd Prawa Konstytucyjnego, 'References to Natural Law in the Constitutions of ModernStates' (*Research Gate*, 2020) <https://researchgate.net/publication/348448102_References_to_Natural_Law_in_the_Constitutions_of_Modern_States> accessed 2 July 2022.

[45] Vijayashri Sripati, 'Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)' (1998)14 American University International Law Review 413.

[46] *The Collector of Customs Madras v Nathella Sampathu Chetty* [1962] AIR 316.

[47] *Maneka Gandhi v Union of India* [1978] AIR 597.

[48] ibid [21].

> *all men (which term includes women) as equals before the law persists. It is, I think, embedded in our own Constitution*."[49]

He further added:[50]

> The idea of a natural law as a morally inescapable postulate of a just order, recognising the inalienable and inherent rights of all men (which term includes women) as equals before the law persists. It is, I think, embedded in our own Constitution.

On the Maneka Gandhi judgement, Tope writes;[51]

> The effect of the judgment in the *Maneka Gandhi case* is really revolutionary. It is submitted that the concept of reasonableness of restrictions has been introduced in the area of protection of life and personal liberty. Hence, it appears that the notions of natural law are indirectly introduced in the interpretation of Article 21….Supreme Court has indirectly introduced the concept of due process of law in the interpretation of Article 21.

To date, Indian constitutional jurisprudence continues to evolve and strengthen its fundamental principles based on ideals of natural law. According to Vakil,[52]

> Just a few months after *Maneka Gandhi* was decided, Justice Krishna Iyer, in *Madhav Hoskot v. State of Maharashtra*, held, point-blank, that under article 21, read with the other rights, "*one component of the fair procedure is natural justice*." Compounding his dismissal of the careful reading of the principles of natural justice as implicated by rights and statutes, Justice Krishna Iyer went on apply these principles to hold that the petitioner in *Hoskot* had the right to be served a copy of a judgment against him in time for him to file an appeal, and further, that the state was obligated to secure the provision of free legal services to him when he was indigent or otherwise disabled from procuring them himself. "*Both these are state responsibilities under Article 21*," he went on to hold, in a dramatic leap from the reasoning in *Maneka Gandhi*. "*Every step that makes the right of appeal fruitful*

[49] ibid.
[50] ibid [17].
[51] ibid [216].
[52] Raeesa Vakil, 'Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights' (2018) 16 International Journal of Constitutional Law.

> *is obligatory, and every action or inaction which stultifies it is unfair and ergo, unconstitutional*." Justice Krishna Iyer also invoked article 39-A, part of the Indian Constitution's list of judicially unenforceable "*Directive Principles of State Policy*" as "*an interpretative tool for Article 21*" to support his claim on natural justice.

Like the case of India, several others national courts have relied on the natural law philosophy to advance several arguments in constitutional matters.

CONCLUSION

An element of exclusivity about natural law has kept it alive and going across generations. Even some of the jurists that adhered to the principles and tenets of legal positivism have shown an inclination towards the principles of natural law, especially as regards the relation between law and morality.

In essence, natural law covers rules of conduct that apply and bind all humankind. In the words of Strauss, "*by natural law is meant a law which determines what is right and wrong and which has power or is valid by nature, inherently, hence everywhere and always*." Over the many centuries, the domain of natural law has been internalised and applied to give life, hope, reform, and humaneness to the laws of societies and nations. With the application of natural law in the realm of legal rules, concepts like universal jurisdiction (in the prosecution of crimes against humanity), procedural standing (access to justice and remedies), humanising of the law (obligations of state and non-state actors), basic rights (non-derogable and universal rights), and so on have attained the status of fundamental principles. To date, this influence informs the most complex situations before individuals, societies, and nations.

ECOCIDE: RE-INITIATING THE DEBATE OF ECOCENTRIC VS ANTHROPOCENTRIC AND CIVIL VS CRIMINAL

- **Ridhi Aggarwal**[*]

ABSTRACT

There are two major approaches to conceive the protection afforded to the environment; first there is the, anthropocentric approach which conceptualises protection given to the environment in terms of consequently protecting humans. Secondly we have the, ecocentric approach which seeks to protect the environment for the sake of environment itself and not humans. Major international legislations have envisaged environmental protection in anthropocentric approach previously. In 2021, the release of draft definition of "ecocide", proposed to become the fifth international crime under the Rome Statute, has reignited the debate around criminalising environmental harm. While the panel claims that the definition is ecocentric, the authors argue that the definition is actually anthropocentric by breaking it down into three threshold requirements. Further, while the panel has given justifications for the ecocentric nature of the definition, the authors argue that it still lacks 'practicality', is unsubstantiated and redundant.

The authors argue that a major issue with the conceptualisation of environmental laws is that differentiation between ecocentric and anthropocentric approaches is not made from a legal lens. Keeping in mind, the major goal of environmental law i.e. to prevent environmental destruction by deterring the activities of exploitation, the paper conceptualises four approaches to environment law- ecocentric civil law, anthropocentric civil law; ecocentric criminal law, and anthropocentric criminal law. These approaches are placed in a continuum from the lowest deterrence regime to the highest deterrence regime based on severity of punishment and legal prerequisites that need to be established. It is observed that firstly, ecocentric civil law is not possible; secondly, anthropocentric civil law causes least deterrence; thirdly, ecocentric criminal law causes the maximum deterrence; and finally,

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anthropocentric criminal law causes medium deterrence. This analysis is put forward as useful for policy makers as well as judicial bodies to determine the nature of law vis-à-vis deterrence caused by the law.

Keywords: Environment, Anthropocentric, Ecocentric, Civil, Criminal

INTRODUCTION

Environment refers to natural resources, and includes, nature, land, water and disaster management. The environment has been used by the humans for tangible benefits since time immemorial to fulfil their needs, wants and greed. Consequently, they have expressed strong disregard towards the interests of the environment or non-human species. Activities including hunting and poaching, deforestation, polluting water bodies and scientific experimentations have directly or indirectly benefited the human species. Although destructive activities such as deforestation cause long-term loss to humans in terms of reduced oxygen supply, the short-term physical benefit in terms of wood and paper incentivises them to pursue such activities further.

When this consequent harm to humans due to degradation of the environment was realised, there were immediate efforts to put in place legal rules to protect the environment in order to protect the humans. This approach of protecting the environment for consequently protecting humans is termed as "*anthropocentric*" approach. This is clear from the International Developmentsin the form of the Stockholm Declaration,[53] Brundtland Commission[54] and Rio De Janerio Convention.[55]

Over time, there developed an entirely different approach to protecting the environment. According to this approach, termed "*ecocentric*" approach, the environment must be protected for the protection of the environment itself, and *not* for protecting the humans. This is also clear from the International Developments, evolution of definition of "*ecocide*". However, until now, there is very little thought given to the *legal effects* of following these two approaches.

While both these approaches seem to have their own benefits to the general environment scholarship, the authors argue that the value in following both these approaches are different for general environment academician and an environment-legal academician. An academician

[53] Stockholm Declaration 1972.
[54] Brundtland Commission 1987.
[55] Rio De Janeiro Convention 1992.

should be concerned about the effect of choosing an anthropocentric approach, which effectually, adds another prerequisite to protecting the environment proving harm to humans; whereas the ecocentric approach does not have that prerequisite of proving harm to human. Since it would be easier to prove ecocentric environmental harm due to less prerequisite, it would be easier to cause deterrence to the environmental harm. Vice-versa would be true for an anthropocentric law.

Apart from whether or not there is an ecocentric or anthropocentric approach, there are two type of protections that can be rendered to protect the environment, civil (injunctions, monetary penalties etc) and criminal (imprisonment and heavy monetary penalties). Criminal sanctions are generally considered a more severe form of protection than civil sanctions.. Therefore, the effect on the deterrence caused by the criminal law is of a much higher degree than a civil law. These two metrics, anthropocentric v. ecocentric and criminal v. civil have very recently been bought into the limelight by the release of a draft definition of the ecocide by a panel of 12 jurists from around the world. This definition of ecocide has in effect re-ignited the debate between anthropocentric v. ecocentric and criminal v. civil. Therefore, this research paper considers this as the starting point to consider two important sections.

[Section 1] situates the international development of the environmental law within the realm of its purpose, whether ecocentric or anthropocentric. It starts off by giving anthropocentric declarations and laws and later moves on to the definition of ecocide. The purpose of [Section 1] and [Section 2] is to show how the legal scholarship has considered ecocentric and anthropocentric laws not for looking at how these affect the application of law but the spiritual vs selfish reasons etc. Actual difference is made out by [Section 3], which discovers a normative framework to understand different possibilities of laws, ecocentric civil, ecocentric criminal, anthropocentric civil and anthropocentric criminal. By drawing these four possibilities on a continuum from where there is maximum deterrence to where there is minimum, it lays down a policy plan for the policy-makers to determine where, which of the four possibilities should be applicable.

INTERNATIONAL DEVELOPMENT

The concerns for catastrophic environmental activities and the consequent apocalypse have received widespread attention from lawmakers for decades. These concerns have transcended political, economic and social boundaries of specific jurisdictions and have received attention on a global level. This section of the paper analyses the numerous legislations or declarations

enacted and implemented, in the international arena, for the protection and preservation of the environment. This section has been divided into two parts, *the first* part proves that the environmental protection was envisaged in an anthropocentric format; and *the second* part shows how the definition of ecocide, although acclaimed as an ecocentric introduction, is in effect an anthropocentric definition.

THE BEGINNING: A CONCEDED ANTHROPOCENTRIC TIME

STOCKHOLM DECLARATION

The United Nations Conference on the Environment in Stockholm in 1972 was the first conference that placed the environment at the forefront amongst several prevailing concerns.[56] This conference led to the adoption of the 'Stockholm Declaration' and 'Action Plan for the Human Environment' which aim at safeguarding the environment for the sake of the invested interest of humans.[57] The theme of the international conference focused on preserving and protecting natural resources like flora, fauna, air, land and water for two purposes. *Firstly*, because they are representative of the ecosystem since millions of species have already been annihilated by human exploitation.[58] Secondly, they are essential for the survival of present and future generations.[59] The declaration clearly reflects the anthropocentric approach which was at the heart of the conference.[60] The anthropocentric approach followed in this conference has also been adopted by the consequent international conferences.

SUSTAINABLE DEVELOPMENT: BRUNDTLAND COMMISSION AND RIO DE JANEIRO CONFERENCE

The Brundtland Commission Report of 1987 defined 'Sustainable Development' as meeting the needs of the present generations vis-à-vis keeping the needs of future generations in consideration.[61] The principle of sustainable development is based on the principle of

[56] United Nations, 'United Nations Conference On The Human Environment, 5-16 June 1972, Stockholm'(2021) <https://un.org/en/conferences/environment/stockholm1972> accessed 7 August 2021.
[57] Günther Handl, 'Declaration Of The United Nations Conference On The Human Environment Stockholm, 16 June 1972 and Rio Declaration On Environment And Development Rio de Janeiro, 1992' (*Legal UN*, May 2012) <https://legal.un.org/avl/ha/dunche/dunche.html> accessed 1 August 2021.
[58] Stockholm Declaration 1972, principle 2.
[59] Stockholm Declaration 1972, principle 2.
[60] Stockholm Declaration 1972, principle 1.
[61] United Nations, Report of the World Commission on Environment and Development: Our Common Future (A/42/427, 1987).

intergenerational equity. Various scholars have argued that the idea of sustainable development clearly has an anthropocentric bias.[62]

In the Rio de Janeiro Conference of 1992, the 'Earth Summit' Declaration was adopted.[63] The Principle 1 of this declaration entailed that "*humans are at the centre of concern for sustainable development*" and entitled to a healthy life in harmony with nature.[64] Principle 6 of the Rio Declaration also recognised that since humans are centric to sustainable development, a fair, just, and inclusive social and economic model for development and environmental protection should be strived for.[65] All of these declarations lay emphasis on the survival of human beings and follow anthropocentric ethics.

POLLUTER PAY PRINCIPLE: RIO DE JANEIRO

Principle 16 of the Rio Declaration enshrines the principle of polluter pays, which expounds that the polluter is liable to bear the costs of compensation for the damage/harm caused to the environment.[66] This principle is based on the assumption that environmental goods are not "*free goods*" and the impact of every human activity must be evaluated and assessed for the damage caused consequently.[67]Again, this principle is also based on anthropocentric approach.

SELF-STYLED ECOCENTRIC APPROACH: A MISGUIDED UNDERSTANDING

Despite a history of destructive use of environment for human development, ecocide was first invoked in popular and institutional memory, and considered morally culpable, only when committed to derive a belligerent advantage. The call for criminalisation within this broad articulation rightly invoked international law of armed conflicts as it comprised identifiable *ecocidaire* belligerents to impute liability to armed forces of States and non-State actors providing the requisite space for a superior individual criminal responsibility, through the

[62] C Speed, 'Anthropocentrism And Sustainable Development: Oxymoron Or Symbiosis?' (*Witpress*, 2006) <https://witpress.com/elibrary/wit-transactions-on-ecology-and-the-environment/93/16862> accessed 4 August 2021.
[63] United Nations, Report of The United Nations Conference On Environment and Development, A/CONF.151/26/ Rev 1 (Vol 1).
[64] ibid principle 1.
[65] ibid principle 6.
[66] ibid principle 16.
[67] Communication by Prof (Dr) M K Ramesh to class of 2023 NLSIU.

inherent structures of hierarchy therein.[68]In June 2021, a panel of 12 pre-eminent jurists (the "*Panel*") released the draft definition of "*ecocide*" that is proposed to be the fifth international crime (the "*Definition*") under the Rome Statute of the International Criminal Court (the "*Rome Statute*").[69] The release of the Definition has sparked debate around the issue of criminalising actions that harm the environment. Within this debate, the controversy around its approach—whether anthropocentric or ecocentric—has received some scattered attention.[70] [Section 1.2.1] argues that even though it has been claimed that the definition is an ecocentric definition, in reality it is an anthropocentric one. [Section 1.2.2] proves how the reasons and justifications by the Panel have tenable counters to them. However, the purpose remains to show that in the international arena too, they haven't considered the effect of ecocentric vs anthropocentric definition.

NATURE OF THE DEFINITION: ANTHROPOCENTRIC APPROACH

Rogers, Co-deputy chair of the Panel, claims that the Definition is a shift away from an anthropocentric approach.[71] However, the Commentary concedes that "*widespread*" brings in the anthropocentric element to the Definition.[72] This research paper proves that there are *three* threshold requirements of the Definition that make it anthropocentric. The Definition reads,

"*ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts*".

First, the first threshold requirement is that the act must be "*unlawful*" or "*wanton*", both of which make the Definition anthropocentric. "*Unlawful*" is not defined under the Rome Statute

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[68] International Committee of the Red Cross, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (2008) <https://icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm> accessed 8 July 2021.

[69] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (*Stop Ecocide Foundation*, June 2021) <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf> accessed 7 July 2021.

[70] Katie Surma and Yuliya Talmazan, 'In a Growing Campaign to Criminalize Widespread Environmental Destruction, Legal Experts Define a New Global Crime: 'Ecocide'' (*Inside Climate*, 22 June 2021) <https://insideclimatenews.org/news/22062021/ecocide-definition-panel-international-crime/> accessed 8 July 2021.

[71] ibid.

[72] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (*Stop Ecocide Foundation*, June 2021) <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf> accessed 7 July 2021.

and International law, in general, is too inadequate in defining unlawful.[73] National standards of "*unlawful[ness]*" will have to be relied on,[74] which will be anthropocentric, in most cases, as Heller points out.[75] The alternative requirement—"*wanton*"—is necessarily anthropocentric. "*Wanton*" is defined as "*reckless disregard for damage which would be excessive in relation to the social and economic benefits anticipated*".[76] The Commentary provides that this threshold aspect is based on "*environmental law principles, which balance social and economic benefits with environmental harms*". However, these environmental law principles relied upon by the Panel are based on an anthropocentric approach. In fact, as Heller points out, the underlying idea behind the Definition is that "*it's fine to cause "severe and widespread or long-term damage to the environment" as long as humans benefit enough from the destruction*".[77]

Secondly, the threshold aspect of the Definition is "*severe […] damage*". "*Severe*", defined as including "*grave impacts on human life or natural, cultural or economic resources*". "*Grave impacts on human life*", is anthropocentric. Likewise, the impact on "*natural resources*", "*cultural resources*", or "*economic resources*" is anthropocentric because "*resource*" is anything that satisfies *human* needs.[78] Therefore, the first threshold requirement makes the Definition necessarily anthropocentric.

Thirdly, along with the Definition, the Panel has released a preambular paragraph that provides that the deterioration of the environment "*gravely endanger[s] […] human systems*".[79] This preambular paragraph, helpful in providing context and interpretational aid,[80] would again necessarily add anthropocentric flavour to the interpretation of the Definition.

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[73] ibid 2b.
[74] ibid.
[75] Kevin Jon Heller, 'Ecocide and Anthropocentric Cost-Benefit Analysis' (*Opinio Juris*, 26 June 2021) <http://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/> accessed 7 July 2021.
[76] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (*Stop Ecocide Foundation*, June 2021) <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf> accessed 7 July 2021.
[77] Kevin Jon Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (*Opinio Juris*, 23 June 2021) <https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/> accessed 6 July 2021.
[78] Tyler Miller, Living in the Environment: Principles, Connections, and Solutions (Cengage Learning 2014).
[79] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (*Stop Ecocide Foundation*, June 2021) <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf> accessed 7 July 2021.
[80] Vienna Convention on the Law of Treaties, art 31; Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (3rd edn, Hart 2016) pp 4.

REASONS AND JUSTIFICATIONS

It may be useful first to note the reasons and justifications offered by the Panel. In a direct but partial response to the *first* threshold requirement discussed above, Christina Voigt, one of the panelist, points out that there are practical concerns in allowing for cost-benefits based threshold.[81] In fact, the Commentary also proclaims that the Definition is "*a practical and effective definition*". However, there is no further explanation provided in the Commentary about what "*practical*" means. Sands, Co-chair of the Panel, said the Definition is not "*so widespread in its effects that States run away and throw their arms up in horror*".[82] There seem to be *two* justifications for the anthropocentric approach—*first*, to account for situations where it is actually necessary to harm the environment; *second*, to convince the nation-states into actually adopting the Definition. However, there are counters to both these justifications.

First, the Definition is proposed to be an amendment to the Rome Statute. The Rome Statute has jurisdiction over only individuals (natural persons) and not the nation-states or groups such as corporates.[83] However, the individuals are statistically,[84] and morally[85] the least blameworthy. In fact, the Panel's cost-benefit analysis is more relevant in cases of the nation-states, who exercise their power of eminent domain, and corporates, who use their abundant resources, to carry out projects causing *severe* and *widespread/long-term* harm to the environment. Since the cost-benefit analysis is hardly useful for the individuals, and corporates and nation-states, the Definition is barely "*practical*".

Second, the Panel seems to believe that this "*practicality*" will help convince the nation-states to actually adopt the Definition. However, this belief is unsubstantiated. The member-nations that support "*ecocide*" do not expect it to be anthropocentric, and the member-nations that do not support "*ecocide*", do not "*not support*" for anthropocentric or ecocentric concerns.[86] The

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[81] Christina Voigt, (*Twitter*, 24 June 2021) <https://twitter.com/ChristinaVoigt2/status/1408060703966056450> accessed 6 July 2021.

[82] Katie Surma and Yuliya Talmazan, 'In a Growing Campaign to Criminalize Widespread Environmental Destruction, Legal Experts Define a New Global Crime: 'Ecocide'' (*Inside Climate*, 22 June 2021) <https://insideclimatenews.org/news/22062021/ecocide-definition-panel-international-crime/> accessed 8 July 2021.

[83] *Understanding the International Criminal Court* (International Criminal Court 2020).

[84] Dr Paul Griffin, 'CDP Carbon Majors Report 2017' (*Carbon Majors Database*, July 2017) <https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772> accessed 8 July 2021.

[85] Walter Sinnott-Armstrong and Richard Howarth (eds), *Perspectives on Climate Change: Science, Economics, Politics, Ethics* (Emerald Group Publishing Limited 2005) 221–253.

[86] David Meyer, 'The crime of 'ecocide' now has a definition—but what will it mean for polluters?' (*Fortune*, 23 June 2021) <https://fortune.com/2021/06/23/ecocide-definition-international-criminal-court-climate-environment/> accessed 8 July 2021.

Panel has failed to show how this "*practicality*" is likely to convince member-nations to actually adopt the Definition.

Moreover, this anthropocentric approach makes it less likely for the country to adopt it due to its redundancy. There already exist anthropocentric crimes that can be used to prosecute harm caused to the environment.[87] Within the four core crimes within the Rome Statute (genocide, crimes against humanity, war crimes, and the crime of aggression) that are anthropocentric, there already exist features that may be used to prosecute harm to the environment.[88] For example:

Article 8(2)(b)(iv) explicitly refers to the environment and criminalises, "*[…] attack [that] will cause […] widespread, long-term and severe damage to the non-human environment*". "*Widespread*", "*long-term*" and "*severe*" have not been defined in the Rome Statute. These terms are also not laid down in the form of discernable rules with pre-defined content but in the form of standards to be determined at the adjudication stage.[89] Therefore, it may be possible to push for a favourable interpretation of this provision to bring in more crimes within its folds.

Article 6 provides for the definition of genocide, which means acts intended to destroy "*a national, racial or religious group*", and includes, "*[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*". Thus, the harm to the environment that may effectually destroy a national, racial or religious group falls squarely within the purview of genocide. Moreover, academics argue that there exists a stronger nexus between genocide and ecocide.[90]

Therefore, there are some justifications afforded for using the anthropocentric approach, but there are fair counters to the adoption of this anthropocentric approach as provided above. In a more important analysis as laid down in the next part of this research paper, the question of whether it *should be* an anthropocentric law or an ecocentric law must not be considered for the aforementioned reasons for a legal policy-maker. Instead, for a legal policy-maker, the law is for a particular purpose, here—to prevent the destruction of the environment. To prevent the destruction of the environment, there needs to be deterrence. Legal-policy makers should thus

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[87] Rachel Killean 'Prosecuting Environmental Crimes at the International Criminal Court – Is a Crime of Ecocide Necessary?' (*IntLawGrrls*, 30 June 2021) <https://ilg2.org/2021/06/30/prosecuting-environmental-crimes-at-the-international-criminal-court-is-a-crime-of-ecocide-necessary/> accessed 8 July 2021.

[88] ibid.

[89] Louis Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42 Duke Law Journal 557.

[90] Martin Crook and Damien Short, 'Marx, Lemkin and The Genocide–Ecocide Nexus' (2014) 18(3) The International Journal of Human Rights <https://tandfonline.com/doi/full/10.1080/13642987.2014.914703> accessed 8 July 2021.

concern themselves with the level of deference caused by ecocentric and anthropocentric laws. Thus, in the next section, this paper lays down a normative framework for policy-makers to consider the effect of laying down an ecocentric vs anthropocentric law.

CRITIQUING BOTH ECOCENTRIC AND ANTHROPOCENTRIC APPROACH

In this section, the research paper —*firstly*, explores the legal regimes as four possibilities— anthropocentric civil law, ecocentric civil law, anthropocentric criminal law, and ecocentric criminal law and *secondly*, after drawing a fair critique of all four, it comes to the conclusion that an ecocentric civil law is not a possibility, anthropocentric civil law is too weak to provide deterrence, anthropocentric criminal law draws the right balance, and ecocentric criminal is way too harsh.

LEGAL REGIMES AS FOUR POSSIBILITIES

The larger goal of the environmental law is to prevent the destruction of the environment to the maximum extent by appropriately ***deterring*** humans from exploiting it. In general, deterrence is dependent on the severity of punishment and the probability of enforcement.[91] Traditionally, a criminal sanction is considered more severe than a civil sanction. A criminal sanction restricts freedom of liberty, which in most nations, is considered a fundamental right, whereas a civil sanction merely affects monetary power. Since monetary sanctions are less severe than the restriction of liberty, civil sanction is considered to be less deterring than criminal sanction. However, it is important to remember that within civil sanction and criminal sanction independently, it is possible to adjust the severity of the punishment. For example, within civil sanctions, a sanction of Five Crores is more severe than a sanction of Five Lakhs within the same currency. Similarly, within criminal sanctions, a sanction of Five Years of imprisonment is more severe than a sanction of Five Lakhs.

Apart from the severity of the punishment, deterrence is also dependent on the number of legal prerequisites. If there are fewer legal prerequisites, it is simpler to invoke the violation of the legal rule, whereas if the legal requisites are more, it is difficult to invoke the violation of the

[91] Stephen Sverdlik, 'Bentham on Temptation and Deterrence' (2019) 31(3) Utilitas 246 <https://cambridge.org/core/journals/utilitas/article/abs/bentham-on-temptation-and-deterrence/62E427620968D80048C25C842CCDC22C> accessed 8 July 2021.

legal rule. These number of prerequisites differ for the two approaches of protecting the environment—*ecocentric* or *anthropocentric*. Although arguments in favor of both ecocentric and anthropocentric approaches are principally and theocratically meritorious, the approaches have different practical consequences for environmental law and policy. Practically, there are different number of prerequisites for invoking ecocentric legal rule and more for anthropocentric legal rule. For an anthropocentric law, there is one added prerequisite—harm or effect to the humans; whereas for ecocentric law, this prerequisite is entirely absent. Therefore, it will be difficult to prove a violation of an anthropocentric law due to an additional prerequisite of human harm/affect, whereas it will be easier to prove a violation of an ecocentric law because there is no pre-requisite in the form of proving harm to humans.

Considering on the aforementioned two different metrics, there arises four different protection for the environment. These are—*first*, anthropocentric civil law would protect any harm to the environment that affects humans by penalising it in the form of an injunction or monetary penalty; *second*, ecocentric civil law would protect any harm to the environment irrespective of whether it affects humans by penalising it in the form of an injunction or monetary penalty; *third*, anthropocentric criminal law would protect any harm to the environment that affects humans by penalising it in the form of imprisonment; *fourth*, ecocentric criminal law would protect any harm to the environment irrespective of whether it affects humans in the form of punishment. These four possibilities can be summarised in the form of the following table for clarity.

Metrics	**Anthropocentric**	**Ecocentric**
Civil	harm to the environment that affects humans by imposing a monetary fine	harm to the environment by penalising it in the form of monetary penalty
Criminal	harm to the environment that affects humans by penalising it in the form of imprisonment	harm to the environment by penalising it in the form of imprisonment

In the next sub-section, these four possibilities are further explored. The purpose and the ability of each of these four parts is critiqued and analysed on its ability to cause deterrence, and consequently, protect the environment.

DETERRENCE: WHICH LAW WHEN?

In this sub-section, the four possibilities charted out in the previous subsection are explored, and it is argued that *first*, ecocentric civil law is not possible; *second*, anthropocentric civil law causes the least deterrence; *third*, ecocentric criminal law causes the maximum deterrence; and *finally*, anthropocentric criminal law causes medium deterrence. This analysis is useful for both the policy-makers—to determine the nature of law vis-à-vis deterrence caused by the law and consequently, the level of protection provided to the environment, and the judicial bodies—to understand the legal policy better, and consequently, adjust the decision-making process.

ECOCENTRIC CIVIL LAW: A FUTILE EXERCISE

As discussed above, an ecocentric civil law would protect against any harm to the environment irrespective of whether it affects humans by penalising it in the form of an injunction or monetary penalty. This means that the law does not have a necessary pre-requisite of harm or effectto humans. However, this sub-section argues that ecocentric civil law is a misnomer, and it would be an implicit form of anthropocentric law. There are *two* reasons why it is an implicit anthropocentric law—*first*, putting costs on violation of environmental harm, the environment is being put on a lower pedestal than humans, and *second*, civil law inherently puts the environment on a different pedestal than humans.

First, the environment is reduced to the pedestal of other artificial objects that are solely meant for human use. In general, Calabresi and Melamed argue that any law that can be violated against a monetary penalty, in effect, is an entitlement that can be bought.[92] For example, if a law mandates that the environment can be destroyed against a monetary penalty, Calabresi and Melamed would argue that destruction of the environment can simply be bought by paying consideration which is differently put – the monetary penalty. In other words, this means that like any other artificial object which can simply be bought against a monetary consideration, the environment is also being reduced to artificial objects – which are for the pleasure of humans. Therefore, since the environment can be bought with monetary consideration at the pleasure of humans in a civil law regime, the civil law regime cannot encompass an ecocentric approach that requires the environment to be protected for the environment, and not humans.

[92] Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089.

Second, civil law inherently puts the environment on a different pedestal than humans. Ecocentric law would protect the environment for the protection of the environment and *not* the protection of humans. As discussed in the beginning, for an ecocentric individual, the environment is considered as a part of the environment as much as any other fact of nature—meaning, that the environment is kept on the same pedestal as humans.If the environment is being put on the same pedestal as humans, then the destruction of the environment should have concurrent/parallel sanctions. Now, destruction of humans, considering done with an intent to cause such a harm, is punished with a criminal offence, usually imprisonment.[93] Therefore, the environment, which is being considered on the same pedestal as humans, must also be punished with a criminal offence. Now, by giving the destruction of the environment a civil sanction and the destruction of humans a criminal sanction; the environment is being kept on a lower pedestal than humans.

For these two reasons, it is not possible to have environmental legislation which has civil sanction but represents an ecocentric viewpoint. However, the previous two situations assume that the harm is being caused intentionally, i.e. with *mens rea*. This means that there exists a bleak possibility of law where the acts are not done intentionally, and where there is a technical possibility of achieving ecocentric civil law. In cases where the harm is not caused intentionally, the two *reasons* pointed out do not apply. *The first* reason does not apply because it is presumed on the ability of humans to "*buy*" – whereas, if the intention is entirely lacking, it is not possible for humans to buy. *Second* one being that in comparison with humans too, if the cause of death of humans is also unintentional, the penalty is not strictly criminal or one following criminalisation. Therefore, for the environment as well, when there is lacking intention, the destruction can simply follow a civil sanction. Now, if that civil law is not laid down and added with a prerequisite harm to the humans but only on the basis of harm to the environment, it can essentially be ecocentric civil protection of the environment.

For such non-intentional destruction, ecocentric civil law is possible. Now, the deterrence of such crime has been depicted in the table below. Although it being ecocentric reduces the number of prerequisites, i.e. harm to humans does not need to be proved, the civil liability with monetary fines or injunction as the remedy reduces the severity of the punishment. Therefore, in this bleak possibility of ecocentric civil law, the kind of deterrence is lower medium on the

[93] Michael S Moore, Mechanical Choices: The Responsibility of the Human Machine (OUP 2020) ch 4.

verbatim between anthropocentric civil and ecocentric criminal, which will be discussed in the next part of this section.

Table description: This table represents a continuum from the lowest deterrence regime to the highest deterrence regime. The policy-makers may consider the following continuum to determine when which form of law must be employed.			
Lowest Deterrence	Low-medium Deterrence	Medium-high Deterrence	Highest Deterrence
	Ecocentric Civil		

ANTHROPOCENTRIC CIVIL LAW

After discussing ecocentric civil law and proving how in most situations an ecocentric law naturally turns into an implicit anthropocentric law due to civil remedy, it will be interesting to explore anthropocentric civil law. As defined before, an anthropocentric law will have a prerequisite – proving human harm, so it contributes to reducing the deterrence by increasing one prerequisite. Moreover, civil law has lower severity of punishment. Therefore, the level of deterrence will be reduced by an increase in the pre-requisite.Therefore,compared with the aforementioned ecocentric civil law, this law will have a slightly lower deterrence threshold – due to the added pre-requisite.

Theoretically, a civil sanction appropriately sits with an anthropocentric law. This is again because of the two reasons studied above. *First*, a civil law reduces the environment to a status similar to artificial objects meant for humans, and an anthropocentric approach assumes that the environment should be protected for human use. *Second*, the environment is reduced to a lower pedestal than humans, which is necessarily true for an anthropocentric individual.

Practically, this law is going to have the least deterrence effect, but it will be appropriate for the policy-makers to consider this possibility as important for making laws.

Table description: This table represents a continuum from the lowest deterrence regime to the highest deterrence regime. The policy-makers may consider the following continuum to determine when which form of law must be employed.			
Lowest Deterrence	Low-medium Deterrence	Medium-high Deterrence	Highest Deterrence
Anthropocentric Civil	Ecocentric Civil		

ECOCENTRIC CRIMINAL LAW

After having discussed two civil law possibilities, it is important to consider two criminal law possibilities as well. The first criminal law possibility—ecocentric criminal law, as discussed, would penalise harm to the environment by imprisonment *not* for the sake of humans but for the sake of the environment itself. Now, compared with the implausible ecocentric civil law, it is important to recall and prove how the two reasons do not apply to ecocentric criminal law. *First*, the harm to the environment cannot be bought like an artificial object because the offence is not monetary anymore, but it is criminal, in effect imprisonment. *Second*, the environment is put on the same pedestal as humans because, similar to humans, harm to the environment is also being subject to criminal penalties. Therefore, the ecocentric approach sits appropriately with the criminal law.

It is also important to determine the level of deterrence caused by such a law. Since it is an ecocentric law, it does not have the added pre-requisite of proving effect on or harm to humans. Moreover, it entails a criminal sanction which is more severe than a civil sanction. A ecocentric criminal law causes the maximum deterrence.

Table description: This table represents a continuum from the lowest deterrence regime to the highest deterrence regime. The policy-makers may consider the following continuum to determine when which form of law must be employed.			
Lowest Deterrence	Low-medium Deterrence	Medium-high Deterrence	Highest Deterrence
Anthropocentric Civil	Ecocentric Civil		Ecocentric Criminal

Unlike other possibilities developed before and hence, there has been some attention in the literature given to ecocentric criminal law. Rob White discusses the evolution of ecocentric criminal law.[94] White refers to two examples – criminal prosecution and sentencing initiatives to prove how ecocentric criminal law is gaining some traction.[95] When White discusses the ecocentric criminal law, the definition of "*ecocide*" as introduced by the Panel in 2021 was not ripe. Therefore, he could not have commented on the definition and aspects of it. White's

[94] Rob White, 'Ecocentrism and Criminal Justice' (2018) 22(3) Theoretical Criminology 342 <https://doi.org/10.1177/1362480618787178> accessed 4 August 2021.
[95] ibid.

analysis would have shifted a mile if he had considered the development – an anthropocentric definition of "*ecocide*" as discussed in the earlier part of this paper. In any case, White does not consider the other three possibilities discussed in this paper and especially is ignorant of the "*anthropocentric criminal law*" which would have provided for an interesting comparison. This the next part, the paper considers that anthropocentric criminal law provides for medium to high deterrence – which has been rightly used in major environmental law legislations.

ANTHROPOCENTRIC CRIMINAL LAW

Although, as observed in the sub-section that the ecocentric approach sits appropriately with the criminal law as it puts humans and the environment on the same pedestal but environment and artificial objects on different, it must be observed that the anthropocentric approach too sits appropriately with criminal law. This is because criminal law is not only reserved for the destruction of humans but may also extend to the non-human-related destruction of property.

For an anthropocentric criminal law, the deterrence would be medium to high. This is because—the anthropocentric approach reduces deterrence by adding the pre-requisite of human harm, and on the other hand, the criminal law approach increases deterrence.

Table description: This table represents a continuum from the lowest deterrence regime to the highest deterrence regime. The policy-makers may consider the following continuum to determine when which form of law must be employed.			
Lowest Deterrence	Low-medium Deterrence	Medium-high Deterrence	Highest Deterrence
Anthropocentric Civil	Ecocentric Civil	Anthropocentric Criminal	Ecocentric Criminal

CONCLUSION

This paper started by looking at the development of the International Environmental Regime. Within the first section, the *first* part highlights that environmental protection was envisaged in an anthropocentric format; and *the second* part shows how the definition of ecocide, although acclaimed as an ecocentric introduction, is in effect an anthropocentric definition.

The major issue identified with the conceptualisation of environmental laws is that the differentiation between ecocentric and anthropocentric approaches is not made from a legal angle. This means that the theoretical reasons considered by general environment scholars have been considered instead of the impact on the law.

To cover this gap, the final part of this paper considers four approaches—*ecocentric civil law*, *anthropocentric civil law; ecocentric criminal law*, and *anthropocentric criminal law*. By placing four on them on the deterrence continuum and by gauging the impact of the four legal regimes on environmental law, this research paper has laid down a framework for policy-makers to consider.

INSTITUTING AN EEZ IS ANYTHING BUT EASY: EVOLUTION OF MARITIME DISPUTES AS A CONSEQUENCE OF THE ALGERIAN EXCLUSIVE ECONOMIC ZONE

- **Ahan Gadkar**[*]

ABSTRACT

Algeria's exclusive economic zone (EEZ), which was established in 2018 via presidential decree 18-96, has been met with a lot of opposition. Such a situation would lead to delimitation conflicts and disputes from other states, primarily over the issue of freedom of navigation. In the last twenty years, especially, the possibility of exploring and exploiting renewable energy resources offshore and the discovery of large deposits of offshore hydrocarbons has resulted in States taking relatively aggressive policy measures to secure their EEZs. The new economic and environmental pressures on the Mediterranean States will cause them to seek to expand their sovereign rights over ever-expanding maritime areas. This article, therefore, discusses in depth the practical rationale behind Algeria creating an EEZ and the delay associated with the same. It also explores the notion of Mediterranean Specificity. Furthermore, this article lays down the importance of strategizing optimal energy security. In the last section, the article discusses the repercussions of Algeria's exclusive economic zone – especially the reactions from Spain and Italy. The paper also discusses the possibility of dispute resolution amongst the States, before discussing the way forward.

Keywords: EEZ, Mediterranean Specificity, Optimal Energy Security, UNCLOS, Dispute Resolution

INTRODUCTION

On March 20, 2018, through presidential decree 18-96,[96] Algeria finally instituted, dare we say it, like other Mediterranean countries, an exclusive economic zone (EEZ), "*the most*

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[96] United Nations, 'Official Gazette of the Republic of Algeria No 18, Presidential Decree No 18-96 of 2 Rajab AH 1439' (20 March 2018)

spectacular creation of the new law of the sea."[97] Indeed, the vast majority of states bordering the northwestern part of the Mediterranean Sea had already established such spaces, after a long reluctance, sometimes described as a "*Symptom of EEZ-phobia*"[98] and a "*Mediterranean exception.*"[99] For example, Morocco established an EEZ in 1981,[100] Tunisia in 2005,[101] Libya in 2009,[102] France in 2012,[103] and Spain in 2013.[104] The reasons for this reluctance to establish such zones are multiple and relate as much to the legal, geographical, and economical as to the politico-geostrategic order.

First, because it is a semi-enclosed sea,[105] a basin dotted with islands and peninsulas, the distance between the opposite coasts of which nowhere exceeds 400 nautical miles,[106] so if two States were to proclaim their EEZs with an extent of 200 nautical miles, as permitted by the United Nations Convention on the Law of the Sea (UNCLOS),[107] any portion of the high seas in the Mediterranean would disappear. This would lead to disputes by third States mainly regarding the question of freedom of navigation and would undoubtedly generate conflicts of

<www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DZA_2018_Decree_1896_en.pdf> accessed 9 September 2022.

[97] *The Palgrave Encyclopedia of Global Security Studies* (1st edn, 2023).

[98] Budislav Vukas, 'State Practice in the Aftermath of the UN Convention on the Law of the Sea: The Exclusive Economic Zone and the Mediterranean Sea' in Anastasia Strati, Maria Gavouneli and Nikos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff Publishers 2006).

[99] ibid.

[100] William Pulido Pulido, 'Morocco, the Canary Islands and the Exclusive Economic Zones (ZEE)' *Revista ejercitos* ,27 December 2019) <https://revistaejercitos.com/en/2019/12/27/marruecos-canarias-y-las-zonas-economicas-exclusivas-zee/> accessed 9 September 2022; Yahia Hatim, 'Morocco Officializes Laws Delimiting Maritime Borders with Spain' (*Morocco World News* (, 31 March 2020) <https://moroccoworldnews.com/2020/03/298217/morocco-officializes-new-laws-delimiting-maritime-borders> accessed 9 September 2022; Andrea Gioia, 'Tunisia's Claims over Adjacent Seas and the Doctrine of "Historic Rights" (1984) 11 Syracuse Journal of International Law and Commerce 327.

[101] Official Journal of the Republic of Tunisia, Loi 2005-50 (2005).

[102] General People's Committee, *General People's Committee Decision No. 260 OF AJ 1377 (AD 2009) concerning the Declaration of the Exclusive Economic Zone of the Great Socialist People's Libyan Arab Jamahiriya* (2009).

[103] République Française, 'Decree No 2012-1148 of October 12, 2012 creating an exclusive economic zone off the coast of the terriotroy of the Republic in the Meditteranean (3 August 2018) <https://legifrance.gouv.fr/loda/id/JORFTEXT000026483528> accessed 10 September 2022.

[104] Act No 15/1978 on the Economic Zone 20 February 1978; Royal Decree No 236/2013 of 5 April 2013.

[105] Budislav Vukas, 'The Mediterranean: An Enclosed or Semi-Enclosed Sea?'in William T Vukowich, *The Law of The Sea: Selected Writings* (Martinus Nijhoff Publishers 2006); Mitja Grbec, *Extension of Coastal State Jurisdiction in Enclosed and Semi-Enclosed Seas: A Mediterranean and Adriatic Perspective* (Routledge 2014); Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff Publishers 2006).

[106] ibid.

[107] ibid.

delimitation. Then, because the institution of such zones would have, in the long term, harmful consequences as well on the biological resources because of their overexploitation as on the marine environment; the latter, which is already undergoing severe degradation due to numerous pollutions, will certainly be even more exposed in the event of exploration and exploitation of the mineral resources of these areas. Finally, because it is precisely a semi-enclosed sea, there is an alleged duty of cooperation between its riparian states as per Article 123 of the UNCLOS, which would be seriously affected by unilateral management of these new areas that are the EEZs.

However, this "*EEZ-phobia*" is gradually switching to an "*EEZ-mania*",[108] particularly in the last twenty years following the discovery of large deposits of offshore hydrocarbons and the possibility of exploring and exploiting renewable energy resources (mainly wind power). These new economic but also environmental challenges will push the Mediterranean States to seek to exercise their sovereign rights over increasingly large maritime areas, as allowed by UNCLOS with the concept of the EEZ.[109]

Coastal state par excellence with a coastline of more than 1280 km bordering the Mediterranean Sea,[110] Algeria will also be part of the dynamics of "*jurisdictionalisation/nationalization*"[111] of the said sea. Faced with this situation, it is legitimate to wonder about the real reasons for the recent creation of the EEZ, especially after so many years of reluctance, and about the consequences that could be generated by this act solemnly. By establishing its EEZ, Algeria decides, on the one hand, to operationalize its right recognized by the international law of the sea in general and by UNCLOS in particular (**Section II**),[112] but at the same time takes the risk, long avoided, of triggering maritime delimitation disputes with States whose coasts are adjacent to its own or face it (**Section III**).

[108] Béatrice Bonafé and Marco Pertile, 'From EEZ-Phobia to EEZ-Mania? The Algerian Exclusive Economic Zone and Its Consequences' (*Questions of International Law* 2022) <http://qil-qdi.org/from-eez-phobia-to-eez-mania-the-algerian-exclusive-economic-zone-and-its-consequences/> accessed 23 September 2022.
[109] ibid.
[110] ibid.
[111] ibid.
[112] United Nations, 'Official Gazette of the Republic of Algeria No 18, Presidential Decree No 18-96 of 2 Rajab AH 1439' (20 March 2018) <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DZA_2018_Decree_1896_en.pdf> accessed 9 September 2022.

THE ALGERIAN EEZ: A LEGAL INSTITUTION, LEGITIMIZED BY ECONOMIC AND ECOLOGICAL INTERESTS

After having hesitated for a long time to establish its EEZ so as not to be "*the first*" State to do so in the Mediterranean, Algeria finally found itself "*the last*" country of the Maghreb and the Western Mediterranean to have proclaimed this zone (*Section A*). However, the UNCLOS, Constitution of the Seas and the Oceans, does not establish any distinction between the States or for the maritime spaces in the creation of such zones, the only condition being the respect of the rights and obligations envisaged by its provisions. If the reasons for such a delay have never been officially communicated, the same goes for the process that led to the proclamation of the Algerian EEZ, even if the most plausible reason seems to relate to economic, environmental but, above all, energy (*Section B*).

A. ALGERIAN EEZ: A LATE PROCLAMATION DUE TO THE MEDITERRANEAN SPECIFICITY

Actively participating in the elaboration of the concept of EEZ during the 3rd United Nations Conference on the Law of the Sea,[113] then constitutionalizing it from 1976,[114] even before its consecration by UNCLOS,[115] Algeria did not establish its EEZ, however, until March 20, 2018, decades after certain Mediterranean states proclaimed theirs.

Such a delay can be explained essentially by the fact that the effective proclamation of this zone would undoubtedly have resulted in inevitable conflicts, particularly of maritime delimitation, especially with Italy and Spain, whose coasts are very close to the coasts States bordering the Mediterranean have long hesitated to establish EEZs in this sea or to delimit their continental shelves,[116] contenting themselves with fragmented or limited zones,[117] *sui*

[113] Harry N Scheiber, Nilufer Oral and Moon Sang Kwon (eds), *Ocean Law Debates: The 50-Year Legacy and Emerging Issues for the Years Ahead* (Brill 2018).
[114] Boukabene Larbi, 'The Algerian Exclusive Economic Zone and the Question of Maritime Boundaries with Neighboring States' (2021) 8 Revue droit des transports et des activités portuaires 6.
[115] ibid.
[116] Budislav Vukas, 'The Mediterranean: An Enclosed or Semi-Enclosed Sea?'in William T Vukowich, *The Law of The Sea: Selected Writings* (Martinus Nijhoff Publishers 2006).
[117] Tullio Scovazzi, 'International Law of the Sea as Applied to the Mediterranean' (1994) 24 Ocean & Coastal Management 71.

generis[118] – including the question of the compatibility with the 1982 Convention has been widely debated by international doctrine[119] – so that most of the Mediterranean obeyed the statute of the high seas and was governed by the principle of freedom.[120] On the motivations of this attitude, Professor Umberto Leanza could write that the establishment of such zones would entail serious dangers of territorialization of the Mediterranean Sea, thus hindering its vocation as a very important international waterway.[121] For his part, Professor Tullio Scovazzi considered that this reluctance could arise from the difficult problems of delimitation of the maritime borders still open between several States, or even from the priority given to certain interests such as the freedom of navigation, the mobility of military fleets or access to living resources.[122] In the same vein, Professor Nathalie Ros believes that if until recently the Mediterranean States have for the most part refrained from establishing an EEZ, it is effectively in order not to open Pandora's Box of delimitation conflicts,[123] but also in order not to deprive this sea of passage, of parts of the high seas whose existence is a condition linked to the freedom of navigation.[124]

However, from a strictly legal point of view, nothing prevents Mediterranean States from declaring EEZs if there is a political will to do so. Neither the provisions of UNCLOS nor general international law prevent States bordering closed or semi-closed seas from establishing such zones,[125] the only condition being to respect the obligation of cooperation established by Article 123 of the said convention in exercise of their rights and performance of their obligations,[126] the establishment of such zones in no way contravening the principle of freedom or its corollaries.

[118] Constantinos Yiallourides, 'Maritime Boundary Delimitation in the Eastern Mediterranean Sea: Progress and Outstanding Legal Issues' [2021] Eastern Mediterranean Affairs 29.
[119] ibid.
[120] Tullio Scovazzi, 'International Law of the Sea as Applied to the Mediterranean' (1994) 24 Ocean & Coastal Management 71.
[121] ibid.
[122] ibid.
[123] Ros N, 'La Mer Méditerranée : Cas Particulier et Modèle Avancé de Gestion de La Haute Mer' (2011) 15Annuaire du droit de la mer 33.
[124] ibid.
[125] Boukabene Larbi, 'The Algerian Exclusive Economic Zone and the Question of Maritime Boundaries with Neighboring States' (2021) 8 Revue droit des transports et des activités portuaires 6.
[126] ibid.

Despite the length of its coast, Algeria has always considered itself a geographically disadvantaged state,[127] firstly because it borders a semi-enclosed sea, but above all because of two other facts: place, the fact that the often narrow and steeply sloping continental shelf in the Mediterranean is practically non-existent all along the Algerian coast; then, the existence opposite its coast of the Balearic Islands and Sardinia will have repercussions on the determination of its EEZ and deprive it of a large area at sea. This is why Algeria, instead of establishing its EEZ, instead opted for a "*reserved fishing zone*" (RFZ), which it created by legislative decree No 94-13 setting the rules relating to fishing,[128] and maintained law via 01-11.[129] Extending up to 32 nautical miles from the border with Morocco at Ras Ténès, and up to 52 nautical miles from Ras Ténès to the border with Tunisia, Algeria will exercise in this zone sovereign rights in terms of exploration and exploitation of fishery resources.[130] And if this zone seems entirely compatible with the provisions of UNCLOS,[131] the fact remains that its institution has not managed to fill the existing legal void in terms of the protection of the marine environment, the conduct of marine scientific research, or even the installation of works in this zone in the absence of an EEZ.[132]

B. ALGERIAN EEZ: FISHERIES MANAGEMENT, ENVIRONMENTAL PROTECTION OR OFFSHORE STRATEGY FOR OPTIMAL ENERGY SECURITY?

The search for hydrocarbons and gas in the Mediterranean was relatively disappointing until the 1990s,[133] the discovery in the early 2000s of large quantities of hydrocarbon deposits, mainly in the eastern Mediterranean,[134] but also in Western Mediterranean[135] – revealing new

[127] UNTC, 'Convention Des Nations Unies Sur Le Droit de La Mer' (*Un.org* 2019) <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_fr> accessed 23 September 2022.
[128] Journal Official De La Republique Algerienne Democratique Et Populaire, Mercendi (1994) 12 Moharram 1415.
[129] Journal Official De La Republique Algerienne Democratique Et Populaire, Dimanche (2001) 16 Rabie Ethani 1422.
[130] ibid.
[131] Boukabene Larbi, 'The Algerian Exclusive Economic Zone and the Question of Maritime Boundaries with Neighboring States' (2021) 8 Revue droit des transports et des activités portuaires 6.
[132] ibid.
[133] James Stocker, 'No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean' (2012) 66 Middle East Journal 579.
[134] ibid.
[135] ibid.

energy and environmental issues – have pushed the States of this region to take measures for their exploration and exploitation in their continental shelves, but also and above all, to claim more and more sovereign rights by the institution of EEZ.

The real reasons for the proclamation of the Algerian EEZ have not been made public by the Algerian Government - at least officially - and even Presidential Decree No 18-96 remains very laconic and does not mention any of them, contrary to certain foreign documents establishing such zones.[136] The wording used in Article 3 is very vague and refers directly to the provisions of UNCLOS on the subject: "*In its EEZ, the People's Democratic Republic of Algeria exercises its sovereign rights and jurisdiction in accordance with the provisions of the United Nations Convention on the Law of the Sea 1982, in particular Part V thereof*." This part provides that the coastal state, has in this area, a range of sovereign rights and jurisdiction relating both to the exploration, exploitation and conservation of the biological and non-biological natural resources of the superjacent waters and the soil and subsoil of this area, as well as with regard to other activities for economic purposes, marine scientific research, the protection and preservation of the marine environment, or the establishment and use of artificial islands, installations and works (Article 55).

However, the analysis of the general context in which the Algerian EEZ was established can provide certain elements of response capable of founding the Algerian approach. According to the National Agency for the Valorization of Hydrocarbon Resources (ALNAFT),[137] Algeria has an offshore hydrocarbon mining area extending over approximately 106,626.34 km² (140,000 km² according to recent data).[138] This area is divided into four vast exploration blocks, which are N° 143, 144a, 144b and 145.[139] It corresponds to the basins of Alboran in the West and Algerian-Provençal in its central and eastern parts.

[136] République Française, 'Decree No 2012-1148 of October 12, 2012 creating an exclusive economic zone off the coast of the terriotroy of the Republic in the Meditteranean (3 August 2018) <https://legifrance.gouv.fr/loda/id/JORFTEXT000026483528> accessed 10 September 2022.
[137] Journal Official De La Republique Algerienne Democratique Et Populaire, 12 Joumada Ethania 1426 (2005).
[138] Oil and Gas Journal, 'Total, Sonatrach Expand Algerian Gas, Petrochemicals Development' (2018) <https://ogj.com/refining-processing/article/17297035/total-sonatrach-expand-algerian-gas-petrochemicals-development> accessed 10 September 2022.
[139] Mourad Medaouri and others, 'The Transition from Alboran to Algerian Basins (Western Mediterranean Sea): Chronostratigraphy, Deep Crustal Structure and Tectonic Evolution at the Rear of a Narrow Slab Rollback System' (2014) 77 Journal of Geodynamics 186.

Unfortunately, the absence (or the difficulty of accessing) of precise and updated maps does not make it possible to locate these prospecting and exploration zones exactly and at the same time to determine whether they do not encroach on other zones. Maritime states adjacent to or facing Algeria. On the geological level, the extent of the continental shelf of the Algerian offshore seems to be very limited and therefore unfavourable to the existence of large hydrocarbon deposits. However, some experts still believe that these mineral deposits in the Mediterranean could come to the rescue of the volumes discovered in onshore, increasingly diminished.[140] Thus, in 2004 already, the Algerian Ministry of Energy and Mines granted prospecting authorizations to the national hydrocarbon company SONATRACH on the perimeter called "*Western Offshore*" (blocks 143 and 144b),[141] and "*Eastern Offshore*" (block 144a and 145).[142]

Following the significant discoveries of offshore hydrocarbons in the eastern Mediterranean, and after the establishment of the Algerian EEZ, SONATRACH signed, on October 29, 2018, two agreements for the exploration and evaluation of the offshore oil potential of the Algerian basin in its eastern parts and Western with the ENI group (Italy) and Total (France). The eastern part of the Algerian offshore will be operated with ENI over an area of around 14,965 km², while the western part will be operated with Total over an area of around 9,336 km². The operations will focus on the acquisition of 3D seismic data, seismic processing and their interpretation, as well as the drilling of an exploration well in each of the two zones.[143] According to the 2020 Annual Report of the national company SONATRACH, significant work has been carried out under these agreements.[144] It should also be noted that Total has abandoned the prospecting contract for offshore hydrocarbons off the Algerian west coast.[145]

[140] ibid.
[141] Journal Official De La Republique Algerienne Democratique Et Populaire, Dimanche 20 Rajab 1425 (2004).
[142] ibid.
[143] Oil and Gas Journal, 'Total, Sonatrach expand Algerian gas, petrochemicals development' (2018) <https://ogj.com/refining-processing/article/17297035/total-sonatrach-expand-algerian-gas-petrochemicals-development> accessed 10 September 2022.
[144] Sonatrach, 'Annual Report 2020' (2020) <https://sonatrach.com/wp-content/uploads/2021/12/RAPPORT-ANNUEL-2020_EN.pdf> accessed 10 September 2022.
[145] Adedapo O Adeola and others, 'Crude Oil Exploration in Africa: Socio-Economic Implications, Environmental Impacts, and Mitigation Strategies' (2021) 42 Environment Systems and Decisions 26.

In addition, Executive Decree No 19-73, granting ALNAFT a mining title for the exploration and exploitation of hydrocarbons provides in its first article that "*it is awarded to the national agency for the development of hydrocarbon resources ALNAFT, a mining title for research activities and/or exploitation of hydrocarbons on the perimeter called 'OFFSHORE ALGERIA' with an area of 131,165, 44 km^2 and adjacent to the territories of the wilayas of El Tarf, Annaba, Skikda, Jijel, Béjaïa, Tizi-Ouzou, Boumerdès, Algiers, Tipaza, Chlef, Mostaganem, Oran, of Ain Temouchent and Tlemcen.*"

THE SPANISH AND ITALIAN REACTIONS FOLLOWING THE ESTABLISHMENT OF THE ALGERIAN EEZ: TOWARDS MARITIME DELIMITATION CONFLICTS?

Given the enormous economic and environmental stakes, but above all the new prospects for exploration and exploitation of the offshore of the north-western Mediterranean, having led to a veritable "*nationalization*" of this sea, the numerous proclamations of EEZs will lead certainly, without a real political will to overcome them, to maritime delimitation conflicts, as is the case in the eastern part of the Mediterranean.[146] The recent Spanish and Italian protests following the establishment of the Algerian EEZ are an instructive example of this (*Section A*). These disputes, even if they have not yet crystallized, will require a peaceful settlement which could be achieved by various means (*Section B*), and result in maritime delimitation agreements such as the Convention relating to the delimitation of the maritime boundary between the People's Democratic Republic of Algeria and the Republic of Tunisia, signed in Algiers on July 11, 2011.[147]

A. REACTIONS AGAINST THE UNILATERAL CREATION OF THE ALGERIAN EEZ

By a *Note Verbale* dated 27 July 2018 addressed to the Secretary-General of the United Nations (UNSG) by the Permanent Mission of Spain,[148] concerning Presidential Decree No 18-96, the

[146] Josep Lloret and others, 'Impacts of Recreational Boating on the Marine Environment of Cap de Creus (Mediterranean Sea)' (2008) 51 Ocean & Coastal Management 749.
[147] Journal Official De La Republique Algerienne Democratique Et Populaire, Dimanche 16 Dhou El Kaada 1434 (2013).
[148] United Nations, 'Convention Des Nations Unies Sur Le Droit de La Mer' (2020) 2019 Droit de la mer Bulletin 1.

Spanish Government wanted to make it known that it rejected the list of geographical coordinates of points fixing the outer limits of Algeria's EEZ, as contained in the annex to the said decree, filed on April 4, 2018, and that the Division of Maritime Affairs and the Law of the sea of the UN Secretariat circulated on April 17, 2018.[149] Indeed, the presidential decree of 2018 is silent on the method used to calculate the coordinates and does not specify the way used to consider the different islands facing the Algerian coast.

The geographical coordinates also seem to show that the Algerian claim encroaches on the EEZ claimed by Spain. Thus, the Spanish Government decided not to recognize the delimitation of the maritime spaces of Algeria and Spain according to these excessive coordinates in relation to the median line of equidistance between the Algerian coasts and the Spanish coasts. It considers that the said delimitation encroaches on the Spanish EEZ in the north-western Mediterranean,[150] as established by Royal Decree 236/2013 of April 5, 2013. It thus considers that the equidistance line between the lines bases for measuring the breadth of the territorial sea is the most equitable solution for delimiting the EEZs by agreement between States whose coasts are adjacent or opposite each other, and declares that it is fully prepared to enter into negotiations with the Government of Algeria in order to reach a mutually satisfactory agreement on the outer limits of their respective EEZs, in accordance with Article 74 of UNCLOS, and as provided for in Articles 2 of Royal Decree 236/2013 and Article 2 of Algerian presidential decree 18-96.

By a *Note Verbale* of November 25, 2018,[151] and referring to the deposit by Spain, on August 31, 2018, of a list of geographical coordinates of points concerning the outer limits of the Spanish EEZ,[152] the Government of Algeria wanted to emphasize that the unilateral delimitation carried out by Spain did not comply with the letter of UNCLOS and did not take into consideration the configuration, the particular specificities and the special circumstances of the Mediterranean, as well as the rules and relevant principles of international law that

[149] United Nations, 'Circular Communications from the Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, MZN (Maritime Zone Notifications)' (2018) MZN 135 2018 LOS.
[150] Boukabene Larbi, 'The Algerian Exclusive Economic Zone and the Question of Maritime Boundaries with Neighboring States' (2021) 8 Revue droit des transports et des activités portuaires 6.
[151] People's Democratic Republic of Algeria, *Note Verbale* (25 November 2018).
[152] United Nations, 'Circular Communications from the Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, MZN (Maritime Zone Notifications)' (2018) MZN 135 2018 LOS.

should govern the equitable delimitation of maritime spaces between Algeria and Spain, in accordance with Article 74 of UNCLOS. Furthermore, the Algerian Government expressed its opposition to the drawing of the outer limits of the Spanish EEZ, some parts of which are largely excessive and create an area of overlap with the Algerian EEZ, and that it, therefore, does not recognize the coordinates appearing in Royal Decree 236/2013. It appears from the analysis of these declarations that the essence of the problem between the two riparian States resides in the fact that Spain claims the application of the principle of equidistance, expressly provided for in its internal legislation,[153] whereas Algeria, given the configuration of its coast and the presence of islands in front of it, is a supporter of equity and equitable principles.[154] Nevertheless, bearing in mind the ties of friendship and the relations of cooperation that bind it to Spain, the Algerian Government has expressed its readiness to work, through dialogue and bilateral negotiations, towards an equitable solution on the outer limits of the two EEZs, in accordance with UNCLOS. Pending a definitive delimitation, the Algerian Minister of Foreign Affairs, by a *Note Verbale* No 15/422/MAE/DAJ/2019, dated June 20, 2019, wished to underline, in general, and rather vague terms, that "*the case law and state practice require that Algeria and Spain refrain, at this stage, from engaging in activities in the disputed overlapping area, linked to their sovereign rights, in particular exploration and exploitation, conservation and management of natural resources, biological or non-biological, as provided for in Article 56 of UNCLOS.*"[155] This Algerian position is described by some authors as "*important from the point of view of the law of the sea*" because it seems to represent an acknowledgement of an obligation against the coastal State not to engage in unilateral activities arising from sovereign rights in the disputed area.[156]

On the other hand, by a *Note Verbale* of November 28, 2018 addressed to the UNSG by the Permanent Mission of Italy,[157] concerning the Algerian presidential decree No 18-96, the Italian Government objected to the delimitation of the EEZ Algerian, insofar as it encroaches on certain areas of exclusively legitimate Italian interest.[158] It recalls that pursuant to Article

[153] Enrico Broggini, 'Law of the Sea: Maritime Delimitation in the Central Mediterranean Sea and Algeria's Proclamation of an Exclusive Economic Zone' (2021) 30 The Italian Yearbook of International Law Online 506.
[154] ibid.
[155] ibid.
[156] People's Democratic Republic of Algeria, *Note Verbale* (20 June 2019).
[157] Permanent Mission of Italy to the United Nations, *Note Verbale* (28 November 2018).
[158] ibid.

74 of UNCLOS, the delimitation of the EEZ is carried out by agreement in order to achieve an equitable solution. While waiting for this agreement, the States will have to do their best to conclude provisional arrangements. To this end, the Italian Government has expressed its readiness to undertake negotiations under Article 74 of UNCLOS to reach a mutually satisfactory agreement in this matter. In reaction to the Italian position, the Algerian Government replied on June 20, 2019,[159] that the establishment of its EEZ falls within the framework of its national legislation and the exercise by Algeria of its rights. sovereigns recognized in this area by UNCLOS more particularly and international law more generally. The Algerian Government also emphasizes that the delimitation of its EEZ was determined taking into consideration the relevant rules and principles of international law guaranteeing a fair and equitable delimitation of the maritime areas between Algeria and Italy, in accordance with the Article 74 of UNCLOS. And contrary to the response to the Spanish objections, with regard to the Italian objections, Algeria, in its response, makes no reference to a "*disputed overlapping area*", the Algerian Government simply recalls its attachment to the bonds of friendship and to the existing cooperation relations between the two countries, and reassures Italy of its full readiness to work to reach a fair and mutually acceptable solution on the outer limits of the Algerian EEZ and the Italian maritime space.

There are therefore indeed, in the author's view, premises for maritime disputes between Algeria on the one hand, and Spain and Italy on the other - notwithstanding the official declarations[160] - which will have to, sooner or later be settled.

B. PROSPECTS FOR DISPUTE RESOLUTION

Article 74 of UNCLOS, to which the Algerian, Spanish and Italian declarations refer, provides that the delimitation of the EEZ between States whose coasts are adjacent or opposite each other is carried out by agreement in accordance with international law, in order to reach a fair solution. This is also confirmed by Article 2 of the presidential decree establishing the Algerian EEZ which stipulates that "*the outer limits of the exclusive economic zone may, if necessary, be modified within the framework of bilateral agreements with the States whose coasts are*

[159] People's Democratic Republic of Algeria, *Note Verbale* (20 June 2019).
[160] People's Democratic Republic of Algeria, 'Press Release' <https://aps.dz/en/> accessed 23 September 2022.

adjacent to or facing the Algerian coasts, in accordance with the provisions of Article 74 of the United Nations Convention on the Law of the Sea of 1982." But if they do not reach an agreement within a reasonable time, the States have recourse to the procedures provided for in Part XV of the Convention, relating to the settlement of disputes (art. 279-299). The latter begins by laying down the obligation of States to settle their disputes by peaceful means. Then, it proposes a set of ways that can lead to the resolution of the conflict: non-jurisdictional (mediation, conciliation, etc.), contractual, provisional arrangements,[161] jurisdictional, with a general tribunal like the International Court of Justice (ICJ), a specialized tribunal like the International Tribunal for the Law of the Sea (ITLOS), an arbitral tribunal constituted in accordance with Annex VII to the Convention, or special arbitral tribunal constituted in accordance with Annex VIII. Regarding possible disputes between Algeria, Spain, and Italy, several scenarios can be envisaged for their settlement, including the legal route, even if it seems difficult to envisage. Indeed, Spain made a declaration of acceptance of the compulsory jurisdiction of the ICJ – under Article 36(2) of the Statute of the Court – in 1990,[162] then declared itself also in favour both at the ICJ and at the ITLOS for the settlement of maritime disputes.[163] Italy also declared itself in favour of the compulsory jurisdiction of the ICJ in 2014[164] and also of ITLOS.[165] Conversely, Algeria has still not accepted the compulsory jurisdiction of the ICJ[166] – which excludes the jurisdiction of the said conflict for the settlement of any dispute between Algeria and Spain or Algeria and Spain. Italy – and declared, upon its ratification of UNCLOS in 1996, that it does not consider itself bound by the provisions of Article 287(1)(b) of the Convention as to the submission of disputes to the ICJ, and that it considers the prior agreement of all the parties involved necessary in each case to submit a dispute to this Court.[167] Nevertheless, Algeria, by a declaration of May 22, 2018, under Article

[161] Alan E Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 International and Comparative Law Quarterly 37.
[162] ICJ, 'Declarations Recognizing the Jurisdiction of the Court as Compulsory' <https://icj-cij.org/en/declarations> accessed 23 September 2022.
[163] International Tribunal for the Law of the Sea,'States Parties' <https://itlos.org/en/main/the-tribunal/states-parties/> accessed 23 September 2022.
[164] ICJ, 'Declarations Recognizing the Jurisdiction of the Court as Compulsory' <https://icj-cij.org/en/declarations> accessed 23 September 2022.
[165] International Tribunal for the Law of the Sea,'States Parties' <https://itlos.org/en/main/the-tribunal/states-parties/> accessed 23 September 2022.
[166] ICJ, 'Declarations Recognizing the Jurisdiction of the Court as Compulsory' <https://icj-cij.org/en/declarations> accessed 23 September 2022.
[167] Stanimir A Alexandrov, 'The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?' (2006) 5 Chinese Journal of International Law 29.

287(1) of UNCLOS, affirms its choice for ITLOS for the settlement of disputes relating to the interpretation or application of the Convention.[168]

It should be emphasized, however, that the provisions of Article 298 of UNCLOS allow States Parties not to accept one or more of the dispute settlement procedures provided for in Section II with regard to certain categories of disputes, including those concerning the application or interpretation of Articles 74 and 83 relating to the delimitation of maritime zones. Algeria,[169] Spain,[170] and Italy[171] have made declarations to this effect in order to exclude court proceedings. Thus, unless the said declarations are withdrawn (Article 298(2) UNCLOS), the means of settling any maritime disputes between these States would rather be agreement by negotiation within a reasonable time or conciliation within the meaning of Article 298(a)(i) of UNCLOS. And it is precisely with this in mind that Algeria, from 2019, in its letters addressed to both Italy and Spain, wished to recall that it "*renews its full availability, to work through dialogue, with a view to reach an equitable solution within the framework of a maritime delimitation agreement, in accordance with Article 74 of the United Nations Convention on the Law of the Sea.*"[172]

Also, the Algerian and Italian authorities proceeded in September 2020, to the official installation of the Algerian-Italian Joint Technical Committee, responsible for the delimitation of the maritime borders between the two States.[173] With regards to Spain, during a joint press conference following a meeting between the Algerian and Spanish Ministers of Foreign Affairs in March 2020, the two parties expressed their common desire to negotiate for any problem of

[168] International Tribunal for the Law of the Sea,'States Parties' <https://itlos.org/en/main/the-tribunal/states-parties/> accessed 23 September 2022.
[169] ICJ, 'Declarations Recognizing the Jurisdiction of the Court as Compulsory' <https://icj-cij.org/en/declarations> accessed 23 September 2022.
[170] ibid.
[171] ibid.
[172] People's Democratic Republic of Algeria, *Note Verbale* (20 June 2019).
[173] Algeria Press Service, 'Algeria-Italy: Official Installation of Technical Committee in Charge of Delimitation of Maritime Borders' (23 September 2020) <https://aps.dz/en/algeria/35850-algeria-italy-official-installation-of-technical-committee-in-charge-of-delimitation-of-maritime-borders> accessed 10 September 2022.

overlapping maritime zones, avoiding however, any clarification as to the timeframe or terms of the negotiations.[174]

CONCLUSION

It appears at the end of this analysis that the "*late*" proclamation by Algeria of its EEZ in 2018 will certainly have advantages but also disadvantages. Such a zone will allow the Algerian State on the one hand to exercise sovereign rights in terms of fishing over a larger area than that allocated by the RFZ – whose fate remains uncertain today – but also in terms of environmental protection, skills which it did not have before beyond 12 nautical miles. But the biggest advantage of this new institution will certainly be the economic profits derived from the offshore exploitation of hydrocarbons from the soil and subsoil of the Algerian EEZ, with all the risks for the marine environment and marine biodiversity that this may entail, especially in a semi-enclosed sea such as the Mediterranean, the balance between exploitation and protection is very difficult to achieve.

Moreover, this increasingly rampant trend of nationalization of the Mediterranean, in which Algerian policy fits like that of other States, will probably lead to a gradual abolition of the high seas in this geopolitically and strategically very important, and with it the "*international regime*" of this sea, responsible and balanced governance of this sea, with real and effective international cooperation, as advocated by Article 123 of UNCLOS.

[174] Inti Landauro, 'Spain Confident Algeria Will Respect Gas Supply Contracts despite Diplomatic Spat' (*Reuters*, 9 June 2022) <https://reuters.com/markets/europe/spain-confident-algeria-will-respect-gas-supply-contracts-despite-diplomatic-2022-06-09/> accessed 10 September 2022.

MY REPUTATION IS MY REPUTATION, NONE OF YOUR REPUTATION: UNFURLING CELEBRITY RIGHTS

- **Nandini Biswas***

ABSTRACT

Celebrity rights are a bundle of rights that entitle a person who has attained a celebrity status to a distinct "identity". The right to privacy inextricably linked with the Publicity Rights may all be referred to as Celebrity Rights. Popular persons frequently find themselves in a soup where their name, picture, or other likeness are distorted or unauthorisedly used by a third party to promote their goods or services by capitalising on their reputation and making it look as if that particular celebrity is endorsing it. In such cases, not only does a celebrity's reputation is likely to be damaged, but the celebrity also faces economic loss. As per John Locke, every person has the right to enjoy the fruit of their labour, similarly, celebrities should have the sole right to reap the benefits of their carefully crafted reputation. It is morally and economically unfair when a third party uses their reputation without their consent. This paper attempts to bring together the evolution, aspects, reasons, jurisprudence, and legislations revolving around celebrity rights under one ink. The paper concludes with serving food for thought to its readers.

Key Words- Privacy, Publicity, Personality, Celebrity, Copyright, Trademark, Passing-off

INTRODUCTION

With the advent of the 21st century, competition among brands has increased manifolds. Along with ensuring product quality, the companies are now tilting towards heavy marketing and advertisements of their goods and services. Companies engage celebrities or popular personalities to endorse their brand to create brand awareness. Celebrity endorsements are a way of influencing customers, gaining visibility and increasing credibility in the market. But

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what happens when a third party uses a celebrity's image or voice unfairly? Does it only affect the celebrity, or does it also affect the endorsing company?

Any unfair use of a celebrity's likeness infringes a group or rights- Privacy, Personality, and Publicity. These rights together form Celebrity rights. When a celebrity endorses a product, the audience believes that the celebrity has faith in that product. In many situations, unfair use of a celebrity's image or voice by brands for advertising their products can disrepute the celebrity if the brand is viewed negatively by the people.[175] For example, a tobacco brand advertising its product by unfairly using a celebrity's image or voice might tarnish the reputation of the celebrity. Celebrities are approached for brand endorsements mainly based on the reputation they have in the eyes of the public. A tarnished reputation is thus bad for their business.

While the celebrity suffers damage to their reputation and above-mentioned rights, the brands they endorse might also face an economic loss. For example, if Mr. X, a celebrity is endorsing a protein drink brand 'A', and another protein drink brand 'B' unfairly uses Mr. X's image or voice while advertising their product, it creates confusion among the audience. The audience is led to believe that Mr. X, is endorsing brand 'A' as well as brand 'B'. Thus, the consumer base that A would have gained due to the popularity of Mr. X, gets divided between brand 'A' and brand 'B', making brand A suffer. So, celebrity rights are crucial not only to the celebrities themselves but also to the brands endorsed by such celebrities. Thankfully, for such brands and celebrities, IPR comes to their refuge, to some extent, to protect them from such unfairness.

RATIONALE FOR PROTECTING CELEBRITY RIGHTS

We generalise celebrities as being popular among the audience and as public figures capable of influencing people. But, from the legal perspective, a generalised view does little to no good. A public person is "*a person who, by his accomplishments, fame or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a "public personage". He is, in other words, a celebrity*."[176] The definition of a public person can also be extended to persons who try or

[175] Michael Madow, 'Private Ownership of Public Image; Popular Culture and Publicity Rights' (1993) 81 CLR <https://jstor.org/stable/3480785> accessed 31 January 2022.
[176] W Prosser, *Handbook of the Law of Torts* (4th edn, 1971) 823.

maintain a celebrity status.[177] Every person who wishes to lead a private life should be able to do so and has a right to be left alone,[178] more so when the person is a celebrity. The value of a celebrity's image or likeness goes beyond the right to privacy of a normal person as they have the right to publicity in their photos, voice, etc.[179] The need to protect celebrity rights can further be justified by the following theories-

1. JOHN LOCKE'S THEORY

John Locke, an English Philosopher and Political Theorist, wrote *The Second Treatise of Government* in 1689. In chapter 5 of the book, Locke explains how every man has a right to the labour of his body and the work of his hands. So, when he uses his labour on a property, it becomes his.[180] Celebrities work hard to earn a good reputation and uphold a positive image. Applying Locke's principle, since celebrities use their labour to create a good reputation for themselves, such reputation is their property and no one has a right to it unless they explicitly give someone a right to use their reputation.

Further, Locke illustrates that although the river created by God is commonly owned by all humans, if a person uses his labour and fills a jug with the river water, it belongs to such a person even though the jug might have been kept in the open where others have access to it. Locke argues that since such a person has used his labour, the jug of water strictly belongs to him and no one can use it without explicit consent.[181] Similarly, although a celebrity's images and likeness are publicly available, it still strictly belongs to the celebrity and no one can use it without their consent. Thus, no brand or company can use a celebrity's image or likeness without obtaining explicit and fair consent.

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[177] Richard B Hoffman, 'The Right of Publicity - Heirs' Right, Advertisers' Windfall, or Courts' Nightmare (1981) 31(1) DePaul Law Review <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=2296&context=law-review> accessed 2 February 2022.
[178] *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632.
[179] *Haelan Laboratories v Topps Chewing Gum Inc* (1953) 202 F 2d 866.
[180] John Locke, *Second Treatise of Government* (first published 1690, Jonathan Bennett, 2017) <https://earlymoderntexts.com/assets/pdfs/locke1689a.pdf> accessed 2 February 2022.
[181] ibid.

2. KANT'S AND HEGEL'S THEORY

A work is considered to be an expression of the author and resembles his personality. His expression forms a part of his creativity which deserves protection. This idea was proposed by a 19th-century philosopher, Kant.[182] Kant proposed that such an expression deserves protection because economic rights are vested in it and because it is the author's work and he has created it. This theory is based on moral rights protected by IPR that gives the artist certain rights to control modifications and derogatory actions against the work.[183]

Quoting the works of another political philosopher, George Hegel "*the circumstance that I, as free will, am an object to myself in what I possess and only become an actual will by this means constitutes the genuine and rightful element in possession, the determination of property*",[184] it is understood that personality of a person, especially a renowned one, is a culmination of their capabilities and reinforcement of self-understanding. Kant further stated that personality-related rights come into existence when such persons are willing to claim such rights against other persons.[185]

Putting this in perspective of celebrity rights and combining the views of the two philosophers, the image and likeness of a renowned person should be protected since it is an expression of their personality in terms of capability and self-understanding. Such an expression of personality needs protection and should be protected only if such persons claim their right over their personality.

3. UNJUST ENRICHMENT

Aside from the celebrities themselves, brands engaging celebrities for commercial advertisements or endorsements are also harmed if some other brand unfairly uses the likeness of such celebrities for promotion. Generally, as a matter of industry practice, celebrities

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[182] Immanuel Kant, *Immanuel Kant: Practical Philosophy* (Cambridge University Press 1996) 30-32 <http://users.clas.ufl.edu/burt/UnReadingDisaster/Kantperpetualpeace.pdf> accessed 2 February 2022.
[183] Berne Convention for the Protection of Literary and Artistic Works, art 6.
[184] Georg W F Hegel, *Elements of the Philosophy of Right* (Cambridge University Press 2001) 76-77 <http://home.lu.lv/~ruben/Vestures_filozofija/HegelPhilosophy%20of%20Right.pdf> accessed 2 February 2022.
[185] Immanuel Kant, *Immanuel Kant: Practical Philosophy* (Cambridge University Press 1996) 30-32 <http://users.clas.ufl.edu/burt/UnReadingDisaster/Kantperpetualpeace.pdf> accessed 2 February 2022.

engaged in a brand endorsement are not allowed to sign an endorsement agreement with another brand in the same product line so that consumers are attracted only to their brand and gain from such association with the celebrity. Eg- If Mr. X endorses a beauty brand 'P', he would not be allowed to endorse any other beauty brand by the endorsement agreement he signed with 'P'. In such a case, if any other beauty brand uses the likeness of Mr. X without his consent or an agreement, such brand will be unfairly benefitted. Richard Hoffman stressed this fact of unjust enrichment. He stated that since a celebrity's likeness attracts attention and promotes brands that the celebrity is associated with, any other brand using the celebrity's likeness without consent would result in unjust enrichment of such brand.[186]

This unjust enrichment is not only against the rightful brand but also against the celebrity. The desirability of a celebrity is a result of their hard work and sacrifices of their privacy (privacy is sacrificed when they agree to lend their name, image and likeness for their work). In the case of *McFarland v. E & K Corp*,[187] the court said that a celebrity's likeness is a fruit of their labour and they should be entitled to legal protection. Their hard work empowers them with significant economic potential and thus, they should be able to freely enjoy the fruits of their labour without unjust enrichment[188] and should be able to capitalise their personality completely.[189] Their reputation is like an investment for them which pays off. If they are not protected against unjust enrichment, they will lose interest in investing in their image.[190] The apex court of US observed that "*The State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual…the protection provides an economic incentive for [the artist] to make the investment required to produce a performance of interest to the public.*."[191]

VARIOUS ELEMENTS OF CELEBRITY RIGHTS

After establishing that celebrities and brands they endorse have the inherent right to protect their work from unjust enrichment, it is quintessential to look at the various rights of celebrities'

[186] W Prosser, *Handbook of the Law of Torts* (4th edn, 1971) 823.
[187] *McFarland v E & K Corp* (1991) 18 USPQ 2d (BNA) 1246.
[188] *Palmer v Schonhorn Enters Inc* (1967) 96 NJ Super 458.
[189] *Zacchini v Scripps-Howard Broad Co* (1977) 433 US 562.
[190] ibid.
[191] *Palmer v Schonhorn Enters Inc* (1967) 96 NJ Super 458.

that act as a safeguard and protect their likeness. As pointed out earlier in this paper, celebrity rights are a combination of 3 rights- Privacy rights, Personality rights and Publicity rights.

1. PERSONALITY RIGHTS

Every person has a unique personality that helps others identify and distinguish them from others. Each person is recognised by their personality, which creates a certain image of themselves in public eyes.[192] An individual's emotions, dignity, morals etc., are a part of their personality.[193] Each person contributes to society in their unique way owing to their personality and individual talents. The Hegelian metaphysical concept of property also justifies such personalities by saying, "*An individual's property is an extension of their personality.*"[194] In accordance with Locke's theory and the Hegelian concept put into the current frame of personality rights, it is safe to conclude that a celebrity's work is an extension of their personality.

Jurisprudence philosopher Sir Salmond once opined that "*persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality received legal recognition.*"[195] One of the first legal battles to claim personality rights was fought in 1931 when Tolley, an amateur golf player was portrayed in a Cadbury chocolate advertisement by the defendants without Tolley's consent. Tolley moved the court and argued that the defendants wrongly portrayed him in the advertisement and made it appear as if he was endorsing the brand to gain an unfair advantage of his reputation and personality as an amateur golf player. The court contended with his argument and awarded damages to him for the wrongful use of his personality.[196]

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[192] Tabez Ahmed and Satya Ranjan Swain, 'Celebrity Rights: Protection under IP Laws' (2011) 16 Journal of Intellectual Property Rights <http://nopr.niscair.res.in/bitstream/123456789/11021/1/JIPR%2016(1)%207-16.pdf?utm_source=The_Journal_Database&trk=right_banner&id=1415701989&ref=16069806d0afbb3d9db21bfeeeb5de0e> accessed 26 January 2022.
[193] Garima Budhiraja, 'Publicity Rights of Celebrities: An Analysis under the Intellectual Property Regime' (2011) 7 NALSAR Student Law Review <http://commonlii.org/in/journals/NALSARStuLawRw/2011/7.html> accessed 26 January 2022.
[194] Kanu Priya, 'Intellectual Property and Hegelian Justification' (2008) 1 NUJS Law Review <http://commonlii.org/in/journals/NUJSLawRw/2008/23.pdf> accessed 26 January 2022.
[195] PJ Fitzgerald, *Salmond on Jurisprudence* (Universal Law Publishing 2002) 298.
[196] *Tolley v Fry* (1931) AC 333.

2. PRIVACY RIGHTS

The concept of celebrity rights gained momentum through the concept of privacy rights. As Samuel Warren and Louis Brandeis argued, the right to be left alone is a basic personal freedom and should be extended to all persons.[197] People are fascinated by a celebrity's lives and need to know every single detail of their lives. To fulfil this wish, the media and paparazzi hover around celebrities to collect whatever information possible and feed the public. As a result, the privacy of a celebrity's family, friends, relatives, etc., is also encroached upon. Amongst all this, the life of a celebrity becomes open to media and public scrutiny, thus resulting in "*colonisation of the veridical self by the public face*" as quoted by David Tan.[198] He further elaborates that even a modicum of privacy for celebrities should be a fundamental human right given how open their lives are to the media and scrutiny.[199] Following the observations of Michael Madow[200] mentioned previously, David Tan's remark seems prudent.

While celebrities do require media attention for their profession, sometimes the overreaching effects of media can be overwhelming. Understanding the dilemma of public figures, Braudy wrote "*Fame is desired because it is the ultimate justification, yet it is hated because it brings with it unwanted focus as well, depersonalising as much as individualising. Then, when the public image threatens to become overpowering, privacy seems to be a retreat*"[201] Simply put, to build an image and reputation, public figures need to have a public life, they wilfully give up their privacy in certain circumstances. But when it starts encroaching their personal space, they start claiming their privacy rights. Everything should be in the right proportion; a balance needs to be maintained. Privacy rights ensure that celebrities have this balance. In a classic case, Dorothy Barber was forcefully photographed inside her hospital room during delivery even after the agency was denied entry.[202] In 2017, India received her landmark judgment on

[197] Louis D Brandeis and Samuel D Warren, 'The Right to Privacy' (1890) 4 HLR <https://cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf> accessed 27 January 2022.
[198] David Tan, 'Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies' (2007) 25(3) AELJ <https://heinonline.org/HOL/LandingPage?handle=hein.journals/caelj25&div=31&id=&page=> accessed 25 January 2022.
[199] ibid.
[200] Michael Madow, 'Private Ownership of Public Image; Popular Culture and Publicity Rights' (1993) 81 CLR <https://jstor.org/stable/3480785> accessed 31 January 2022.
[201] Leo Braudy, *The Frenzy of Renown: Fame and its History* (Oxford University Press 1986).
[202] *Barber v Times Inc* (1942) 159 SW 2d 291, 295.

privacy rights that included privacy as a part of fundamental rights.[203] The court, in this case, further recognised privacy rights to upheld individual autonomy and personal dignity.

3. PUBLICITY RIGHTS

It was in the 1950s that the marketing and advertising industry realised the potential of celebrity endorsements. Due to high economic returns on celebrity endorsements, the commercial value of celebrities increased.[204] The newly introduced concept of celebrity endorsement gained momentum quickly due to its economic benefits and thus needed legal protection. It is a fact that if something has a high commercial value, the judicial system will always protect it.[205]

Publicity rights prevent the unauthorised use of a celebrity's name or likeness by a third person for commercial benefit. It was first defined as "*inherent right of every human being to control the commercial use of his or her identity*" in 1984.[206] Publicity rights give a celebrity the exclusive right to license their name and likeness to a third party of their choice for commercial. In case of unauthorised use of their likeness, publicity rights grant them the right to demand compensation. The first case to ever recognise this right and separate it from privacy rights[207] was *Harlan Laboratories, Inc. v. Topps Chewing Gum Inc.*[208] In the case, the court ruled that public figures have "*publicity rights in their photographs*" and have the "*right to grant the exclusive privilege of publishing*".

In *Martin Luther King, Jr. Centre for Social Change, Inc. v. American Heritage Products, Inc.*,[209] it was upon the court to decide whether the death of a celebrity extinguishes their publicity rights, the opined that "*if the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely*

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[203] *K S Puttaswamy v Union of India* (2017) 10 SCC 1.
[204] George M Armstrong Jr, 'The Reification of Celebrity: Persona as Property' (1991) 51(3) Lousiana Law Review <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5285&context=lalrev> accessed 28 January 2022.
[205] ibid.
[206] *Lerman v Flynt Distrib Co* (1984) 745 F 2d.
[207] Harshada Wadkar, 'India: Publicity Rights and its Scope in Intellectual Property Laws' (Mondaq, 19 March 2020) <https://mondaq.com/india/trademark/905188/publicity-rights-and-its-scope-in-intellectual-property-laws> accessed 25 January 2022.
[208] *Haelan Laboratories v Topps Chewing Gum Inc* (1953) 202 F 2d 866.
[209] *Martin Luther King Jr Center for Social Change, Inc v American Heritage Products, Inc* (1983) 694 F 2d 674.

death would seriously impair, if not destroy, the value of the right of continued commercial use.." thus implying that celebrity rights are transferable and inheritable.[210]

INDIA'S STANCE ON CELEBRITY RIGHTS

With regard to the judicial interpretation of celebrity rights, India is far behind its Western counterparts. The Indian legislation also has not shown acceptance of this concept. While India is still at a nascent stage in conceptualising celebrity rights, the momentum in India is not very encouraging. Only one piece of legislation in India prohibits the unauthorised use of certain public figures and national emblems for commercial benefits- The Emblems and Names (Prevention of Improper Use) Act, 1950.[211] Such marks as provided in the schedule of the act is also prohibited from being trademarked on the grounds of complete refusal of registration.[212] Montblanc, a German company launched a limited edition of 'Gandhi Pens in honour of Mahatma Gandhi. On 29 September 2009, Tushar Gandhi, Mahatma's great-grandson launched the 'Gandhi Pens' in India. 2 days after the launch, a petition was filed before the Kerala High Court stating that the sale of such pens is illegal since the section 9A of the Emblems Act protects the name and pictorial representation of Mahatma Gandhi and states that it cannot be used as an item for commercial or trade purposes.[213] The court closed the petition after the respondent agreed not to sell the 'Gandhi Pens' owing to the Emblems Act.

1. CELEBRITY RIGHTS AND IPR

In the late 1990s, courts recognised the popularity to be an IPR. In an unreported case of *Sourabh Ganguly v. Tata Tea Ltd.,*[214] although Sourabh was an employee of the defendant company, he did not authorise the company to advertise their tea using his name. Thus, the court held that the fame and popularity he gained as a cricketer constituted Intellectual property rights of which he was the proprietor. For a long time, celebrity rights have been sought after as per the ambit of IPR in India, primarily because India did not recognise the right to privacy as a fundamental right until the Puttaswamy case in 2017.[215] This case put privacy rights in

[210] Prakash Sharma and Devesh Tripathi, 'Celebrity Agony: Establishing Publicity Rights under the Existing IPR Framework' (2019) Summer Issue ILI Law Review <https://ili.ac.in/pdf/prakash.pdf> accessed 27 December 2021.
[211] Emblems and Names (Prevention of Improper Use) Act 1950, s 3.
[212] Trade Marks Act 1999, s 9(2)(d).
[213] *Dijo Kappen v Union of India* (2011) SCC OnLine Ker 1213.
[214] *Sourabh Ganguly v Tata Tea Ltd* (1997)CS No 361 of 1997.
[215] *K S Puttaswamy v Union of India* (2017) 10 SCC 1.

India on the map of Part III of the Constitution. Thus, there has been very little development of celebrity rights concerning privacy in India. However, privacy has been the setting ground for the recognition of celebrity rights as a concept around the world.[216] In IPR, celebrity rights get protected via Trademark, Copyrights and tort of passing-off.

A. TRADEMARK

Protection under Trademark is similar to celebrity rights in one aspect- Controlling confusion. As trademarks prevent consumers from confusing one brand for the other, celebrity rights also prevent the audience from thinking that a particular celebrity is associated with the brand in the case where the brand unfairly uses such celebrity's likeness. But, the purpose of Trademark is wholly different from celebrity rights.[217] The test for Trademark infringement is based on "*likelihood of confusion*" and the test to determine infringement of publicity rights is "*identifiability*".[218]

The Shakespearean concept of 'What's in a name?' seemed apt for those times when people wanted to spread the idea of believing in a man's ability than in his name. But now, a person is recognised by his name for the hard work he puts in. Bringing this in context with the theme of the paper, a celebrity is known by their name. The fruit of their hard work is embedded in their name and likeness. After the 2016 Supreme court judgment[219] where the court held that title of a work cannot be protected under Copyright, the only resort left was that of the trademark.

No provision under the Trademarks Act, 1999 prohibits a celebrity from trademarking their name. Section 2(zb) defines 'trade mark' as a sign or symbol represented graphically that distinguishes the goods and services of one person from the other.[220] To prevent unscrupulous use of celebrity's names, they have turned towards trademarking their name. In India, the act allows registration of "*sign capable of distinguishing goods and services of one person from*

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[216] Louis D Brandeis and Samuel D Warren, 'The Right to Privacy' (1890) 4 HLR <https://cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf> accessed 27 January 2022.
[217] McCarthy and J Thomas, *Rights of Publicity and Privacy* (Clark Boardman Callaghan 1999).
[218] Patrick J Heneghan and Herbert C Wamsley, 'The Service Mark Alternative to the Right of Publicity: Estate of Presley v. Russen' (1982) 2(1) Loyola of Los Angeles Entertainment Law <http://preslaw.info/the-service-mark-alternative-to-the-right-of-publicity-estate-of-presley-v-russen> accessed 14 February 2022.
[219] *Krishika Lulla v Shyam Vithalrao Devkatta* (2016) 2 SCC 52.
[220] Trade Marks Act 1999, s 2(zb).

another, any word (including personal names), design, numeral and shape of goods or their packaging"[221] as a trademark. Indian courts, too have granted celebrities protection under Trademark by allowing them to trademark their name and titles and characters and titles of films.

To save themselves from unauthorised use of their names, celebrities in India like Shahrukh Khan, Kajol, Ajay Devgan, Sunny Leone and a few more have trademarked their name. Nice classification for Trademark categorises goods and services into 45 classes,[222] thus every good and service sought to be trademarked should be with respect to the classes. Celebrities wanting to trademark their name will also have to register under one of the 45 classes. For e.g., Shahrukh Khan registered work mark 'SRK' under class 9.[223]

After registering their name and likeness, celebrities can assign or licence their trademark.[224] Celebrities gain monetary benefits from such assignments and licensing. This way, they are in complete control of their image and likeness, commercially benefit from their goodwill and are also protected against any unauthorised use. In case of a deceptive mark or symbol similar to the one registered, is in use, the proprietor of a registered trademark can claim infringement of their trademark. This is called dilution of trademark which was first recognised in Indian courts in the 1990s.[225] Dilution has been termed as 'a species of infringement' by courts.[226] By far, Trademark provides the best protection amongst all the other forms of IPR protection.[227]

B. COPYRIGHT

Amitabh Bachchan was keen on copyrighting his voice after he learnt that a Gutka company imitated his voice in their advertisements to sell Gutka. But, unfortunately, the Copyright Act

[221] Trade Marks Act 1999, s 2(1).
[222] WIPO, Nice Classification <https://wipo.int/classifications/nice/nclpub/en/fr/> accessed 13 February 2022.
[223] Trademark Public Search, IP India online, Application no 970166 <https://ipindiaonline.gov.in/tmrpublicsearch/tmsearch.aspx?tn=254229726&st=Wordmark> accessed 18 February 2022.
[224] Trade Marks Act 1999, ss 37-56.
[225] *Daimler Benz Aktiegesellschaft v Hybo Hindustan* AIR 1994 Del 239.
[226] *ITC Limited v Philip Morris Products* (2010) 42 PTC 572.
[227] Prakash Sharma and Devesh Tripathi, 'Celebrity Agony: Establishing Publicity Rights under the Existing IPR Framework' (2019) Summer Issue ILI Law Review <https://ili.ac.in/pdf/prakash.pdf> accessed 27 December 2021.

in India does not protect voice *per se*.[228] The Copyright Act protects literary, dramatic, artistic or musical work, or cinematograph films and records. There has been no interpretation made to date by the judiciary that extended copyright protection to a person's voice *per se*.[229]

When the popularity of the fictional characters played by real-life celebrities increases, the audience tends to associate that celebrity with that fictional character.[230] In such cases, the celebrities have rights in their performance of that character, commonly known as performers' rights. Several international conventions like- The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (Rome Convention), Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS) and the WIPO Performances and Phonograms Treaty, 1996 (WPPT) protect and recognise performers' rights. The Indian legislation recognises performers to be "*actors, singers, musicians, dancers, acrobats, jugglers, conjurers, snake charmer, a person delivering a lecture or any other person who makes a performance*."[231] The legislation provides certain economic rights to performers like the right to make a visual recording or a sound recording of the act performed by the performers including the right to issue copies, the right of production, right to communicate the work to the public, the right to broadcast the performance to the public and right to sell or give the work on commercial rental.[232] Moral rights like the right to attribution and the right to the integrity of work are also vested in the performers.[233] Thus, if anyone uses a video or photograph or any kind of excerpt from the performance of a performer, such performer can claim infringement of their performers' rights.

Performers have three kinds of moral rights associated with their work according to the Delhi High Court.[234] First, paternity right in their work, i.e.- the right to have their name on the work.

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[228] Amit Gupta, 'When Celebrities Seek Copyrights' *Financial Express* (Noida, 27 December 2010) <https://financialexpress.com/archive/when-celebrities-seek-copyrights/729569/#:~:text=Voice%2C%20per%20se%2C%20cannot%20be,or%20cinematograph%20films%20and%20records.&text=However%2C%20copyright%20protection%20is%20not%20available%20specifically%20for%20voice.> accessed 19 February 2022.
[229] ibid.
[230] Nishant Kewalramani and Sandeep M Hegde, 'Character Merchandising' (2012) 17 JIPR <http://nopr.niscair.res.in/bitstream/123456789/14770/3/JIPR%2017%285%29%20454-462.pdf> accessed 17 February 2022.
[231] Copyright Act 1957, s 2(qq).
[232] Copyright Act 1957, s 38A.
[233] Copyright Act 1957, s 38B.
[234] *Amar Nath Sehgal v Union of India* (2005) 30 PTC 253.

This right is also called the right to identification since the work gets identified with the name of the performer. Second, the right to disseminate or divulge the work i.e.- selling the work for valuable consideration and lastly, the right to maintain the purity, i.e.- right against any kind of distortion or misidentification.

The supreme court in *Indian Performing Rights Society v. Eastern India Motion Pictures Association*[235] stated that the composer and lyricist of a cinematograph song have the right to perform that song in public even if the copyright of that song vests in the film producer if the film producer commissioned that song to the composer and lyricist for a valuable consideration. Such a person will then have performers' rights in the performance in today's date.

C. TORT OF PASSING-OFF

The tort of passing is not defined in the Indian legislation explicitly. The Cambridge Dictionary[236] defines the tort of passing-off as "*the illegal act of selling a product that is similar to one that another company has legally protected by a trademark*". The Trademark law protects against infringement of registered marks and provides the same remedy in case of unregistered marks in the form of the tort of passing-off.[237] The tort of passing-off is, therefore a common law tort protecting the goodwill of the trademark holder, whether registered or not, against any damage caused by the defendant using deceptive marks.[238] It is based on the concept "*A man may not sell his goods under the pretence that they are the goods of another man*"[239] The Supreme court defined the tort of passing-off as unfairly gaining economic benefit by capitalising on the reputation earned by the plaintiff.[240] The action of passing off is independent of the trademark claim of the plaintiff.[241] More than protecting the right of the plaintiff, the tort of passing-off protects the consumers against confusion and

[235] *Indian Performing Rights Society v Eastern India Motion Pictures Association* AIR 1977 SC 1143.
[236] 'Cambridge Dictionary' <https://dictionary.cambridge.org/dictionary/english/passing-off> accessed 21 February 2022.
[237] Trade Marks Act 1999, s 27.
[238] 'Passing-off Action under the Trademark Law' (Indian Bar Association) <https://indianbarassociation.org/wp-content/uploads/2013/02/Passing-off-action-under-trade-mark-law.pdf> accessed 23 January 2022.
[239] *N R Dongre v Whirlpool Corporation* AIR 1995 Del 300.
[240] *Cadila Healthcare Ltd v Cadila Pharmaceuticals Ltd* (2001) 5 SCC 73.
[241] *Wander Ltd v Antox India P Ltd* (1990) (Suppl) SCC 727.

misrepresentation.[242] One of the essentials of passing off is the consumers believing the goods to be that of the plaintiff and buying them.

The tort of passing off can be claimed after establishing three important elements. First, the plaintiff has goodwill and reputation, second, misrepresentation was made by the plaintiff either intentionally or unintentionally and third, the plaintiff has suffered or is likely to suffer damage due to the misrepresentation.[243] These essential elements were reiterated by the Supreme Court in 2002.[244] In the famous case of *Honda Motors Co. Ltd v. Charanjit Singh & Others*,[245] the plaintiff is the famous Japanese car and motorcycle giant and the defendants started selling pressure cookers under the name 'Honda'. Honda was an unregistered trademark then in 2002 (it registered its trademark in 2005),[246] the plaintiff filed an injunction against the defendants for the tort of passing off. The plaintiff could establish that they had goodwill and reputation, the defendants misrepresented their mark and that they suffered damages due to such misrepresentation by the defendants. Thus, the court granted an order of injunction in favour of the plaintiff.

In light of the theme of the paper, if a popular band- ABC has not registered its logo, and an apparel company starts associating the band's logo or uses a logo deceptively similar to the band. In this case, the public will be led to believe that the apparel company is somehow related to the band. So, ABC can claim the tort of passing off against the apparel company. In the case of *Irvine v. Talksport*,[247] the plaintiff, who was a famous sports star, came to know that a manipulated photo of his was used by the defendant as if the plaintiff was endorsing the defendant's radio station. The court held that although the plaintiff's likeness was used in a different industry, the tort of passing off will be maintainable since the "*likeness of the plaintiff is a fundamental of a brand and along with several economic and other rights conjoined with that status.*" In *Henderson v. Radio Corporation Pvt Ltd*,[248] the plaintiffs were professional

[242] *Consumer Distributing Co v Seiko Time Canada Ltd* [1984] 1 SCR 583.
[243] *Baker Huges Ltd v Hiroo Khushalani* (2000) 102 Comp Cas 203.
[244] *Laxmikant V Patel v Chetanbhat Shah* AIR 2002 SC 275.
[245] *Honda Motors Co Ltd v Charanjit Singh* (2002) 101 DLT 359.
[246] Trademark Public Search, IP India online, application no 797154 <https://ipindiaonline.gov.in/tmrpublicsearch/tmsearch.aspx?tn=255271965&st=Wordmark> accessed 21 February 2022.
[247] *Irvine v Talksport* (2002) WLR 2355.
[248] *Henderson v Radio Corporation Pvt Ltd* (1969) RPC 218.

ballroom dancers who claimed the tort of passing off and sought an injunction against the selling, printing or distribution of the gramophone record cover entitled "*Strictly for Dancing Vol 1*." The court agreeing with the plaintiff opined that "*wrongful appropriation against the personality of a professional is an injury to professional reputation*." Since the plaintiffs were professionals and their name was unauthorisedly used by the defendants in the same industry, it was likely to create confusion amongst the public and would lead them into believing that the plaintiffs were associated with the goods of the defendants.

2. JUDICIAL EFFORTS

The judiciary has been putting efforts to evolve a holistic jurisprudence for the concept of celebrity rights. In various cases, the courts have taken varying opinions giving us the surety that the courts will not carry a strict interpretation of the concept. The judiciary while delivering on that surety has gone ahead with the legislation and recognised all the three elements of celebrity rights- Privacy, personality and publicity independent of any legislation.

A. PUBLICITY AS A PRIVACY RIGHT

The Supreme Court while laying down that right to privacy is a part of Article 21 of the constitution in the R Rajagopal case, opined that "*A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy"*[249] This judgement came way before the development of publicity rights started in the country. This shows that the courts have always wanted to root publicity rights as a part of privacy. Further, this same para of the judgement was cited by the Madras high court while expressing that publicity rights lie in the right to privacy.[250]

[249] *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632.
[250] *K Ganeshan v Film Certification Appellate Tribunal* (2016) SCC OnLine 9355.

Analysing the last line of the cited paragraph of the R Rajagopal case, the court believes that if a person voluntarily brings controversy upon himself, the right to privacy would not be available to them. As discussed earlier in this paper, celebrities wish to be in the spotlight, and thus voluntarily bring controversy to themselves. Building upon this view, the defendants in the case of *Phoolan Devi v. Shekhar Kapoor*[251] argued that since the plaintiff is a celebrity who chose to live a life open to the public domain, does not have privacy rights. Interestingly, the court relied on the same case of R Rajagopal (which the defendant used to base their argument) and ruled that "*the right to privacy must encompass and protect the personal intimacies of the home, family, marriage, motherhood, procreation, and child-rearing, irrespective of whether the person is a public figure*" and passed an order in favour of the plaintiff.

The first case that recognised celebrity rights was *ICC Development (International) Ltd. v. Arvee Enterprises*.[252] The court opined that the publicity rights of a celebrity have grown from privacy rights and a person acquires publicity right by virtue of his association with a sports movie etc. The court indicated that "*such a right is only vested in an individual or the indicia of the individual's personality like name signature voice etc*." It further stated that such rights are not vested in any organisation that promoted the person and made him popular.

B. IDENTIFIABILITY - AS A PERSONALITY RIGHT AND PROPERTY RIGHT

In another Madras high court case,[253] the famous actor Shivaji Rao Gaikwad aka Rajnikanth filed an injunction against a film titled "*Main Hoon Rajinikanth"* claiming that he did not authorise the film. Further, the defendant chose to advertise the film as "*Hot Kavita Radheshyam As Sex Worker For Rajinikanth*". The plaintiff found the act of the defendant to be defamatory and unauthorised. The court, in this case, did not focus on the privacy right that the plaintiff is entitled to but focussed on how the film was not consented to and the advertisement was defamatory to the plaintiff who has acquired a reputation and built a personality of his own. The court found the actions of the defendant to be a breach of personality right vested in the plaintiff and granted a permanent injunction. The court stressed the fact that to claim personality rights, the person needs to be a celebrity- easily identifiable.

[251] *Phoolan Devi v Shekhar Kapoor* (1994) SCC OnLine 722.
[252] *ICC Development (International) Ltd v Arvee Enterprises* (2005) 30 PTC 253.
[253] *Shivaji Rao Gaikwad v Varsha Productions* (2016) 62 PTC 351.

Interestingly, the court while deciding this case referred to the cases of publicity rights and thus equated personality rights with publicity rights.[254]

In the case of *D.M. Entertainment v. Baby Gift House*,[255] Daler Mehndi had assigned his trademark to the plaintiff to commercialise his persona. The defendant misused the trademark and the plaintiff sought a remedy against the defendant. This case brought a big jump in the jurisprudence of publicity rights as it laid down the test of 'identifiability'. The court said that personal attributes should be identified as a part of personality and concluded by remarking that "*publicity right can, in a jurisprudential sense, be located with the individual's right and autonomy to permit or not to permit the commercial exploitation of his likeness or some attributes of his personality."*

In a personality right infringement filed by Sonu Nigam against Mika Singh, the Bombay High Court held that: "*no third person should make any commercial profits by using celebrity images unless they have consented to it*". The court deemed fit to impose a heavy fine on the defendant and in general in such cases so that the fine acts as a deterrent against gaining unjust enrichment by using a celebrity's reputation and likeness

Titan Industries v. Ramkumar Jewellers[256] is an authoritative text on publicity rights in India and has been cited repeatedly. Mr Amitabh Bachchan and Mrs Jaya Bachchan had assigned the plaintiff their publicity rights to advertise the goods of the plaintiff. The defendant unauthorisedly portrayed Mr Amitabh Bachchan and Mrs Jaya Bachchan as endorsers of the defendant's business on hoardings that were put up for advertising his goods. The plaintiff argued that they had a publicity right that had been allocated to them by a contract. The discussion was broken into three points by the court. The first is the plaintiff's legal right to sue. In this case, the court decided that the plaintiff should be allowed to sue because of the exclusivity clause in the contract. Second, the court defined the publicity right as a celebrity's right. Finally, the court examined 'validity' and 'identifiability' as aspects of publicity rights. The same criterion of 'identifiability' was mentioned in the D.M. Entertainment case,[257]

[254] Siddharth Jain and Sanyam Jain, 'Publicity Right in India: A Misconception!' (2020) 3(2) JIPS <https://journalofipstudies.files.wordpress.com/2020/07/vol-3-issue-2-6.pdf> accessed 16 February 2022.
[255] *D M Entertainment v Baby Gift House* MANU/DE/2043/2010.
[256] *Titan Industries v Ramkumar Jewellers* (2012) 50 PTC 486.
[257] *D M Entertainment v Baby Gift House* MANU/DE/2043/2010.

however, in the present case, the 'validity' factor was defined as the plaintiff having an enforceable claim in a human being's identity or persona, thus justifying the *locus standi* of the plaintiff.

C. PUBLICITY RIGHTS AS A PART OF TRADEMARK LAW

Mr Arun Jaitley's name, the court found in *Arun Jaitley v. Network Solutions Private Limited and Ors,*[258] comes into the category of names that, in addition to being a personal name, have acquired distinguishing indicia of their own. As a result, the said name has become a well-known personal name or mark under trademark law due to its unique nature or distinctive character, as well as its increased popularity in a variety of industries. As a result, trademark law protects some part of the right to publicity.

The plaintiff was a luxury brand and the defendant was a luxury online shopping portal in the case of *Christian Louboutin Sas v. Nakul Bajaj*.[259] The plaintiff observed sales of their product-line made on the defendant's platform were unauthorised sales and sued the defendant for dilution of trademark, passing-off, and trademark infringement on various grounds, one of them being that the defendant's website prominently exhibited images of Mr Christian Louboutin, infringing on his right of publicity. In support of his claim, the plaintiff argued that popular persons have the right to publicity in their photos, and cited a US judgement- *Haelan Laboratories v. Topps Chewing Gum*[260] and the Titan Industries case[261] to back up their argument. The Delhi high court found the scales of justice dipping weighing in the favour of the plaintiff.

In the case of *Gautam Gambhir v. D.A.P & Co*.,[262] the plaintiff who is a well-known cricket personality Gautam Gambhir filed an injunction seeking to prevent the defendant from using his name in the tagline of the restaurants owned by the defendant. The defendant contended that the use of 'Gautam Gambhir' was due to the defendant's name being Gautam Gambhir. The defendant was further able to prove that he had taken cautious steps by putting his pictures

[258] *Arun Jaitley v Network Solutions Pvt Ltd* (2011) 181 DLT 716.
[259] *Sas v Nakul Bajaj* (2015) 216 DLT (CN) 9.
[260] *Haelan Laboratories v Topps Chewing Gum Inc* (1953) 202 F 2d 866.
[261] *Titan Industries v Ramkumar Jewellers* (2012) 50 PTC 486.
[262] *Gautam Gambhir v DAP & Co* (2017) SCC OnLine 12167.

on online websites and associating his name with those pictures. In this case, it was noted that the ' 'plaintiff's goodwill in so sense was depreciated in his field- cricket. The court noted that the defendant did not have any malafide intention of capitalising on the plaintiff's reputation and since the plaintiff is not associated with the restaurant industry and thus the plaintiff's name was not being commercialised by the defendant to gain any economic advantage. The defendant was merely using his name in the tagline of the restaurants. The significance of this case is that it emphasised the importance of a clear message of endorsement and thus used the confusion test, which is commonly used in trademark law, to determine the validity of the plaintiff's claims. It also laid down certain boundaries for claiming publicity rights in the likeness of celebrities, another wise any person with the same or similar likeness to that of the celebrity will never be able to use their personality traits in the public domain.

CONCLUSION

Celebrity rights give celebrities the right to commercialise their personality and gain monetarily, thus vesting economic rights in their personality. Locke's theory[263] aptly justifies why a celebrity should be able to capitalise on their personality and Kant[264] stresses the fact that economic right is vested in the work of the author since it's an extension of his personality. On the other hand, Hegel[265] believes that personality rights are not vested in the celebrity they come into existence only when claimed. This parody is resolved by looking at IPR. The IPR regime supports Kant to some extent. In the case of copyright, India does not mandate the registration of work in order to claim copyright infringement and monetary compensation.[266] Although the Trademark act in India mandates registration of the trademark,[267] an unregistered mark can be protected via common law- tort of passing-off.[268] Thus, it can be safely concluded that economic rights vest in the celebrity.

[263] John Locke, *Second Treatise of Government* (first published 1690, Jonathan Bennett, 2017) <https://earlymoderntexts.com/assets/pdfs/locke1689a.pdf> accessed 2 February 2022.
[264] Immanuel Kant, *Immanuel Kant: Practical Philosophy* (Cambridge University Press 1996) 30-32 <http://users.clas.ufl.edu/burt/UnReadingDisaster/Kantperpetualpeace.pdf> accessed 2 February 2022.
[265] Georg W F Hegel, *Elements of the Philosophy of Right* (Cambridge University Press 2001) 76-77 <http://home.lu.lv/~ruben/Vestures_filozofija/HegelPhilosophy%20of%20Right.pdf> accessed 2 February 2022.
[266] Copyright Act 1957, s 45.
[267] Trade Marks Act 1999, s 27.
[268] Trade Marks Act 1999, s 27(2).

Turning to the judiciary, celebrity rights have come a long way from being recognised as a part of privacy and IPR to having its separate share of judicial interpretation. The judiciary in India has been proactive in evolving jurisprudence around the concept the celebrity rights. Celebrity rights encompass- privacy rights, personality rights and publicity rights, publicity rights being the most important one. From the jurisprudential aspect, privacy rights only claimed a breach of privacy which every person has a right to as opined in the R. Rajagopal case[269]. Then came the right to personality which gave rights only to persons who attained a celebrity status to claim rights on their likeness and damage to reputation by the act of the defendant.[270] With the advent of publicity rights, celebrities' right to assign and license their personality rights were guaranteed and any misuse of such assignment and licensing was prevented.

The judiciary has made it amply clear that publicity rights only vest in a celebrity.[271] This is contrary to what Canada follows. In Canada, every person has a right to their name, voice and likeness.[272] Since the Indian judiciary is of the opinion that publicity rights are rooted in privacy right[273]- a right available to all the citizens of the country, then why doesn't the court allow a non-celebrity to claim a breach of publicity right? – Just a food for thought!

[269] *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632.
[270] *Shivaji Rao Gaikwad v Varsha Productions* (2016) 62 PTC 351.
[271] ibid.
[272] Nina R Nariman, 'A Cause Célèbre: Publicity Rights in India' (2021) 6(1) SCC-J <https://scconline.com/blog/post/2022/01/24/a-cause-celebre-publicity-rights-in-india/> accessed 22 February 2022.
[273] *ICC Development (International) Ltd v Arvee Enterprises* (2005) 30 PTC 253.

‘RELEVANT’, ‘INTERNATIONAL’, AND ‘STANDARDS’ UNDER THE TECHNICAL BARRIERS TO TRADE AGREEMENT: THREE SIDES OF A GOLDEN TRIANGLE

- **Anshul Dalmia**[*]

ABSTRACT

The absence of a definition in an international agreement to which several States are signatories, not only creates uncertainty but also prevents the effective implementation of the said Convention. The potential misuse of such broad and undetermined clauses in international instruments tends to trouble the global legal community and plagues the regime. Unfortunately, Article 2.4 of the Technical Barriers to Trade (‘TBT’) Agreement fails to define and highlight the contours of the term – ‘relevant international standards’. Through this paper, the author aims to navigate the jurisprudential underpinnings of the undefined term ‘relevant international standards’ in the TBT Agreement. In this backdrop, this paper attempts to bridle this unruly horse and contextualise the term using interpretative tools. The importance of standards especially in a consumer-driven market is showcased, coupled with an in-depth analysis of contemporary judicial decisions that have aimed to bridge the widening hiatus. Subsequently, the possibility of including international organisations whose standards could be considered as a part of the undefined term is evaluated. While attempting the herculean task of evaluating the inclusion of a few potential International Standardising Bodies, the paper would use the ‘consensus’ requirement present under Article 1.2 of the TBT Agreement as an interpretative tool. Moreover, the qualifications of ‘relevant’ and ‘international’ are examined with the objective of streamlining the interpretation. The author concludes the paper by viewing the international standardising bodies through a critical lens and provides novel suggestions to accentuate the existing lacunae.

Keywords: Relevant International Standards, Technical Barriers to Trade Agreement, Standardisation, International Standardising Bodies, Consensus

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INTRODUCTION

The expansion of international markets led to an increase in the consumer demand and preference for products being safer and better. The solution to this was found in the process of standardisation – where products go through a process of development in order to meet certain well-defined criteria, which would be tailored according to the values and inclinations reflected by the society[274]Over the years, standardisation has become a catalyst for international trade, global commerce, and the World Trade Organization ('WTO') through the TBT Agreement that is aimed at providing some deference to technical regulations and international standards.[275] However, the term 'relevant international standards' has not been defined under the TBT Agreement giving rise to a plethora of problems.

An undefined term in an agreement is always an issue when it comes to the interpretational aspect of it. Not only does it cause immense confusion to jurists and practitioners, but also tends to be a matter of worry due to the possibilities of imprecise evaluations of products. The lack of an explanation for such an imperative term goes against the need for which it was incorporated. The potential misuse of such broad undetermined clauses in international instruments tends to trouble the global legal community and plagues the regime with the following issues.

Firstly, since the WTO is not a standard-setting body, there has been a 'regulatory outsourcing' to several International Standardising Bodies ("*ISBs*"). The standards developed by private ISBs have assumed immense significance as compliance to the TBT Agreement is adjudicated with respect to the fulfilment of these standards.[276] The growth of this transnational framework has materialised in a vacuum without any interference from any formal State law – leading to the development of extremely fluctuating informal standards. The delegation of legislative power to private parties has made this paradigm more of power politics than good global governance practices. *Secondly*, the TBT Agreement does not expressly list the ISBs which have been determined to provide such standards, unlike the Sanitary and Phytosanitary

[274] Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) Journal of World Trade 1223, 1225.
[275] Luis Cabral and Tobias Kretschmer, 'Standard Battles and Public Policy' in Shane Greenstein and Victor Stango (eds), *Standards Battles and Public Policy* (Cambridge University Press 2006).
[276] Joost Paulewyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).

Measures ('SPS') Agreement, leading to considerable confusion.[277] *Thirdly*, the standards created by the ISBs, which have been adopted in the regulatory landscape of the WTO are claimed to be incorporated through opaque processes that are not in accordance with the due procedure, with nonchalance towards the ideals of inclusivity, consensus and representativeness – the pillars supporting the foundation of the WTO.[278] In this backdrop, the paper seeks to define the contours of the term 'relevant international standards' and suggest measures to bridge this gap and rectify this grave error for a holistic international trade framework.

Through this paper, the author aims to navigate the jurisprudential underpinnings of the undefined term 'relevant international standards' in the TBT Agreement. Part I of the paper introduces the topic at hand and attempts to explain the background and significance of the lack of a definition and the imperative need to streamline such an explanation. The paper, through Part II, aims to examine the nature of standards in the international trade regime. The need for having the standards in the first place will be explored, coupled with their responsibilities as espoused under the TBT Agreement will be navigated. Through Part III of the paper, the author will attempt to bridge this vacuum through an in-depth analysis of judicial decisions. Moreover, it will seek to evaluate the inclusion of a few potential ISBs by interpreting the provisions of the TBT Agreement vis-à-vis the SNP Agreement. The paper will use the 'consensus' requirement present under Article 1.2 of the TBT Agreement as an interpretative tool. Additionally, this part will study the decision-making process of the ISBs through a critical lens to highlight the need of streamlining a precise explanation for the term.

Part IV of the paper will seek to provide novel suggestions and recommendations in order to ensure that the ISBs become both effective and efficient and duly discharge their responsibilities as envisioned by the TBT Agreement.

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[277] Agreement on the Application of Sanitary and Phytosanitary Measures 1995, art 3(4).
[278] Panos Delimatsis, "Relevant International Standards' and 'Recognized Standardization Bodies' under the TBT Agreement' [2014] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489934> accessed 12 February 2021.

EXAMINING THE UNIQUE NATURE OF 'STANDARDS' IN THE INTERNATIONAL TRADE CONTEXT: PROVIDING CONTEXTUAL UNDERPINNINGS

This part aims to elucidate the nature and behaviour of 'standards' under the global framework vis-à-vis the TBT Agreement. Moreover, this part of the paper examines the importance of the standards in the international trade regime and highlights their imperative role by highlighting their nationwide presence. Additionally, this section also discusses the problems faced by the practice of standardisation, arising from the lacunae present in the TBT Agreement leading to a multitude of issues.

International trade, essentially, involves the export and import of goods across different jurisdictions and customers. Hence, there was a need to create certain 'standards' which could act as common parameters on which the quality and innovation of a product could be adjudicated nationwide.[279] The Preamble of the TBT Agreement establishes an assumption that adherence to 'standards' by a product is a clear benchmark of its efficiency, indicating a status of calibre.[280] Standards have thus become, technical knowledge codified under several international instruments in order to provide for procedural safeguards while developing conformity assessment systems.[281] They have been developed in such a manner that they constrict and regularise the behaviour of producers. They have become important yardsticks for measuring the development of domestic markets as well as the growth of international economies.[282] Initially, they were created to act as a mechanism of 'self-regulation' and were deemed to be 'soft-laws' due to their non-binding nature.[283] However, through the years, the standards which were supposed to bridge the gaps have instead become 'hard-laws' that are binding.[284] The advent of technology coupled with the complexities of a diverse world, have left most traditional states incompetent to regulate such behaviours. The incompetency arises

[279] ibid.
[280] The Technical Barriers to Trade Agreement, Preamble.
[281] Peter Swann, Paul Temple and Mark Shurmer, 'Standards and Trade Performance: The UK Experience' (1996) 106 The Economic Journal 1297, 1298.
[282] Knut Blind and Andre Jungmittag, 'The Impact of Patents and Standards on Macroeconomic Growth: A Panel Approach covering 4 Countries and 12 sectors' (2008) 29(1) Journal of Productivity Analysis 51.
[283] Nils Brunsson and Bengt Jacobsson, *A World of Standards* (Oxford University Press 2000) 89.
[284]John Howard Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press 2006) 65.

from the lack of adequate technological resources.[285] These constraints are present in most States and have led States to delegate their regulatory and supervisory role vis-à-vis the creation of technological standards with non-state actors, giving rise to a 'technocratic legitimacy' at the transnational level.[286] Such an approach, ridden with 'technological rationality' has appeared to be a win-win situation for both the States as well as the private actors, since there is a reduction of costs for the governments and an accentuation of sovereignty for private actors.[287]

Standards, supported by the pillars of innovation, quality, technological growth and evolution of knowledge, has been the basic foundation of consumer welfare.[288] The advantages and benefits arising from the presence of standards in the international community are innumerable. Standards provide an incentive to producers to innovate and capitalise on technological advances since it provides them a first-mover advantage and allows the creator to capitalise and subsequently monopolise the product vis-à-vis the market.[289] For instance, if there is a new technology with respect to fruits, the producer would attempt to capture this development since a standard would be created and provided to him based on the inclusion of the technology within his product.

This would provide the producer with an impetus to innovate and introduce effective products in the market.[290] Thus, the '*trade facilitation*' function of standards cannot be dispensed with. As highlighted through the above illustration, standards play an imperative role in ensuring the growth of businesses and national markets.[291] This aids in enabling trade with other countries across the world who would want the developed and specialised product, leading to an increase

[285] Linda Sender, *Soft Law in European Community Law* (Hart Publishing 2004).
[286] Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press 2009) ch 2.
[287] Kenneth W Abbot and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421.
[288] Daron Acemoglu, Gino Gancia and Fabrizio Zilibotti, 'Competing Engines of Growth: Innovation and Standardization' (2012) 147 Journal of Economic Theory 570.
[289] Christel Lane, 'The Social Regulation of Inter – Firm Relations in Britain & Germany: Market Rules, Legal Norms and Technical Standards' (1997) 21 Cambridge Journal of Economics 197.
[290] Harm Schepel, *The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets* (Hart Publishing 2005).
[291] Patrick Messerlin, *Measuring the Costs of Protection in Europe: European Commercial Policy in the 2000s* (Peterson Institute for International Economics 2001).

in the profitability, while also facilitating trade between nations.[292] This leads to an ease in business, affecting access to markets positively, and augments the survival of small-scale businesses.[293] The TBT Agreement hence, attempted to regulate these standards in order to introduce them into the skewed jurisprudence of international trade.

However, apart from these advantages, the presence of standards has been the subject of criticism from several scholars and noted academicians on account of the fact[294] that standards may also impede trade.[295] The adoption of these standards leads to an increase in the compliance costs for businesses, subsequently affecting economies of scale and trade in a negative manner.[296] Moreover, several standards which have been created have captured several markets and industries leading to the spread of asymmetric information and data. Organisations using these standards while attempting to monopolise the markets create several restrictions to access the market for both domestic and foreign actors.[297] Additionally, the WTO places a lot of emphasis on the usage of 'relevant international standards' espoused under Article 2.4 of the TBT Agreement.

However, unfortunately, the TBT Agreement does not provide any meaning, explanation or illustration which would allow the evaluation of the contours of the meaning of this term. Such a legislative lacuna has furthered the growth of private ISBs, which has led to a plethora of issues.[298] The involvement of private bodies has rendered the creation and adoption of standards a political decision-making process and a battle of egos between different countries, instead of setting up of good governance practices.[299] These decision making processes employed by private ISBs are devoid of any tenets of inclusion, transparency or representation

[292] Michelle P Egan, *Constructing a European Market: Standards, Regulation and Governance* (Oxford University Press 2001).
[293] A Claire Cutler, *Private Power and Global Authority – Transnational Merchant Law and the Global Political Economy* (Cambridge University Press 2003).
[294] Robert W Staiger and Alan O Sykes, 'International Trade, National Treatment and Domestic Regulation' (2011) 40 Journal of Legal Studies 149.
[295] Panos Delimatsis, "Relevant International Standards' and 'Recognized Standardization Bodies' under the TBT Agreement' [2014] SSRN Electronic Journal 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489934> accessed 12 February 2021.
[296] ibid.
[297] ibid.
[298] Joost Paulewyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).
[299] ibid.

and instead are opaque in their approach. The focus on power politics has led to prioritising the interests of developed countries over developing countries, which has resulted in a structural divide.[300]

The major disadvantage is that standards created by such processes are being used to check compliance with WTO obligations vis-à-vis the TBT Agreement, and thus, there is an immediate need to bridge this legislative vacuum.

ATTEMPTING TO BRIDGE THE JURISPRUDENTIAL HIATUS: STREAMLINING THE MEANING OF 'RELEVANT INTERNATIONAL STANDARD'

Through this part, the author attempts to plug in these legislative lacunae and examine if it is possible to provide some meaning or context to the term 'relevant international standards' while considering a conjoined reading of other provisions in the TBT Agreement. Through such examination, the author aims to provide a list of ISBs which would qualify as standardising bodies under the TBT Agreement, similar to the SPS Agreement.[301] As stated earlier, the standards created by these ISBs will be evaluated on the touchstone and anvil of WTO obligations. It is imperative that the decision-making processes are also viewed through a critical lens.

A. EVALUATING THE SCOPE OF INCLUSION OF POTENTIAL INTERNATIONAL STANDARDISING BODIES: A HERCULEAN TASK?

The scope of the term 'relevant international standards' shall be evaluated after inspecting the qualifications to the term 'standards' provided under Article 2.4 of the TBT Agreement, i.e., by investigating the jurisprudence around the terms 'international' and 'relevance' and then, attaching these pieces of the puzzle together in order to provide some contours regarding the application of the entire term.

[300] Panos Delimatsis, "Relevant International Standards' and 'Recognized Standardization Bodies' under the TBT Agreement' [2014] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489934> accessed 12 February 2021.
[301] Agreement on the Application of Sanitary and Phytosanitary Measures 1995, art 3(4).

a) THE 'CONSENSUS' AND THE 'OPENNESS' CRITERIA: HIGHLIGHTING THE 'INTERNATIONAL' REQUIREMENT

The WTO is an organisation which is driven by consensus amongst its member States and thus, it was contended that the term 'relevant international standards' must be interpreted in a manner that permits only those standards which are created through consensus between States or the standards created by ISBs where the approval of the standards are done by consensus.[302] However, a bare reading and perusal of the attached Explanatory Note to Annexure 1.2 of the TBT Agreement which defines the term 'standard',[303] clearly states that standards will essentially be determined by the documents created by the international standardisation communities, irrespective of the consensus requirement.[304] The Explanatory Note defines 'standards' as documents that are created either by consensus or even by non-consensus.[305] This position highlights the fact that the drafters of the TBT Agreement did not intend to consider 'consensus' as a requirement.[306] This was even held in the EC- Sardines case, where the Appellate Body held that focus has to be given to the last line of the Explanatory Note, where the ingredient of consensus has been rendered insignificant.[307] The major imbroglio occurred when it was showcased that the definition as present in Annexure 1.2 of the TBT Agreement was substantially based on and derived from ISO/IEC Guide where the requirement of consensus has been given paramount importance.[308] However, the incorporation of the last sentence signifies the intention of the drafters to exclude this imposition on the creation of a standard.[309] Moreover, the Appellate Body in the above case, arrived at the conclusion that such a position to not give importance to the requirement of consensus was present in order to ensure flexibility in the ISBs under the TBT Agreement, who now had the choice to choose between either the incorporation or the ignorance of this 'consensus' requirement in their internal operation.[310]

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[302]Claus Dieter Ehlermann and Lothar Erring, 'Decision Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization adequate for Making, Revising and Implementing Rules of International Trade?' (2005) 8(1) Journal of International Economic Law <https://hdl.handle.net/1814/3484> accessed 12 February 2021.
[303] Technical Barriers to Trade Agreement (entered into force 1 January 1995) 1868 UNTS 120 Annexure 1.2.
[304] ibid Explanatory Note.
[305] ibid.
[306] WTO, *European Communities- Trade Description of Sardines* (25 July 2003) WT/DS231/18.
[307] ibid para 35-37.
[308] ibid para 225.
[309] ibid para 223.
[310] ibid para 227.

This interpretation warrants the incorporation of the 'openness' criterion which is to be examined closely by inspecting Annexure 1 of the TBT Agreement and subsequent reading of Annexure 1.2 and 1.4.[311] Annexure 1.2 defines a standard to be a document that is created and approved by a recognised international body.[312] On the other hand, Annexure 1.4 defines an international body to be one whose membership is open to at least all the member states of the WTO.[313] A similar provision is also present in Article 3.4 of the SPS Agreement where a residuary clause is provided which defines standards to be *firstly*, the ones created by the above-mentioned bodies and *secondly*, the documents created by international organisations whose membership is 'open for all' as identified by the SPS Committee.[314]

Such an analysis found support in the decision of the *US Tuna II* case, where a 'dolphin safe' standard was contended to be a 'relevant international standard'.[315] However, the adjudicators held that since the Agreement on International Dolphin Conservation Program allowed membership to new States and parties only via an invitation, such a 'dolphin safe' standard was outside the purview of being a 'relevant international standard'.[316] Hence, the United States was under no liability to apply this standard on their products.

Thus, from the above-mentioned analysis, it can be observed that the term 'relevant international standards' encompasses only those standards which are created by ISBs whose membership is 'open to all' members of the WTO. Such an interpretation highlights the evaluation of the 'international' qualification present in the term 'relevant international standards' enshrined under Article 2.4 of the TBT Agreement.

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[311] Rudiger Wolfrum, Peter Tobias Stoll and Anja Seibert Fohr (eds), *WTO Technical Barriers and SPS Measures* (Brill 2007) 191.
[312] Technical Barriers to Trade Agreement (entered into force 1 January 1995) 1868 UNTS 120 Annexure 1.2.
[313] ibid Annexure 1.4.
[314] Agreement on the Application of Sanitary and Phytosanitary Measures 1995, art 3(4).
[315] WTO, *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (14 December 2018) WT/DS381/49/Rev 1.
[316] World Trade Organization, 'The WTO Agreement Series Technical Barriers to Trade' <https://wto.org/english/res_e/publications_e/tbttotrade_e.pdf > accessed 12 February 2021.

b) SHOWCASING THE 'RELEVANCE' QUALIFICATION

Through this part, the jurisprudence surrounding the qualification of 'relevance' is sought to be highlighted in order to ascertain if this can aid in the interpretation of Article 2.4 of the TBT Agreement.

In the *EC-Sardines* case, the Appellate Body borrowed the definition of 'relevance' from the Webster's New World Dictionary, where 'relevance' is defined as "*bearing upon or relating to the matter in hand and thus, pertinent*".[317] On the other hand, in the cases of *US – COOL*[318] read with *Australia – Tobacco Plain Packaging* case,[319] it was decided that the qualification of 'relevance 'was a dynamic concept and could not be pre-decided. It must be assessed based on the specific facts and circumstances of the case.[320] Moreover, the 'relevance 'of the standards for other international instruments and agreements transcended across the claims made by the parties.[321] Essentially meaning that, if one standard was not relevant for a particular claim, it could still be relevant for other claims.[322] The absence of 'relevance' of a particular standard does not *ipso facto* render the standard irrelevant. Thus, the relevance of a standard has to be adjudicated upon by examining the 'specific purpose and the specific claim' for which it has been raised.[323]

While accentuating the meaning of 'relevance', the above jurisprudence fails to offer a steady and uniform benchmark or yardstick which can aid in defining the scope of Article 2.4. Since relevance has to be judged on a case-to-case basis, it becomes extremely arduous to employ this interpretation as a precedent in ascertaining the ISBs which will be under the purview of the TBT Agreement.

[317] Joost Paulewyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) para 229.
[318] WTO, *United States- Certain Country of Origin Labelling Requirements* (7 December 2015) WT/DS384/39.
[319] WTO, *Australia – Certain Measures concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*(9 June 2020) WT/DS435/28.
[320] ibid para 7.405.
[321] ibid.
[322] ibid.
[323] ibid para 7.420.

c) THE ADDITIONAL ACCOMPANYING 'DEDUCTION/INFERENCE' METHOD

Several academicians[324] pose an argument that the TBT Agreement does not expressly list ISBs whose standards would be construed as the 'relevant international standards' under Article 2.4 of the TBT Agreement is unfounded as a deeper and closer look at Annexure 1 of the TBT Agreement mentions two standardising bodies, namely the International Organization for Standardisation ('ISO') and the International Electrotechnical Commission ('IEC')[325] However, these bodies have merely been provided as illustrations in the 'Explanatory Note' of the provisions and definitions present in Annexure 1. These bodies have also been mentioned in Annexure 1 since the TBT Agreement relies substantially on their Guide, i.e. the ISO/IEC Guide in order to provide definitions to several terms.[326] Hence, an inference can be drawn that the standards created by these bodies is within the scope of Article 2.4 of the TBT Agreement.

However, it has been contended that the presence of these two bodies does not exclude the involvement of other ISBs, and thus, it is not an exhaustive list.[327] Article 3.4 of the SPS Agreement substantiates this contention as it states that international standards are the recommendations, standards, and, guidelines provided by ISBs such as the World Organization for Animal Health and for Plant Health, Codex Alimentarius Commission, and the international institutions under the International Plant Protection Convention.[328] Here, Article 3.4 limits the scope of the terms as only the standards created by these bodies are validated.

Unlike this explicit mention under the SPS Agreement, the TBT Agreement states that the two bodies i.e., the ISO and the IEC in a haphazard manner does not expressly highlight that under Article 2.4, the international standards would solely be the ones created by these ISBs. Through a closer look, such an inference can be made and, is a way of including potential ISBs under the scope of Article 2.4.

[324] Steven Bernstein and Erin Hannah, 'Non-State Global Standard Setting at WTO: Legitimacy and the Need for a Regulatory Space' (2008) 11(3) Journal of International Economic Law 575.
[325] Technical Barriers to Trade Agreement (entered into force 1 January 1995) 1868 UNTS 120 Annexure 1.2 explanatory note.
[326] ibid.
[327] Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) Journal of World Trade 1223, 1225.
[328] Agreement on the Application of Sanitary and Phytosanitary Measures 1995, art 3(4).

B. ORGANISATIONS SATISFYING THE ABOVE CRITERION

As highlighted in the above discussion, the term 'relevance' is not a requirement that is set in stone. Hence, the organisations satisfying the 'openness' criterion have to be primarily evaluated to set some level of uniformity and consistency in the standardisation framework. This is because not every standard can be adjudicated upon by the WTO Panel and Appellate Body each time 'relevance' has to be determined. An empirical analysis showcases the presence of several international organisations that develop standards and whose membership is open to all the members of the WTO.[329] The organisations and the corresponding TBT Documents have been mentioned herein for easy understanding and identification.

Proposed GATT Code of Conduct for preventing TBT (1972)	**List created under Article 10.4 and 13.3. of the TRS Agreement (1980)**	**Information provided involved in the creation of standards (1999)**	**2nd TBT Triennial Review (2000)**
FAO, OIML, IPU, IGU, ISO, IEC	WMO, IMO, ILO, OIV, IOOC, ICAO, IIR, BIPM, IAEA	WHO, IEC, ITU, ISO, OECD, OIE, OIML, CODEX, UN/ECE	IEC, OIE, OIML, OECD, ITU, FAO, WHO, ISO

The acronyms of the above organisations have been mentioned for an easier understanding and is an attempt to keep the table precise. As stated, the standards created by the institutions can be considered to be 'relevant international standards' under the TBT Agreement. Hence, with the above analysis, the author has attempted to put some 'reigns and leashes over this unruly horse' and, through a nuanced reading of the provisions of the TBT Agreement, has provided the above-mentioned contours to specify the scope of the undefined term present under Article 2.4 of the TBT Agreement.

[329] Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) Journal of World Trade 1225.

VIEWING THE DECISIONS TAKEN BY THESE STANDARDISING BODIES THROUGH A CRITICAL LENS

As showcased above, standards created by the ISBs are within the scope of the TBT Agreement and will, thus, be checked on the touchstone of WTO obligations. Essentially, indicating that the standards would be a determinative factor in assessing compliance with the TBT Agreement. Hence, there exists a need to examine the stages of the decision-making process leading to the creation and evolution of standards through a critical lens. The following part will *firstly*, analyse the several stages taken by the ISBs, *secondly*, highlight the major issues faced by member States during such procedures and meetings, and *lastly*, it will provide several suggestions to augment the existing framework.

A. UNDERSTANDING THE STAGES OF DECISION MAKING FOR THE CREATION OF 'STANDARDS'

The analysis carried out in the above parts has clearly allowed us to deduce that the WTO is not a standard-setting regulatory body with the ability to issue and decide on the promulgation of technical standards.[330] Instead, the WTO has outsourced its regulatory power to international organisations that are adept in creating technologically efficient and compatible standards.[331] It is imperative to analyse the process behind the creation of these standards as these yardsticks will only be compatible and efficient in their truest sense if all the interests of the members are considered and the rules of the organisation are respected.[332]

There are around six stages after which a standard is approved. This includes a discussion and debate over every aspect and feature of the standard by all the members involved.[333] *Firstly*, there is a 'proposal stage' which highlights the need for a particular standard in the international community and requires confirmation to move to the subsequent stage.[334] *Secondly*, there is

[330] Christian Calliess, George Nolte and Peter Tobias Stoll (eds), *Coalitions of the Willing: Avantgarde Or Threat?* (Carl Heymanns Verlag 2007).
[331] ibid.
[332] Henk J De Vries, *Standardization: A Business Approach to the Role of National Standardization Organizations* (Springer Science and Business Media 1999) 34 – 37.
[333] 'Stages and Resources for Standards Developments' (*International Standardization Organization*) <https://iso.org/stages-and-resources-for-standards-development.html> accessed 12 February 2021; 'International Electrotechnical Commission' (*IEC*) <https://iec.ch/homepage> accessed 12 February 2021; 'The Codex System: The Codex Alimentarius Commission and How it Works' (*FAO*)<http://fao.org/3/a0850e/a0850e01.pdf> accessed 12 February 2021.
[334] ibid.

the 'preparatory stage' which involves the creation of a working group to facilitate the initiation of a working draft of the standards.[335] *Thirdly*, we have the 'committee stage' which comprises several technical committees to comment on the working draft created in the earlier stage. A final draft is then created and circulated for voting and comments in the *fourth* stage of 'enquiry'.[336] Subsequently, in the *fifth* stage, the standard is approved after circulation to all members of the ISBs and *finally*, is published by the respective Secretariat of that international organisation.[337]

At first glance, these stages do not present any issues with the process of decision-making and approval of an international standard. Hence, there exists a need to look beneath the surface to evaluate the procedures closely and critically.

B. SHOWCASING THE MAJOR IMBROGLIOS IN THE PROCESS OF DECISION MAKING

The following problems are faced on an everyday basis in the above stages of creating an international standard in these standardisation bodies.

a) LACK OF PARTICIPATION FROM SEVERAL INTERESTED STAKEHOLDERS

The creation and development of a standard as evidence from a part is a detailed process and does not merely involve member States discussing amongst themselves. These procedures encompass a host of representatives, bodies, interest groups, governmental organisations, non-governmental institutions, environmentalists, manufacturers, representatives, producers and consumers.[338] All these groups are imperative to facilitate smooth discussion and deliberation over the imposition of a standard and hence, co-ordination between these bodies is necessary.[339] However, due to the substantial investment of time, interest and money, several

[335] ibid.
[336] ibid.
[337] ibid.
[338] Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) Journal of World Trade 1223, 1233.
[339] Anne Wilcock and Alejandra Colina, 'Consumer Representation on Consensus Standards Committee: A Value-Added Practice' (2007) 3(1) International Journal of Standards and Services 1.

of these stakeholders fail to participate in the decision-making process leading to the creation of a standard that obviously does not represent their true needs, wants and concerns.[340]

In the long run, such standards are not supported by the people affected by them and end up being side-lined. This ends up frustrating and making the process redundant since these standards are present in theory but not in practice.

b) DISADVANTAGEOUS POSITION FOR 'DEVELOPING COUNTRIES'

Apart from the reduction of active participation in the process, it is evident that the ISBs and the decisions rendered by them are skewed in favour of the developed countries and the developing countries are at a disadvantageous position[341] Empirical studies have also highlighted that developing countries do not hold prominent positions in the ISBs.[342] Moreover, the committees headed by developed countries have often been shown to have prejudice towards developing countries and do not facilitate coordination between the states irrespective of the 'level of development'.[343] This has disincentivised developing countries to meaningfully participate in the creation of standards and contribute to the decision-making process. This leads to non-participation along with the issues highlighted above. Moreover, it is apparent that a corollary and logical consequence to this non-participation is that most of the standards are tilted towards developed countries. Hence, this 'vicious circle' still continues.

c) 'POLITICISATION' OF THE DECISION-MAKING PROCESS

Another issue majorly faced during such processes is that of external political pressure exerted on the representatives, and hence, during none of the stages the process is completely isolated from political pressure.[344] The pressure is not only exerted by developed countries or the countries most affected by the recognition of certain standards but also by dominant producer groups and bodies.[345] Hence, the current regime is riddled with biases and prejudice. Thus, it

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[340] Bruce J Farquhar, 'Governance in the International Standardization Organization (ISO) and the International Electrotechnical Commission' [2005] Consumers International 342.
[341] Filippo Fontanelli, 'ISO and CODEX Standards and International Trade Law: What gets said is not what's heard' (2011) 60(4) The International and Comparative Law Quarterly 895.
[342] Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) Journal of World Trade 1223, 1233-1236.
[343] ibid.
[344] Alan O Sykes, *Product Standards for Internationally Integrated Goods Markets* (Brookings Institution 1995).
[345] ibid.

was contended that there exists a need to create an independent adjudicatory and regulatory body free from the pressure and influences exerted by such interest groups who aim to make the process undemocratic and generally skewed in their favour, hampering the international spirit.[346]

d) LENGTHY PROCESS OF THE CREATION OF STANDARD

A study has found that the average time to discuss, debate, create, and approve a standard through all of these different stages takes a minimum time of five years or even more.[347] Such findings highlight the extremely lengthy process adopted by these standardising bodies. An obvious consequence of this is that the objective of creating a standard is completely frustrated. It was shown earlier that the major need and advantage of having standards is capitalisation and monopolisation of recent technological advances.[348] Here, the lengthy process frustrates this aim as, by the time the standard is approved, the technology does not remain novel and loses its value, rendering the standard old and obsolete. The subsequent technology that comes uptakes another five years of time to be finalised, creating a void in the system.

This process even leads to the creation of low-quality standards due to the non-approval of subsequent standards which is a result of the lengthy processes involved in reaching a consensus. The standards created earlier are not replaced and hence, are valid and can still be found in several guides and documents issued by the ISBs. These standards may not be appropriate for the contemporary market and economic conditions and instead of acting as a catalyst to innovation, they may impede trade and delay the growth of products and services by several years.[349]

[346] Archna Negi, Jorge Antonio Perez Pinda and Johannes Blankenbach (eds), *Sustainability Standards and Global Governance* (Springer Singapore 2020).
[347] Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) Journal of World Trade 1223, 1238.
[348] Robert Vinaja and Mahesh S Raisinghani, *A Review of the Standards Making Process in the Telecommunications Industry: Challenges and Potential Solutions* (IEEE 2001).
[349] ibid.

e) PROCEDURAL IMPEDIMENTS DURING THE PROCESS

The decision-making process consists of several procedural restrictions which highlight the problems faced by the members of the ISBs. *Firstly*, the issue of translation from one language to the other at every stage of the process makes it difficult for several representatives to follow the discussion and meaningfully participate in it.[350] Also, a lot of understanding of the standard gets diluted or lost in translation from one language to the other. Here, it is imperative to note that the language constraints are not only for the member States but also the technical experts, consumer representatives, producer interest bodies, non-governmental groups and other local organisations.[351] Moreover, the cultural background and differences contribute to making the process time-consuming and acts as a major procedural restriction.[352]

Secondly, the views of the technical experts involved during the process have not always been independent of their national identity, making them partial and biased.[353] These experts are supposed to render impartial assistance to the ISBs in order to ensure that the technical underpinnings and consequences of their decisions are understood.[354] These experts provide the members with a window, which helps them view the practical implications of their theoretical decisions. Such bias warrant re-evaluation of appointments, capacities and functions of these technical experts involved in several committees of the process.

All these issues cumulatively hamper the efficient functioning and working of the standardisation bodies in creating and developing 'relevant international standards' and thus, in the long run, undermined the obligations espoused by the TBT Agreement. In response to these issues, I suggest some recommendations which would allow the ISBs to accentuate the existing regime.

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[350] United Nations, '*International Products Standards: Trends and Issues*' (1991) 50.
[351] ibid.
[352] Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) Journal of World Trade 1223, 1238.
[353] Kristin Tamm Hallström, *Organizing International Standardization: ISO and IASC in the Quest of Authority* (Edward Elgar 2004) 158.
[354] ibid.

C. SUGGESTIONS FOR ENSURING EFFECTIVE STANDARDISING BODIES

In response to the issues highlighted above, the author attempts to propose the following recommendations in order to augment the skewed jurisprudence so that the international legal landscape can be accentuated in the long run. Moreover, these suggestions aim to provide true meaning to WTO obligations under the TBT Agreement.

In order to ensure that all stakeholders meaningfully participate in the decision-making process of creating standards, the ISBs have to ensure that some incentive is provided to the representatives and delegates to contribute effectively. Certain organisations could make it mandatory for representative groups to be present during the decision-making process as well as give them positions of power in order to provide them with an impetus to be involved during the creation of such standards. Committees and bodies can, thus, be specially created to look after the consumer's wants and needs vis-à-vis a standard. For instance, the Committee on Consumer Policy was specifically established by the ISO to look after the interests of consumers and provide them with a forum to express their thoughts and experiences so that the standards, which are ultimately created for consumer satisfaction, can gain prominence in the long run. Essentially, in the end, every attempt made must ensure that these groups feel included in the process. Close co-operation and co-ordination between different stakeholders would allow the process of creation of standards to be a holistic process, one which ensures that every voice is heard and every opinion is considered.

In order to increase the participation of developing countries, the first step would be to ensure that the developing countries are given positions of power such as chairpersons and secretariats of ISBs not because being in such positions would allow them to dominate and influence the process, but because it would ensure that they are incentivised in participating in such meetings, leading to the end of the 'vicious circle'. This would assure them that their concerns will be attended and their 'special needs' will be looked after by the ISBs. Moreover, a special investigative process needs to be undertaken to inspect the concerns of the developing countries in order to make the standards truly international in nature. In furtherance of this cause, a special policy committee and a task force was created by the ISO to figure out the needs of the developing countries and create a future policy plan which can be implemented. Such procedural safeguards would provide all the countries with the same platform and forum, to deliberate and decide a standard.

Moreover, in order to solve the problems generally present in most decision-making processes on the international forums i.e., lengthy procedures and opaqueness, it is suggested that a provision for a time limit is established so that the process is completed within a fixed and reasonable period of time, and this will avoid rendering the entire process redundant or making the technology obsolete. Moreover, the standards must be revised and examined once every two years in order to keep up with the pace of growth and economic development. Additionally, it is highly recommended that the principles of – impartiality, transparency, representativeness, coherency, openness, effectiveness, relevance and contemporariness are steadily incorporated into the process. The case of *US Tuna II* espoused these guiding principles as well. However, it is imperative that these principles are applicable in the practical arena as well and are followed in both letter and spirit. All of these suggestions must be favourably looked over and incorporated accordingly, as these processes will develop relevant international standards whose compliance will adjudicate the breach of the WTO obligations through the TBT Agreement.

CONCLUSION

In the course of this paper,the author has attempted to define and provide some clarity on the term 'relevant international standards' under Article 2.4 of the TBT Agreement. The contours of defining such a term were showcased by conjointly reading Annexure 1.2 and Annexure 1.4 of the TBT Agreement and coming to the ascertainment that the standards created by the standardising bodies whose membership is open for all WTO members will come under the purview of Article 2.4 of the TBT Agreement. The limitations of the 'consensus' requirement were also highlighted in order to arrive at such a determination. Moreover, through the course of the paper, the author has critically evaluated the decision-making process of the standardising bodies since the standards created by such procedures are the anvil on which compliance under the TBT Agreement is adjudicated. In the end, the paper concludes by providing novel suggestions in order to ensure representativeness in the processes. The adoption of standards created by such inclusive steps and measures would make them 'relevant international standards' in the true sense.

‘SOMETHING NEW AND SOMETHING BORROWED’: INTERPLAY OF FANFICTIONS AND COPYRIGHT LAW IN INDIA

- **Sayan Dasgupta**[*]

ABSTRACT

People who write fanfiction do so to explore, sustain, and add to content with which they have an emotional connection— a body of work that is typically protected by copyright. The legal status of fanfiction in relation to copyright law is murky, but fanfiction is widely seen as transformative. Regardless matter how a court views fanfiction, writers put time, effort, and love into works that can often be longer than a traditionally published novel. While fanfiction is currently a hot topic in the legal world, fanfiction plagiarism is often overlooked. Similarly, there is currently no actual regulation of plagiarism in the fanfiction community other than social pressure, such as online shame. The paper highlights the defences available to a fanfiction author and the regime that may or may not afford protection of copyright to the fanfiction based on several criterions.

Keywords: Fair Use, Fanfiction, Transformative Work, Derivative Work, Copyright, Infringement, subject matter of copyright.

INTRODUCTION

Literature worldwide has always served one purpose – imagination, whether that imagination leads to political uprisings, fantasies, lover’s spat, vivid dreams, nightmares, inspiration, art, or any other physical manifestation. All of the aforementioned start with words on the paper. One of the most popular manifestations in this digital era is fan fiction, commonly abbreviated by their readers and patrons as “fanfics”. The purveyors of this culture have been the linchpins of queer liberation, feminist wants and portraits, and the general merriment of young adults and teenagers.

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Among the young adult (*hereinafter* 'YA') fiction literary circles, the name of Cassandra Claire (or Claire) would most certainly ring a bell. Her published work of the "*Mortal Instrument*"[355] series garnered cartage of adorners and was well received both by readers and critics. It is believed that the series was influenced by many popular fandoms, however, major inspiration was collected from the *Harry Potter* series.[356] In the early 2000s, i.e., 2000 to 2006, she was quite in vogue in the online *Harry Potter* fandom[357] with her *Draco Trilogy*[358] comprising *Draco Dormiens, Draco Sinister, and Draco Veritas* adding up to approximately 1 million words.[359] The trilogy offers an alternate universe from that of J.K. Rowling, where Draco Malfoy, the Machiavellian antagonist of the *canonical* novel series, was the protagonist.[360] This fame didn't last very long when the accusations of plagiarism befell her.[361] Readers discovered that the action scenes and dialogues were stolen, and soon after, the hosting website banned Claire and took down her work.

The rabbit hole of divergence from the author's work is well-known, diverse, and contemporaneous. E. L. James' series titled "*Fifty Shades of Grey*" is another instance or example of fanfiction adored by many. The novel series, later adapted into a movie franchise, was inspired by Twilight.[362] The history of fanfiction can be traced back to science fiction magazines from the 1920s and 1930s however, traces and links can be sourced to the oral and mythic traditions as well.[363] Fanfictions signal an alternate universe delineated by fans based on the plot line and character of the original work of the author and may be sourced and inspired

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[355] Cassandra Clare, *City of Bones* (Simon & Schuster 2007); Cassandra Clare, *City of Ashes* (Simon & Schuster 2008), Cassandra Clare, *City of Glass* (Simon & Schuster 2009).

[356] Namera Tanjeem, '50 Shades and More: 11 Published Fanfiction Books' (*Book Riot*, 12 September 2019) <https://bookriot.com/published-fanfiction-books/> accessed 8 June 2022.

[357] Kristina Busse and Karen Hellekson (eds), *Introduction To Fan Fiction and Fan Communities in the Age of the Internet: New Essays* (McFarland & Company 2006).

[358] Narisa Bandali, 'I Wrote This, I Swear!: Protecting the "Copyright" of Fanfiction Writers from the Thievery of Other Fanfiction Writers' (2019) 101(2) J Pat & Trademark Off Society 274 <https://jptos.org/index.php?mact=News,cntnt01,print,0&cntnt01articleid=626&cntnt01showtemplate=false&cntnt01returnid=97> accessed 8 June 2022.

[359] 'Draco Trilogy' (*Fandom*)<https://harrypotter.fandom.com/wiki/Draco_Trilogy> accessed 8 June 2022.

[360] Cassandra Claire, 'Draco Dormiens' (*Broom Cupboard*) <http://www.broomcupboard.net/fanfiction/DracoDormiens.pdf> accessed 9 June 2022; Cassandra Claire, 'Draco Sinister' (*Wattpad*) <http://broomcupboard.net/fanfiction/DracoSinister.pdf> accessed 9 June 2022.

[361] Avocado, 'The Cassandra Claire Plagiarism Debacle' (*Fanlore*, 4 August 2006), <https://fanlore.org/wiki/The_Cassandra_Claire_Plagiarism_Debacle> accessed 9 June 2022.

[362] Hayley C Cuccinello, 'Fifty Shades Of Green: How Fanfiction Went From Dirty Little Secret To Money Machine' (*Forbes*, 10 February 2017) <https://forbes.com/sites/hayleycuccinello/2017/02/10/fifty-shades-of-green-how-fanfiction-went-from-dirty-little-secret-to-money-machine/?sh=9d679cf264cf> accessed 8 June 2022.

[363] Bronwen Thomas, 'What Is Fanfiction and Why Are People Saying Such Nice Things about It?' (2011) 3 Storyworlds: A Journal of Narrative Studies 1.

from a single work and/or novel, or it may be a product of an aggregate of work.[364] The narrative is a cultural currency and takes the original plot or "*canon*" to another dimension or changes the plot or character imaginatively.[365] It is fluid and takes shape based on several extraneous factors such as sexuality, gender identity, the trauma of the author, issues related to work or personal lives, relationships, and may even extend to fetishes and sexual innuendos/overtones. However, the common thread between all the fan work is that it democratises literature and plays a crucial role in disseminating emotions, passion, and work of several people based on the original author's work, which *ipso facto* gets promoted and collects attention. Albeit colourful and vivid, fanfiction is not considered "professional writing"[366] and is generally understood as an expression of a person exploring the canon and reimagining the original author's work or providing it with an alternate ending.[367] Therefore, there may not be a requirement for the fanfiction author to venture into the superstructure of the plot arc, character presentation, contexts, and publicity while also being creative.[368]

The plagiarism scandal of Claire opens the domain of fanfiction to several legal issues – one of them being plagiarism.[369] It must be noted that fanfictions walk the tight line between transformative work of art, fair use, and infringement.

INTERSECTIONAL ANALYSIS OF FANFICTION WITH COPYRIGHT REGIME

A book or a novel is ordinarily composed of the following elements – theme, setting, character, and plot. An author of fanfiction creates a narrative derived from the *canon* that may be the character, world of the *canon, and* setting and may either reimagine and reexplore the plot or may change the plot by making distinguishable variations in theme or character or providing

[364] ibid.
[365] Samantha S Peaslee, 'Is There a Place for Us: Protecting Fan Fiction in the United States and Japan' (2015) 43 Denv J Int'l L & Pol'y 199, 199; Meredith McCardle, 'Fan Fiction, Fandom, and Fanfare: What's All the Fuss?' (2003) 9 BU J SCI & TECH L 433, 435.
[366] Meredith McCardle, 'Fan Fiction, Fandom, and Fanfare: What's All the Fuss?' (2003) 9 BU J SCI & TECH L 433, 435.
[367] Viktor Mayer-Schonberger and Lena Wong, 'Fan or Foe? Fan Fiction, Authorship, and the Fight for Control' (2013) 54 IDEA 1.
[368] ibid [277].
[369] 'Plagiarism' (*Fanlore*) <https://fanlore.org/wiki/Plagiarism> accessed 8 June 2022.

alternate possibilities.[370] The contention may be that the *canon's* author is the source and the fanfiction, though an independent work is derived from the *canon* literature, including but not limited to the theme, character, and other essential elements of the work created. Therefore, since the source is the foundation, it is protected by copyright, including the individual elements that provide it with its personality. Ergo, any reproduction or appropriation would impinge on the exclusive economic rights of the *canon* author.

In a general sense, a fanfiction author borrows from the world of the *canon* work, their characters (either their name or their characterisation, or both), and the setting of the character, placed in a different plot which may be the same theme or not. The author of the *canon* would fortiori have copyright protection over the entire work since it is an expression of an idea. However, the contention could be that every element of *canon* is also an expression cumulating the grand narrative and, therefore, also amenable to the subject matter of copyright protection.[371] Therefore, protection must be afforded to individual elements from appropriation and reproduction.

The question of whether themes and/or ideas are copyrightable has already been answered by the Hon'ble Apex Court in *R. G. Anand v. Delux Films*[372] that copyright protection does not extend to themes, plots, or facts – legendary or historical. The protection was afforded to how the elements are arranged and utilised by the author and how the resultant expression appears, and the manner of presentation. The Division Bench of Delhi High Court further held along the same lines that the primary purpose of copyright was not to protect ideas and themes but to protect the resultant expression, which is the fruition of imagination, creativity, and effort.[373] The contrariety between idea and expression was extrapolated by the Calcutta HC in *Barbara Taylor Bradford v. Sahara Media Entertainment Limited*,[374] that law protects only well-delineated expression of an idea and not the central idea (theme) of the work. The law plays a balancing effect between two different interests – that of the author and of the general public. The law must protect the author and the originality of their work, prevent unfair appropriation, and provide an exclusive bundle of rights. While on the other hand, this protection must not

[370] Kate Romanenkova, 'The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright' (2014) 18 Intellectual Property Law Bulletin 183.
[371] Jiarui Liu, 'Copyright Reform and Copyright Market: A Cross-Pacific Perspective' (2016) 31 Berkeley Technology Law Journal 1461.
[372] *R G Anand v Delux Films* AIR 1978 SC 1613; *Chatrapathy Shanmugham v S Rangarajan* 2004 (29) PTC 702 Mad.
[373] *Time Warner Entertainment Company v RPG Netcom* 2007 (34) PTC 668 Del.
[374] *Barbara Taylor Bradford v Sahara Media Entertainment Ltd* 2004 (28) PTC 474 Cal.

translate to overprotection, whereupon any future creativity would be curbed. The Court held as follows:

"...If plots and ordinary prototype) characters were to be protected by the copyright law, then soon would come a time in the literary world, when no author would be able to write anything at all without infringing copyright... an intending author, instead of concentrating upon the literary merit of his expression, would be spending his life first determining whether he is infringing the copyright of the other authors who have written on this topic or that. The law of copyright was intended at granting protection and not intended for stopping all literary works altogether by its application."

WHETHER APPROPRIATION OF CHARACTER FROM *CANON* LITERATURE AMOUNTS TO INFRINGEMENT?

It can be concluded with the assurance that themes, ideas, and subject matter are not afforded protection under the copyright regime in India. However, whether characters (individual or collective) of the *canon* are protected under the regime is a major source of the brouhaha. It is understood that general themes, ideas, and plots cannot be afforded protection under the law, however, what is the recourse if the characters are not general themes or ideas but rather well-defined expressions?[375] Since fandoms appropriate the characters, the copyrightability of individual elements such as a character becomes a pertinent issue.[376]

Character, understood in common parlance, is a caricature painted by words not just describing physical traits but also actions, emotions, and context of the character's development. Therefore, the character is not apparent but depends upon the imagination of the reader and their interpretation of the literature.[377] A prime contemporary example of this ought to be Mr. Darcy of Jane Austen's *Pride & Prejudice*. Mr. Darcy, the lead protagonist, has been a specimen of much feminist literature studying textual and cinematic masculinities. A superficial reading may suggest a polished and genteel Victorian man but an 'Austenian' interpretation suggests a hint of a man lacking perfunctory courtesies but rather tethered to femininity and desires thereto. The effort of the reader to interpret Fitzwilliam Darcy harkens

[375] ibid.
[376] ibid.
[377] SKD Biswas, 'Copyrightability of Characters' (2004) 9 Journal Of Intellectual Property Rights 148, 149.

to the reader's desires and trepidation *vis-à-vis* masculinity. The cinematographic representation of Darcy provoked a split opinion. However, the same was a result of "*seeing the old from a new perspective, in viewing [him] in a new context that opens up possibilities previously overlooked*".[378]

The Courts are wary and cautious in granting protection to characters and need to be satisfied to a great threshold that the characters are "*well delineated*".[379] In the case of *Warner Brothers Pictures v. Columbia Broadcasting SystemI*,[380] it was held that characters are not extended the protection of copyright law unless it was described in great detail with precision and critical to the story being told rather than simply a mode of storytelling. The character of ET was given protection under the copyright regime since it was a distinct character and instrumental to the movie in the case of *Universal City Studios v. Kamar Industries*.[381] Kerala High Court has also concurred with this position insofar as well-defined and delineated characters are afforded protection under the Copyright law.[382]

However, a fanfiction author, while using a character of the *canon,* does so by attributing new personality traits and by changing the character arc to provide an alternate universe plot.[383] Therefore, it may be argued that changing features essential to *canon* literature and the character contained in it would change the 'basic structure', thereby creating a new character and a story. The character as pictured by the readers is a portrayal of words describing the character, their personality, physical appearance, context, behaviour, and how such a character is viewed by other characters in the *canon.* Changing dialogues, speech patterns, interaction with other characters, character's motivation, and behaviour (to alter the character arc) delineates a different character altogether and therefore does not infringe the exclusive rights of the *canon* author.

What remains an issue is the degree of ascertaining what constitutes an infringement of character. From the aforementioned settled law, character copyright and infringement thereof would be reduced to a question of fact.

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[378] Gina MacDonald and Andrew MacDonald (eds), *Jane Austen on screen* (Cambridge University Press 2003).
[379] Dr VK Ahuja, *Law Relating to Intellectual Property*, (Lexis Nexis 2017) 35.
[380] *Warner Brothers Pictures v Columbia Broadcasting System* 216 F 2d 945 (9th Circuit, 1954).
[381] *Universal City Studios v Kamar Industries* 1982 Copyright L Decisions (CCH) 25, 452 (SD Tex. 19); *Arbaaz Khan Production Private Limited v Northstar Entertainment Pvt Ltd* 2016 (67) PTC 525.
[382] *V T Thomas v Malayala Manorama* AIR 1989 Ker 49.
[383] Fanfic, 'Writing a Character Arc for a Canon Character' (*Wattpad*) <https://wattpad.com/583676438-how-to-write-fanfiction-writing-a-character-arc/page/2> accessed 10 June 2022.

"*BUT WHY AM I FAMOUS, HAGRID*?": PUBLICITY RIGHTS AND FANFICTIONS

The factions of literati often resign to the fate that their characters are personalities in themselves, thus copyrightable. The exploitation of personalities and intangible values therein was founded upon the personhood approach of Kant and Hegel.[384] It was opined that work product is a reflection of personalities, therefore, protection of intellectual property is to essentially protect self-expression.[385] Personality of the character (fictional or not) would incorporate the emotional and moral values, temperament, cadence, and other reflections found in the author. It goes without saying that literature is a product of cogitation and would thus be ingrained with the timbre of personalities and turmoil of the author. Therefore, while expression provides the author of *canon* exclusive economic rights over the words, the author parallelly exploits the personality of the expression – the intangible value that adds texture to the expression.

However, publicity rights of one's personality extend to limits set by Section 38 of the Copyright Act, 1957,[386] i.e., performers' rights. Albeit protecting the rights of performance, the same would not extend to fictional characters[387] owing to the definition of a "*performer*"[388] and "*performance*".[389]

Even if publicity rights are extended to fictional characters and compared to famous personalities and celebrities, inspired (or mimicked) performance, imitation thereof is not actionable per se. *Bloom & Hamlin v. Nixon*[390] was one of the first cases that settled this position. The defendants were producers wherein an artist mimicked the singer of 'The Wizard of Oz' song – *Sammy*. Plaintiff, the copyright holders of *Sammy*, brought an action of copyright infringement. The Court, holding that there was no copyright infringement, opined the following:

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[384] Garima Budhiraja, 'Publicity Rights of Celebrities: An Analysis under the Intellectual Property Regime' (2011) 6 NALSAR Student Law Review 7.
[385] Robert C Bird and Lucille M Ponte, 'Protecting Moral Rights in United States and United Kingdom: Challenges and Opportunities under UK's New Performance Regulations' (2006) 24 BU ILJ 213, 216.
[386] Copyright Act 1957, s 38.
[387] *Star India Pvt Ltd v Piyush Agarwal* 2014 (58) PTC 169 (Del) 173-174 and 176; Copyright (Second Amendment) Act 1994; Copyright Act 1957 ss 38, 39, 39A.
[388] Copyright Act 1957, s 2(qq).
[389] Copyright Act 1957, s 2(q).
[390] *Bloom & Hamlin v Nixon* 125 F 977 (CCED Pa 1903).

"…what is being presented are the peculiar actions, gestures, and tones of Miss Faust; which were not copyrightable… It is the personality of Lotta Faust imitated that is the subject of Miss Templeton's act, modified, of course, by her own individuality, and it seems to me that the chorus of the song is a mere vehicle for carrying the imitation along. No doubt, the good faith of such mimicry is an essential element… Fay Templeton does not sing it, she merely imitates the singer; and the interest in her own performance is due, not to the song, but to the degree of excellence of the imitation. This is a distinct and different variety of the historic art from the singing of songs, dramatic or otherwise, and I do not think that the example now before the court has in any way interfered with the legal rights of the complainants."[391]

Bloom & Hamlin[392] was later affirmed by *Savage v. Hoffman*[393] and *Murray v. Rose*.[394] Providing immunity for inspired performances or mimicry becomes especially pertinent for the entertainment and comedic domain. Such an immunity, though available, would generally not be required for fanfictions. The objective of fanfiction is to create literature that may not be commercially viable and is an experiment of themes, alternate superstructures of stories, and asserts narratives that don't fit with the ideal tastes of the market.[395] Creating such deviations fit for the consumption of particular niches makes a different expression and/or art.

OWNERSHIP AND ORIGINALITY OF FICTIONAL CHARACTERS AND COPYRIGHT ACT, 1957

At this juncture, exploring ownership of a character becomes pertinent when exploring the rights of such characters. Copyright subsists in the expression of ideas such as literary, dramatic, or artistic work.[396] "*literary work*" under Section 13 of the Copyright Act is inclusive and broad. It includes poetry, prose, and anything in between that is in writing and is original, notwithstanding the quality and "*aesthetic merit*".

[391] ibid.
[392] Copyright Act 1957, s 2(q).
[393] *Savage v Hoffman* 159 F 584 (SDNY 1908).
[394] *Murray v Rose* 30 NYS2d 6 (1941).
[395] Henry Jenkins, 'Gender and Fan Studies (Round Five, Part One): Geoffrey Long and Catherine Tosenbeger', (*Henry Jenkins*, 28 June 2007) <http://henryjenkins.org/blog/2007/06/gender_and_fan_studies_round_f_1.html> accessed 28 June 2022; Rebecca Tushnet, 'All of This Has Happened before and All of This Will Happen again: Innovation in Copyright Licensing' (2014) 29 Berkeley Technology Law Journal 1447.
[396] Copyright Act 1957, s 13.

Ownership subsisting in fictional characters has been discussed in the case of *Star India Pvt. Ltd. v. Leo Burnett*.[397] The plaintiff herein sought an injunction against the defendant for using a character being telecasted on television that was comparable to the plaintiff's character. The Court held that such protection and ownership could only arise where the character has attained an original identity independent of the show or movie and has acquired public recognition.[398] While analysing the ambit of "*literary work*" under the Act, the test of originality requires attention. Originality under the Act does not require the work product to be inventive or novel. The copyright regime in India is rarely ever concerned with the originality of idea. It only concerns itself with the originality of expression of the idea.[399] Therefore, 'originality' concerns itself with the input of a certain amount of skill, labour, and judgment. Such a display of creativity creates a derivative work, thus acquiring originality.[400] The broad and inclusive definition would not contain characters (products or expressions) that display substantial or sufficient differences from the character in question. The only caveat is that subsisting of copyright in derivative work would require a much higher degree of creativity than in the case of primary work/literature. Thus, originality, a *sine qua non* of the copyright regime, is overcome by fanfictions in most cases.[401]

INFRINGEMENT AND FANFICTION: A DILEMMA

Copyright is a bundle of rights that an author is entitled to exploit. The author is conferred with this 'monopoly' as a reward for their skill, judgment, and labour. It is to encourage more creativity. Such a right is both positive and negative. It is positive insofar as the author of an original expression can economically exploit it themselves or license its use commercially. However, a negative right connotes that such a right exists in exclusion of everyone else. Trespass in the exclusive rights conferred and protected by law without the author's consent is called infringement.[402] Therefore, what is an exclusive right of the author must be understood by Sections 14(a) and 14(b) of the Copyright Act. Any unauthorised distribution and circulation

[397] *Star India Private Limited v Leo Burnett* 2003 (27) PTC 81 Bom.
[398] *Arbaaz Khan Production Private Limited v Northstar Entertainment Pvt Ltd* 2016 (67) PTC 525.
[399] *Rediff India v E-Eighteen.com Ltd* 2013 (55) PTC 294 (Del).
[400] *Dr Reckeweg & Co GMBH v Adven Biotech Private Limited* 2008 (38) PTC 308 (Del).
[401] Catherine Tosenberger, 'Potterotics: Harry Potter Fanfiction on the Internet' (*University of Florida Digital Collections* 2007) <http://ufdc.ufl.edu/UFE0019605/00001> accessed 1 September 2022.
[402] *Bobbs-Merrill Company v Isidor Straus and Nathan Straus* 210 US 339.

of work for profit or any act that unfairly prejudices the author would be considered an infringement.

On the issue of fanfictions, the plea of infringement on the grounds of copying would be raised. Copying may be direct or indirect. A work will be considered "*copied*" if it is substantially similar to the contended work. There must be a substantial degree of resemblance,[403] and it must create an implication of being the original work in the reader's mind.[404] The test of substantial resemblance or similarity depends on the quality of the derived work rather than the quantity.[405] Indirect copying is copying by changing the form of work into another form of work. Since fanfictions are literary expressions like the *canon*, this type of infringement would not be applicable in the present case.

There is no thumb rule to ascertain the substantiality and quality of the derived work and the *canonical* literature. Reproducing a basic idea or a superstructure alone cannot be considered an infringement. Since there is no settled law prescribing a degree of resemblance that is requisite to establishing infringement, it is left to Courts to exercise discretion. However, this discretion should be exercised within the context of 'similarity'. Two work products would be called substantially similar if it produces the same effect on the mind of the reader, and the reader would be deceived on the issue of which one is original. The discretion must not decide based on individual characteristics but on the 'total look and feel'.[406]

FAIR USE EXCEPTION

Fair use is instrumental in the academic world where teachers, professors, and students use scholarly work and textbooks to impart or undertake education and, in certain instances, quote such work as well.[407] Fair use is an exception to the exclusive right provided to the author of the work, which, if absent, would amount to infringement. Such permitted uses are listed under Section 52 of the Copyright Act of 1957.[408]

Notwithstanding the changes made to the *canon* by the fanfiction author, there is an obvious possibility of overlap of certain elements that may be the same. Elements that are essential to

[403] *C Cunniah & Co v Balraj & Co* AIR 1961 Mad 111.
[404] *Mishra Bandhu Karyalay v Shivratanlal Koshal* AIR 1970 MP 261.
[405] *Ladbroke v William Hill* (1964) 1 WLR 273 276.
[406] *R G Anand v Delux Films* AIR 1978 SC 1613.
[407] AMLEGALS, 'Virtual Teaching and Copyright: How Fair is Fair Use?' (*Mondaq*, 19 June 2020) <https://mondaq.com/india/copyright/955608/virtual-teaching-and-copyright-how-fair-is-fair-use> accessed 10 June 2022.
[408] Copyright Act 1957, s 52.

the *canon* are often not altered to cater to the fanbase, albeit creatively placed in the work. This can be argued as making fanfiction a 'copied work' which may amount to infringement.

Madras HC in *Blackwood and Sons Ltd. v. A.N. Parasuraman*[409] interpreted what constitutes "*fair*" in "*fair dealing*". The Court firstly held that to constitute unfairness, the work must be authored with an intention to compete in the market with the author and derive profit from such authorship. Secondly, the animus of the infringer must be proved to be improper to constitute unfair dealing. The intention element is not a necessary requirement and can be ignored if the Court comes to a finding that the infringing work is substantially similar to the original body of work. The key element herein can be distilled to profiteering and drawing away from the author's exclusive monopoly over the market without consent. Ascertaining fair use is a question of fact, degree, and overall impression carried by the court.[410]

TRANSFORMATIVE WORK PRODUCT AND FANFICTIONS

Using the copyrighted work and building upon it for a different purpose is christened as transformative use. The entire premise of fanfictions is based on the 'transformative' character of the product. What is 'transformative' is a question of opinion and not an issue of fact and objective truth. Thus, the transformative character is dependent on the interpretations of counsels and recognised by courts.

Chinese Supreme Court in 2002 interpreted that if the work products are of the same theme but are "*creative and independently completed*", then they enjoy independent copyright,[411] and there is no case of infringement.[412] Fanfictions primarily draw from subsisting copyrights and elements of the *canon*. Although, the unoriginality of fanfiction would seem difficult to assert since most fanfictions stray away from the *canon* to explore the different identity of the literature and alter several elements of the original literature. The general rule here is that the greater the deviation from *canon*, the more the transformative and non-infringing character of

[409] *Blackwood and sons Ltd v AN Parasuraman* AIR 1959 Mad 410.
[410] *Super Cassettes Industries Ltd v Hamar Television Network Pvt Ltd* 2011 (45) PTC 70 (Del).
[411] Copyright Law of the People's Republic of China (2010 Amendment), art 10 (14).
[412] Zuigao Renmin Fayuan Guanyu Shenli Zhuzuoquan Minshi Jiufen Anjian Shiyong Falv Ruogan Wenti De Jieshi [Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Correctly the Civil Copyright] (promulgated by the Supreme People's Court Oct. 15, 2002) (China), <https://digitalcommons.law.uw.edu/wilj/vol25/iss1/6/>.

the fanfiction. Independent copyright can thus be claimed by the fanfiction author insofar as it does not unfairly prejudice the author of the *canon*.

The present opinion of the copyright regime of the United States is that fanfictions constitute infringement since they demonstrate "*literal similarity*".[413] Industry experts are also of a similar opinion that fanfictions are "*most likely substantially similar to the original works*".[414] In arguendo, it is a case of infringement, the Court ought to consider other qualified exceptions of infringement, such as study, research, or criticism. This becomes especially imperative and more than just lunchtime chinwag owing to several administrative and governmental inclinations towards censorship and prevailing societal perceptions of gender and sexual norms. This is especially the case in conservative countries in East and South East Asia and the Middle East. Fanfiction is an escape from the heteronormative and commercially viable structures that don't often approve of homosexuality or nonnormative femininity, among various other themes. Courts must take an approach that bypasses such impediments and promote creativity in every theme and domain.[415] The Court must place heavy reliance on the intent of the author of fanfiction and whether the animus possesses the elements of creating a transformative work. [416] Such an approach can be noted in the case of *Blanch v. Koons*[417]. The defendant in the case created a collage that contained four pairs of women's legs, one of which was appropriated from a famous photograph shot by the plaintiff. The Court dismissed the claim of infringement on the ground that the defendant had altered size, colour, proportions, and background, therefore, providing the viewer with an entirely new perspective and conclusion making it an entirely new work capable of independent copyright protection.

CONCLUSION

Intellectual property and law related thereto seems impervious to and lacking pejoratives against any social biases and stigmas and thereby attaining a status of rational neutrality. However, such a regime has only one purpose – commercial and economic viability. Most mainstream authors create works of literature suited to the consumption of society and cater to cultural hegemonies. Fan-based activities provide a much-needed reprieve in this literary

[413] *Anderson v Stallone* 11 USPQ2D (BNA) 1161; Copyright L Rep (CCH) P22, 665.
[414] Leanne Stendell, 'Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction' (2005) 58 SMU Law Review 1551, 1554.
[415] *Barbara Taylor Bradford v Sahara Media Entertainment Ltd* 2004 (28) PTC 474 Cal.
[416] *Castle Rock Entertainment Ltd v Carol Publishing Group Inc* 150 F 3d 132 (2nd Cir 1998).
[417] *Blanch v Koons* 467 F 3d 244 253 (2nd Cir 2006).

vacuum, catering to niches by departing from the original piece of literature and exploring sexualities, gender roles, alternate realities, and endings of the *canon,* among other themes drawing elements from the *canonical* source.

This locus serves as a cesspool of speculations and is a legal grey area. Owing to the origin of fanfiction, question *vis-à-vis* infringement of the original work and independent copyright of the fanfiction *dehors* of the *canon* notwithstanding its foundation on *canonical* themes and characters. On one end, the law is required to protect the originality of the author and provide them with exclusive economic exploitation rights excluding all others. While on the other fag end, the law must also play a balancing effect so as to not limit all future work that may be inspired by previous existing literature. Fanfictions lie in the grey area between these two camps of reasonable expectations. The status of fanfiction in the domain of intellectual property law remains a matter of subtle and subjective judgment and not of an objective and cognizable truth.

It can be deduced from the abovementioned authorities that fanfictions can be independently protected by the copyright law provided the adaptation does not bear a great degree of resemblance, does not create deception in the mind of reader to be original, and is not substantially similar. Infringement of literary work by fanfictions can generally be claimed on the grounds of the theme of the literary work or *canon* or characters of the *canon*. Most fanfictions are not a substantial replication of the literary work, and thus nothing needs to be said on communication and commercial exploitation of the literary work itself.

It has been settled through a catena of judgements that themes and superstructures of literary works are not copyrightable. The copyright of the literary work subsists in the expression of themes and ideas, more specifically on the arrangement and usage of the theme and facts. However, such themes don't attain monopoly, and the general theme of the literary work is not protected. The Court has interpreted this balancing effort to not impose an absolute embargo on the usage of themes and development of future literary works.

The character of the literary work, a well-defined expression and product of the imagination and creativity of the author, is often central to the storytelling and can be copyrighted provided it is well delineated. Thus, appropriation of characters may importune the legality of the fanfiction. The sanctum to fortify the literary work lies in one non-negotiable factor – the quality of it being transformative. Authorship of character is a rather unique phenomenon. Literary works describe the characters and abdicate the duty of interpretation to the reader, unlike cinematography. The quandary of authorship of characters provides a broad spectrum

of deviation and transformation by altering physical appearances, temperaments, and responses to external stimuli. In as much as fanfiction manifests substantial dissimilarity by way of adding creativity, imaginative value, and transformation of the *canonical* character, it would be protected by the copyright regime independent of the original literary work. Since fanfiction explores alternate realities of the characters and themes and accommodates several elements generally unexplored by the original literary work, the resultant product would satisfy the test of originality. The more fanfiction divorces the *canon*, the less likely it is to be established as infringement.

The copyright law rests on one leg – accrediting the author an exclusive market and conferring a bundle of rights in exclusion of others. Therefore, the similarity of elements between *canon* and fanfiction is nugatory if two basket factors are met. The first and primary basket of factor is that the fanfiction must show sufficient transformative value. The second basket further buttresses the protection and is a bundle of factors such as market substitution (intent and/or innocent occurrence), profit, degree of similarity, etc. The second basket of factors constitutes the fair use exception and is not imperative if the quagmire of the degree of similarity and input of ingenuity is overcome.

It is necessary that Courts take a liberal approach than browbeat the domain of fanfiction. Fanfiction emerged as a response to existing hegemonies. The flourishing of fanfiction ensures literary creativity and also an exploration of issues that are not culturally tasteful or commercially viable. Fanfictions require a pragmatic and permissive interpretation given its wealth of queer creativity and outlet of emotions and ideations. It creates a world within a world and democratises mainstream literature.

THE NEED FOR RECOGNITION AND ENFORCEMENT OF FOREIGN CUSTODY ORDERS IN INDIA IN THE CONTEXT OF INTERNATIONAL PARENTAL CHILD ABDUCTION

- **Prof (Dr) Ghulam Yazdani* and Syed Mujtaba Athar****

ABSTRACT

This article discusses the inherent problem concerning foreign custody jurisprudence. It highlights that despite enormous development at the international level, Indian laws remain unclear and uncertain with respect to the recognition and enforcement of foreign custody judgements. The article argues that the problem could be easily reconciled by the creation and implementation of rule-based norms informed by the considerations in the best interest of the child. Unfortunately, in the absence of constitutional and legislative guidelines, the judges have determined the cases using different methodologies resulting in contradictory conclusions. In addition, the 'best interest of the child' criterion is too broad to result in a rule-based determinant in child abduction cases. Conversely, it has instead limited the powers of the courts when utilised. International parental child abduction is a serious concern, and this article looks at the Indian and international laws that apply to the cases. In the background of such debates, this article attempts to shed light on the current impasse in foreign custody jurisprudence and suggests viable alternatives to the situation.

Keywords: Child Custody, International Child Abduction, Recognition and Enforcement of Foreign Judgement, Child Rights, Hague Child Abduction Convention.

INTRODUCTION

Indian law concerning the recognition and enforcement of foreign custody decrees remains unsettled and ineffective.[418] An appropriate and effective remedy to the problem would simply

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[418] Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021); Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014); VC Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).

be the drafting and application of the rule-based norms within the best interests of the child's concerns.[419] Unfortunately, courts are not constitutionally obligated to apply such norms.[420] Furthermore, even when it has been applied, the principle of 'best interests of the child' has not helped prevent the disorders inherent in child abduction cases, but has only embarrassed the courts in their efforts to deal with the problem.[421] This article discusses the prevailing Indian and international law governing the issue of international parental child abduction. It makes an effort to shed light on the shortcomings of the existing system (which has a tendency to favour transnational child abduction by failing to recognise and implement foreign custody decisions) and offers an alternative to the way things are currently handled in the legal system.

INTER-COUNTRY PARENTAL CHILD ABDUCTION

'Child Abduction' is neither recognised nor defined under any of the statutes in India.[422] It is also not a punishable offence within the criminal code of India.[423] Child abduction occurs when a parent breaches a custody decree by removing the child from their habitual residence and taking them to another jurisdiction or keeping the child in a second jurisdiction beyond an authorised visitation period.[424] Children abducted and brought into this country are difficult to locate because there is no mandatory registration requirement for children entering the Indian territory from a foreign country. Even if the child is located, there is no assurance that the child will be returned to the custodial parents.[425]

[419] George J Roman, *Recognition and Enforcement of Foreign Judgments in Various Foreign Countries* (Law Library, Library of Congress 1984).
[420] Joseph Landisman, 'Custody of Children: Best Interests of Child vs. Rights of Parents' (1945) 33(2) California Law Review 306.
[421] Julie E Artis, 'Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine' (2004) 38 Law and Society Review <www.jstor.org/stable/1555090> accessed 17 August 2022; GH Miller, 'The Psychological Best Interest of the Child is Not the Legal Best Interest' (2002) 30 Journal of the American Academy of Psychiatry and Law 196; Nadjma Yassari, Lena-Maria Möller and Imen Gallala-Arndt (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (T MC Asser Press 2017).
[422] Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 Macquarie Law Journal 38.
[423] Stellina Jolly and Aditya Vikram Sharma, 'Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration' (2021) 17 Journal of Private International Law 114.
[424] Anne-Marie Hutchinson, Henry Setright and Rachel Roberts, *International Parental Child Abduction* (Jordan Publishing Limited 1998).
[425] Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 Macquarie Law Journal 38.

Parental child abduction disturbs the child's need for security and stability and seriously disrupts his personal relationships, often causing emotional problems.[426] Courts have contributed to this problem by taking jurisdiction in custody disputes on tenuous grounds and re-litigating modifiable custody decrees.[427] Non-custodial parents are thus encouraged to take away the child and move to a more favourable forum, often 'disappearing' in the process.[428]

INDIAN RESPONSES

There is no legislation or domestic law in India that specifically provides for the rights of parents in the event of international child abduction.[429] The legislation that governs this region is one that is founded on precedent.[430] In India, the substantive law that governs the interactions between parents and children is controlled by the general (secular) laws of the country as well as the personal laws of the parents involved.[431]

THE GUARDIANS AND WARDS ACT, 1890

The Guardians and Wards Act of 1890 (*hereinafter*, 'GWA') is a general statute that regulates the legal status of children's upbringing. It is a secular law applicable to all individuals, regardless of their religious beliefs. A 'guardian' is responsible for raising a minor child/ward under this Act.

According to the Indian Majority Act of 1875, a 'minor' is someone who has not turned eighteen, the legal age of majority, as defined by the Guardians and Wards Act of 1890.[432] The term 'guardian' refers to a person who is responsible for a juvenile or the juvenile's property, or both.[433] Parents, whether married or single, are often the child's natural guardians. In the event of a disagreement between the parents, one parent may file an application for

[426] Anne-Marie Hutchinson, Henry Setright and Rachel Roberts, *International Parental Child Abduction* (Jordan Publishing Limited 1998).
[427] Stellina Jolly, 'International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India' (2017) 31 International Journal of Law, Policy and the Family 20.
[428] Eve M Brank and Lorey Scott, 'The Historical, Jurisprudential, and Empirical Wisdom of Parental Responsibility Laws' (2012) 6 Social Issues and Policy Review 26.
[429] Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 Macquarie Law Journal 38.
[430] Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021); Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014).
[431] Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.
[432] Guardians and Wards Act 1890, s 4(1); Indian Majority Act 1875, s 9.
[433] Guardians and Wards Act 1890, s 4(2).

guardianship under Section 7 of the GWA.[434] This authority is exercised by the courts in consideration of the child's welfare and in conformity with Section 17 of the GWA.

The GWA and other family-related personal laws in India give a legal means for remedial recourse. Section 24 of the GWA outlines the responsibilities of a guardian. It states that a guardian is responsible for the child's care and must provide support for the child's health, education, and other legal requirements.[435] Therefore, if the responsibilities outlined in Section 24 are not met, remedies under the Act can be sought by filing a petition in the court.[436]

Section 43 of the Act permits the court to issue orders restricting the behaviour or actions of guardians, as well as the implementation of such orders.[437] The court has the authority to issue an order limiting the behaviour or actions of any guardian appointed or declared by the court, either in response to an application filed by an interested party or on its own initiative.[438] If there is more than one guardian for a child and those guardians are unable to reach a decision on an issue that affects the child's welfare, any one of the guardians may petition the court for direction, and the court may issue whatever order it considers to be appropriate.[439] The court will transmit notice of the application or intention to the guardian or guardian who did not make the application prior to the making of the order unless it seems that the delay would undermine the purpose of the preceding orders. In this case, the court will not send the notice. This order can be enforced in the same manner as an injunction that was granted in accordance with either Section 492 (now Order 39, rule 1) or Section 493 (now Order 39, rule 2) of the Code of Civil Procedure of 1882. Under this clause, orders can be issued against a court-appointed or proclaimed guardian.[440]

PERSONAL LAWS

The following personal laws apply to the relevant parties in India, but only if they follow one of the recognised religions. In case of an inter-religious marriage, if the marriage has taken

[434] Guardians and Wards Act 1890, s 7.
[435] Guardians and Wards Act 1890, s 24.
[436] Sai Ramani Garimella and Stellina Jolly, *Private International Law South Asian States' Practice* (Springer Nature 2017).
[437] Guardians and Wards Act 1890, s 43.
[438] R Lakshana, 'Judicial Patterns in the Enforcement of Foreign Judgments: International Child Custody Issues' (2018) 5(2) Indian Journal of Law & Public Policy 11.
[439] Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.
[440] Code of Civil Procedure 1908.

place in accordance with the secular law, then only the secular law will apply.[441] Otherwise, the law according to which the marriage took place shall be the governing law of the parties to the dispute.[442]

WHEN BOTH PARENTS ARE HINDU BY VIRTUE OF THE DEFINITION OF 'HINDU' UNDER INDIAN LAW

The definition of 'Hindu' within Indian law is quite vast and includes the religion of Buddhism, Jainism, Sikhism and any other practice or belief not corresponding to Islam, Zoroastrianism or Christianity.[443] Both the Hindu Minority and Guardianship Act of 1956 and the Hindu Adoptions and Maintenance Act of 1956 address the care and welfare of minors.[444] The courts are required to examine these two acts in conjunction with the Guardian and Wards Act since their provisions are complementary.[445] When considering the custody and guardianship of a minor child, the child's best interests must take precedence.[446] The idea of well-being must be carefully considered and interpreted broadly.[447] Therefore, the court must evaluate the child's moral and physical health as well as their emotional and loving attachments.

Concerning very young children, it is well-established through a series of Supreme Court decisions that the mother should have custody, as the father is unable to provide maternal tenderness (considered essential for the child's proper growth and psychological development).[448] The Hindu Minority and Guardianship Act stipulates that the mother shall be granted custody if a child is under five years of age.[449] Other religious laws do not include such specific restrictions.

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[441] V C Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).
[442] ibid.
[443] Constitution of India 1950, art 25(2)(b).
[444] Hindu Minority and Guardianship Act 1956; Hindu Adoptions and Maintenance Act 1956.
[445] Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.
[446] Stellina Jolly, 'International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India' (2017) 31 International Journal of Law, Policy and the Family 20.
[447] Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021); Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014).
[448] R Lakshana, 'Judicial Patterns in the Enforcement of Foreign Judgments: International Child Custody Issues' (2018) 5(2) Indian Journal of Law & Public Policy 11.
[449] Hindu Minority and Guardianship Act 1956, s 6(a).

WHEN THE MUSLIM LAW IS APPLIED TO THE PARTIES

The Muslim Personal Law as per the (*Shariat*) Application Act of 1937 governs Muslims within India (except in the State of Goa).[450] In Islam, the custody of a minor child is referred to as '*hizanat*', which literally translates to 'care of the new-born'.[451] According to Sharia law, the father is the natural guardian of his children regardless of their gender. However, the mother can have custody of her boy until the age of seven and her daughter until she reaches puberty. Therefore, according to Muslim law, a male attains adulthood/majority at the age of seven, while a girl does so upon reaching puberty.[452] As noted previously, the Guardianship and Ward Act permits the application of the minor's personal law.[453] Additionally, GWA provides that a guardian shall be appointed in line with the personal law applicable to the parties.[454]

In *Akhtar Begum v. Jamshed Munir*,[455] the High Court of Delhi declared that 'the personal law of the parties must be considered when evaluating an application for custody under Section 6 of the Act.' If a court fails to do so, it would be operating improperly and with substantial irregularity.

While analysing the concept of custody of a minor child and guardianship in *Athar Hussain v. Syed Siraj Ahmed*,[456] the court ruled that guardianship and custody are different, depending on the situation. The father might be the natural guardian, but custody can be given to someone else. The court cannot appoint another guardian unless the father is unfit to be one, per Section 19 of the GWA. In this case, the Family Court and the High Court deemed the father unfit. The court ruled that although the father is the child's natural guardian, the child's well-being may imply that another friend or family should have legal custody.

CHRISTIAN LAW AS APPLIED IN INDIA

In biblical law, guardianship might be separate from custody. Christian law follows the 1869 Indian Divorce Act regarding custody (*hereinafter*, 'IDA').[457] The Act does not discriminate on the basis of religion. Section 41 of the act addresses child custody rulings following a

[450] Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (19th edn, 1990).
[451] Nadjma Yassari, Lena-Maria Möller and Imen Gallala-Arndt (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (T MC Asser Press 2017).
[452] Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (19th edn, NM Tripathi 1990).
[453] Guardianship and Wards Act 1890, s 6.
[454] Guardianship and Wards Act 1890, s 17.
[455] *Akhtar Begum v Jamshed Munir* AIR 1979 Delhi 67.
[456] *Athar Hussain v Syed Siraj Ahmed* (2010) 2 SCC 654.
[457] Narendra Subramanian, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India* (Stanford University Press 2014).

divorce.[458] In any action to obtain a judicial separation, the court may, from time to time, prior to rendering its decree, make such interim orders and decree provisions as it deems appropriate with respect to the custody, maintenance, and education of the minor children whose parents' marriage is the subject of the action, and may, if it deems it appropriate, direct proceedings to be taken for placing such children under the protection of the court.[459]

IN CASE OF PARSI LAW

The Parsi Marriage and Divorce Act of 1936 governs the legal status of children in Parsi households. In any action brought under this Act, the court may issue interim orders and include such provisions in the final decree regarding the custody, support, and education of children under the age of 18 whose parents' marriage is the subject of the action.[460] In such instances, the court may make, cancel, suspend, or modify any orders and provisions regarding the custody, support, and education of the children that could have been made by the final decree or interim orders if the action to acquire the decree were still continuing.[461]

There is a significant distinction between custody and guardianship in India. Guardianship is a more valuable and complete right than custody.[462] As a result, guardianship and trusteeship are quite similar concepts. In addition, a guardian's duties are somewhat more onerous than those of a normal custodian. For instance, custody could only be granted for a short period of time and should serve a specific purpose.[463] When parents are married and are living together, they share joint custody and are jointly responsible for the child's upbringing. In the event of separated/divorced parents, legal responsibility for the kid rests with the parent who has been designated 'guardian' by the court and given legal custody.

Typically, the mother is granted legal custody of the children in India. However, even in situations where the mother is given legal custody, the father is legally obligated to provide financial assistance for the child's upbringing, and the courts will issue an order to this effect when declaring guardianship and awarding custody. Since there is no legal distinction between

[458] Indian Divorce Act 1869.
[459] Narendra Subramanian, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India* (Stanford University Press 2014).
[460] Phiroz K Irani, 'The Personal Law of the Paris of India' JND Anderson (ed), *Family Law in Asia and Africa* (Routledge 2021).
[461] ibid.
[462] Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.
[463] Sonali Abhang, 'Guardianship and Custody Laws in India- Suggested Reforms from Global Angle' (2015) 20(7) IOSR Journal of Humanities And Social Sciences 39.

legitimate and illegitimate children in Hindu law, the father will be required to offer financial support for the child's upbringing, even if the mother is the 'natural' guardian.[464] There is no legal distinction between a father who is included on the child's birth certificate and a father who is not. According to this philosophy based on established law, there is no distinction between the legal rights of legitimate and illegitimate offspring.

RESPONSE OF THE COURTS IN CHILD ABDUCTION CASES

Consequently, it is evident from the debate that there is no legislation or domestic law that specifies parental rights in cases of international child abduction. This domain is governed by precedent-based law.

India is not a signatory to the 1980 HCCH Convention on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention) or any other treaty or convention in this area. Therefore, India is not required to repatriate a kid to the nation from where it was illegally abducted.

However, the Supreme Court of India recently ruled that the principle of comity of nations applies when children are wrongfully removed from the jurisdiction of foreign countries to which they belong and that the parties should be returned to the jurisdiction of the court with the closest relationship to the child. The custody question should be decided definitively by the courts in that nation.

The law that the Supreme Court of India has established has evolved through time. The following decisions provide insight into the principles utilised by Indian courts while deciding international child abduction cases:

In *Surinder Kaur Sandhu v. Harbax Singh Sandhu*,[465] the Supreme Court has ruled that the doctrine of conflict of laws favours the jurisdiction of the state having the closest connection to the case's concerns. The court said that allowing another state to assume jurisdiction in such situations would promote forum-shopping.

In *Elizabeth Dinshaw v. Arvand M. Dinshaw*,[466] the Supreme Court of India adopted a child-centric approach. It stated that if a custody dispute involving a child comes before a court, the

[464] Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.
[465] *Surinder Kaur Sandhu v Harbax Singh Sandhu* AIR 1984 SC 1224.
[466] *Elizabeth Dinshaw v Arvand M Dinshaw* (1987) 1 SCC 42.

matter must be settled without regard to the legal rights of the parents, but exclusively and predominantly on what is in the best interest of the child.

Dr. V Ravi Chandran v. Union of India[467] is an important case towards recognition and enforcement of foreign custody orders. In this case, the mother fled to India with her child and was subsequently untraceable. The Supreme Court ordered the Central Bureau of Investigation (CBI) to locate the child. The child was seized by the CBI in Chennai and returned to US court jurisdiction.

Similarly, in *Shilpa Aggarwal v. Aviral Mittal*,[468] the Supreme Court of India ruled that child custody disputes should be decided by the courts having the closest connection to the problem at hand. In this instance, both parties, permanent citizens of the United Kingdom, travelled to India with their three-year-old daughter. The father filed a petition for custody of his daughter when the mother refused to return the child to England. The Supreme Court ruled that the English courts, where both parents lived continuously, should decide the child's custody based on the comity of courts and the child's best interests.

However, in *Ruchi Majoo v. Sanjeev Majoo*,[469] the Supreme Court decided that the courts in India have *parens patriae* jurisdiction over children, which is an onerous responsibility. As the child's welfare is an essential issue, the Supreme Court declared that even if a foreign court has a definite opinion on the minor's welfare, Indian courts cannot forego an independent examination with objectivity. However, the Court added that this does not mean that foreign court orders should still be regarded and the welfare of the child shall remain the pivotal principle over all other considerations.

However, this case was overruled in *Arathi Bandi v. Bandi Jagadrakshaka Rao*.[470] The Supreme Court adopted its reasoning in the Dr. V Ravi Chandran *case*.[471] It held that when a parent removes the child from the foreign nation to India in contravention of the domestic court's decision, they cannot avail any remedy. The Supreme Court expressly endorsed the current idea of Conflict of Laws, which favours the recognition of the jurisdiction of the state having the closest connection to the dispute.

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[467] *Dr V Ravi Chandran v Union of India* (2010) 1 SCC 174.
[468] *Shilpa Aggarwal v Aviral Mittal* (2010) 1 SCC 591.
[469] *Ruchi Majoo v Sanjeev Majoo* (2011) 6 SCC 479.
[470] *Arathi Bandi v Bandi Jagadrakshaka Rao* 2013 (15) SCC 790.
[471] *Dr V Ravi Chandran v Union of India* (2010) 1 SCC 174.

The Supreme Court gave due consideration to the child's choice while deciding the case in *Jitender Arora v. Sukriti Arora*.[472] The Supreme Court of India has ruled in favour of a 15-year-old girl who was taken from the UK to India by her father. Her mother filed a habeas corpus petition asking that she be returned to the UK. But the teenager said she did not wish to travel to the United Kingdom to be with her dad, and the Supreme Court upheld the child's right to choose to be equivalent to the best interest of the child, when they are able and willing to take a rational decision regarding their custody.

In *State of N.C.T. v. Nithya Anand Raghavan*,[473] the Supreme Court reaffirmed its ruling in Dr. V Ravi Chandran case[474] that India's Courts could not be divested of their authority to refuse the return of a child to their home country. However, the Court remarked that such situations must be evaluated on a case-by-case basis, regardless of whether a summary or in-depth investigation is conducted.

In *Prateek Gupta v. Shilpi Gupta*,[475] the Supreme Court extensively discussed the principles of 'intimate contact' and 'closest connection'. The court held that the concept of comity of courts and principles of 'intimate contact' and 'closest connection' must be evaluated based on the facts of each case. In situations of child abduction, a court may adopt either a summary inquiry or order the child's prompt return to its home country. The court has been of the opinion that these cases should not be rule-based. Instead, the facts of each case and the opinion of the judge based on common law principles and the welfare of the child should be the guiding force in such cases.

The latest and the most controversial case of international parental child abduction to date is the case of *Kanika Goel v. The State of Delhi*.[476] The question cannot be resolved primarily on the rights of the parties vying for custody of the minor, the three-judge bench in this case declared, and the emphasis must instead be on whether the child's return to the country of origin is in their best interests. Most importantly, the court held that the fact that the minor child's prospects will improve with repatriation might be important in substantive proceedings for custody of the minor but it will not be crucial when examining threshold concerns in a habeas corpus petition. Thereby restating that the Court is under a responsibility to objectively

[472] *Jitender Arora v Sukriti Arora* 2017 (3) SCC 726.
[473] *State of NCT v Nithya Anand Raghavan* (2017) 8 SCC 454.
[474] *Dr V Ravi Chandran v Union of India* (2010) 1 SCC 174.
[475] *Prateek Gupta v Shilpi Gupta* (2018) 2 SCC 309.
[476] *Kanika Goel v The State of Delhi* (2018) 9 SCC 578.

determine over the admission of the writ petition for the return of the child. The result in this case was that the child was taken away from the US embassy in Nepal to the father in Chicago, and the US government upheld the action by the father since the father already had the decision in his favour.[477]

INTERNATIONAL RESPONSES - THE HAGUE CONVENTION

Unlike the proposed draft, the Hague Convention does not formulate recognition and enforcement standards; rather, it requires the prompt restoration of the custody that existed before the abduction.[478] The Hague Convention is intended to deter child abductions by putting potential abductors 'on notice' that the removal of a child to, or retention in, a country other than the child's habitual residence will result in the prompt return of the child.[479] The Hague Convention has two specific objectives. First, it discourages child abduction across international borders by securing the expeditious return of the wrongfully removed or retained child in any contracting state. By returning the situation to the way it was before the abduction, the Convention removes the benefit sought by the abducting parent. The child's speedy return and the restoration of the pre-abduction custody status deprive the abductor of any legal or practical benefits of acting outside the law.[480] Subsequent litigation on the rights of custody is not prohibited once the child's return is accomplished.[481]

The second objective of the Hague Convention is to ensure that the law of custody and access rights in one state is effectively respected in the other. The protection of the non-custodial parent's right of access is provided for in Article 21.[482] In essence, the Hague Convention is structured to secure the prompt return of a child under sixteen who is wrongfully removed or retained after an award of custody has been made.[483]

Thus, to order the immediate return of the child, the court, under the Convention, must find that (1) the child was wrongfully removed from his habitual residence and (2) proceedings

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[477] Ned Price, 'Department Press Briefing- May 5, 2022' (*US Department of State*, 05 May 2022) <www.state.gov/briefings/department-press-briefing-may-5-2022/> accessed 30 September 2022.
[478] Rhona Schruz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 International and Comparative Law Quarterly 771.
[479] ibid.
[480] Stellina Jolly, 'International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India' (2017) 31 International Journal of Law, Policy and the Family 20.
[481] Rhona Schruz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 International and Comparative Law Quarterly 771.
[482] Convention on the Civil Aspects of International Child Abduction 1980, art 21.
[483] Convention on the Civil Aspects of International Child Abduction 1980, art 4.

were instituted within the Convention's one-year statute of limitations. If one year or more has passed, the authority is required to order the return of the child unless the child is now settled in his new environment.[484]

Article 13 provides two of the three limited exceptions to Article 12's return requirement. Under Article 13, the judicial authority may refuse to return the child if the person who opposes the child's return establishes that the child's custodian was not exercising his custody rights at the time of removal or retention, that the custodian has consented to or subsequently acquiesced in the removal or retention; or that a grave risk of physical or psychological harm or otherwise intolerable situation would await the child upon return.[485] The 'harm to the child' exception does not include economic or educational disadvantage.[486] The Hague Convention is a step in the right direction to decrease the number of child abductions. Nevertheless, it has its own shortcomings, which acceding nations must minimise to most effectively implement the Convention.[487]

Perhaps the Convention's most apparent weakness is that the non-convention countries may become haven states for abducting parents.[488] Ultimately, the effectiveness of the Convention may depend more upon its adoption by a large number of states than on its precise terms.[489] Ideally, public pressure will encourage governments to ratify the Convention, thus significantly reducing the haven state problem.[490]

Another weakness is that judicial discretion is still permitted under the aforementioned exceptions to immediate return. If the Courts construe these exceptions too broadly, the purpose of the Convention will be significantly hampered. Thus, the requested Court should exercise its discretion and assert jurisdiction to protect the child only in an actual emergency.[491]

The third weakness of the Convention is that it may only be invoked if the removal or retention is deemed wrongful. Article 3 of the Convention states that removal or retention is deemed

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[484] Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021).
[485] Stellina Jolly and Aditya Vikram Sharma, 'Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration' (2021) 17 Journal of Private International Law 114.
[486] ibid.
[487] Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 Macquarie Law Journal 38.
[488] ibid.
[489] Sai Ramani Garimella and Stellina Jolly, *Private International Law South Asian States' Practice* (Springer Nature 2017).
[490] Sarah Viger, *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing 2011).
[491] Stellina Jolly and Aditya Vikram Sharma, 'Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration' (2021) 17 Journal of Private International Law 114.

wrongful: (1) if it breaches the custody rights of the applicant under the law of the child's state of habitual residence; and, (2) when at the time of the removal or retention those rights were actually being exercised "*but for*" the abductor's actions.[492] An abducting parent who removes the child before a custody decree is granted does not breach any existing custody right; hence, his act is not wrongful under the Convention.[493]

Another area for concern is the limitation period of one-year post-abduction/retention for invoking the Convention.[494] This statutory limitation is especially problematic for those parents who do not know where their children have been taken.[495] Thus, a parent who successfully takes away the child and remains undetected for over a year may ultimately benefit.[496]

Finally, there is the question of how the courts will apply the Convention. A court that is petitioned by the custodial parent essentially pass it over at times.[497] In such cases, the court hearing the petition essentially states, "*The jurisdictional courts of the country issuing the order are responsible for that, not us,*" by refusing to recognise and enforce the other country's decree.[498] Therefore, the court simply sends the parties back to the country that issued the decision.[499] On the other hand, if India recognises and enforces the foreign custody decision, it may benefit India's foreign policy.[500]

By taking the initiative in recognising and enforcing the foreign decree, India will be sending a message to the foreign nation that India will not interfere with the court decisions of that country, even at the expense of Indian citizens.[501] Hopefully, this will lead to reciprocal

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[492] Anne-Marie Hutchinson, Henry Setright and Rachel Roberts, *International Parental Child Abduction* (Jordan Publishing Limited 1998).
[493] Rhona Schruz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 International and Comparative Law Quarterly 771.
[494] Convention on the Civil Aspects of International Child Abduction 1983, art 12.
[495] Sarah Viger, *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing 2011).
[496] V C Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).
[497] Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 Macquarie Law Journal 38.
[498] George J Roman, *Recognition and Enforcement of Foreign Judgments in Various Foreign Countries* (Law Library, Library of Congress 1984).
[499] Amanda Michelle Waide, 'To Comply or Not to Comply? Brazil's Relationship with the Hague Convention on the Civil Aspects of International Child Abduction' (2010) 39 Georgian Journal of International and Comparative Law 271.
[500] VC Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).
[501] Adeline Chong, 'Moving towards Harmonisation in the Recognition and Enforcement of Foreign Judgment Rules in Asia' (2020) 16 Journal of Private International Law 31.

treatment by foreign countries of the recognition and enforcement of Indian court decrees.[502] All countries have a strong interest in protecting their own citizens. However, that interest must give way, if countries hope to gain the return of their abducted children.[503] If a country refuses to enforce a custody decree of another country and return the child to that other country, how can it ever expect to get anything but like treatment? When a parent kidnaps their child in violation of an already-issued custody decree, he should not be allowed to benefit by hiding behind the interest that his homeland has in him as one of its citizens.[504]

Reciprocity would clearly further any country's foreign, as well as public policy.[505] By recognising and enforcing the custody decrees of other nations, any nation could hope to receive equal treatment. This would strengthen ties between the reciprocating nations.[506] Furthermore, public policy would be furthered in that aggrieved parents will ultimately benefit from the recognition and enforcement of the foreign decree when their children are returned.

THE ALTERNATIVE: RECOGNITION AND ENFORCEMENT

Although the Hague Convention is a significant effort at alleviating the problems of parental child abduction in the international arena, a recognition and enforcement statute would make it much more likely that a custodial parent from a foreign country could better enforce a custody order against an abducting non-custodial parent.[507]

While no clear consensus exists on the underlying motivation for recognition and enforcement of any foreign judgment, several rationales have been put forward in favour of such action. They include: (1) the avoidance of duplicating judicial efforts; (2) the protection of the successful foreign litigant from harassing or evasive manoeuvres; (3) the promotion of a stable and uniform international order; (4) the belief that in certain instances, the rendering forum is more appropriate than the recognising jurisdiction; and (5) recognition and enforcement of foreign custody decrees furthers Indian foreign policy.

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[502] Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 Macquarie Law Journal 38.
[503] Adeline Chong, 'Moving towards Harmonisation in the Recognition and Enforcement of Foreign Judgment Rules in Asia' (2020) 16 Journal of Private International Law 31.
[504] R Lakshana, 'Judicial Patterns in the Enforcement of Foreign Judgments: International Child Custody Issues' (2018) 5(2) Indian Journal of Law & Public Policy 11.
[505] Shruti Sahni, Samanvi Narang and Sunidhi Setia, 'Custody of Children in India- An Inter-Country Dispute' [2021] Design Engineering <https://pure.jgu.edu.in/id/eprint/1201/> accessed 22 August 2022.
[506] Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014).
[507] Sarah Viger, *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing 2011).

An analysis of the previous sections brings to the fore the sense of frustration the 'victimised' parent must experience when seeking relief through the courts in these matters.[508] Indian ideals expect that each nation, when awarding custody to a parent or guardian, should base its judgment on the investigations and advice of a support system of social workers and psychologists so superior and knowledgeable that their recommendation for custody is flawless.[509] In practice, however, this ideal has been unattainable, and the only other solution is to uphold and respect the decree set down by the issuing nation, whether flawless or not, as a definite enforceable standard must be set in this sensitive dilemma.[510] Nations finding themselves the harbourers of parental child abduction would then be required to enforce the decree of the foreign nation and return the child to the custodial parent. If nations want rule-based order for regulating parental abduction cases, they must honour, rather than scrutinize and then modify, the decrees of other nations and send back the children of those nations. To put it plainly, the current legal framework has to be upgraded.[511]

Claims of child abuse as the reason for having fled with a child should be the only exception, and these, of course, should be carefully investigated by the petitioning nation.[512] If the abducting parent can prove that the child would be subject to danger if the original decree were enforced, there should be an exception to the absolute recognition and enforcement standard proposed. The burden of proof, of course, should be on the abducting parent to prove that the danger exists to the child in question.

IMPLEMENTATION OF A RECOGNITION AND ENFORCEMENT STANDARD

Although not the focus of this article, a few brief words on implementing a recognition and enforcement standard should be mentioned. The Central Government may assume power over the proposed Indian recognition and enforcement law in either one of three principal ways: the exercise of the treaty-making power, a protocol to the existing treaty, or the enactment of a

[508] Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021).
[509] George J Roman, *Recognition and Enforcement of Foreign Judgments in Various Foreign Countries* (Law Library, Library of Congress 1984).
[510] Adeline Chong, 'Moving towards Harmonisation in the Recognition and Enforcement of Foreign Judgment Rules in Asia' (2020) 16 Journal of Private International Law 31.
[511] Stellina Jolly and Aditya Vikram Sharma, 'Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration' (2021) 17 Journal of Private International Law 114.
[512] ibid.

central statute. The crystallisation of law through multilateral treaties would be the preferred method for two reasons.[513] First, distrust between diverse political and economic systems remains a fact of life. A mutually negotiated and satisfactory treaty would do much to alleviate these problems, particularly concerning troublesome countries like the USA and Norway.[514] Furthermore, a greater likelihood exists that respective concerns will be addressed and resolved in a treaty, thus leading to reciprocal recognition agreements. Second, exercising the treaty power as the vehicle for recognising foreign decrees would enable the federal branches of government to weigh foreign policy considerations.

The second alternative for implementation would be a protocol to the existing treaty. Although a protocol to an existing treaty requires the same implementation process (and this carries with it the same advantages) as that of a multilateral treaty, this alternative would not be as effective. Problems may arise in attempting to alter the convention in its current state from an intentionally vague and deliberately simple treaty to a specific recognition and enforcement treaty. A discussion of these problems, however, is outside the purview of this article.

The last avenue of implementation could be through the enactment of a Central government legislation.[515] Central legislation of foreign decree recognition practices would strengthen Indian recognition law.[516] The benefits received from the exercise of centre treaty-making power, namely, reciprocity and the furtherance of Indian foreign policy, would also accrue from a central statute. A crucial distinction, however, is that a treaty would promote greater international stability because it represents a more direct approach to redressing the current problem areas India faces with regard to other countries. India is not a signatory to the HCCH Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention) and therefore is not under an obligation to return a child to the country from which they had been wrongfully removed. India is also not a signatory to the:[517]

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[513] Sonali Abhang, 'Guardianship and Custody Laws in India- Suggested Reforms from Global Angle' (2015) 20(7) IOSR Journal of Humanities And Social Sciences 39.

[514] Apoorva Mandhani, 'Submissions to the Committee on the Hague Convention on the Civil Aspects of International Child Abduction' (*LiveLaw*, 30 September 2017) <www.livelaw.in/lawyers-collective-urges-centre-not-sign-hague-convention-civil-aspects-international-child-abduction-read-submission/?infinitescroll=1> accessed 22 August 2022.

[515] Sai Ramani Garimella, 'International Parental Child Abduction and the Fragmented Law in India-Time to Accede to the Hague Convention?' (2017) 17 Macquarie Law Journal 38.

[516] Sai Ramani Garimella and Stellina Jolly, *Private International Law South Asian States' Practice* (Springer Nature 2017).

[517] Atul M Setalvad, *Setalvad's Conflict of Laws* (3rd edn, LexisNexis 2014).

- Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Regulation).
- HCCH Convention on the jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children 1996 (Child Protection Convention).

The law relating to international child abduction is precedent-based law and there is no specific statute/convention governing the courts in India.[518] Repatriation of the child is done based on the principles of comity of law (under which states will mutually recognise each other's legislative, executive, and judicial acts).[519] However, precedence is always given to the welfare of the child. In a recent judgment of the Supreme Court, it has been held that the essence of the judicial decision on the issue of repatriation of a child removed from its native country must be clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of 'intimate contact and closest concern'.[520] Though the principle of comity of courts and the above doctrines in a foreign court are factors that deserve notice in deciding the issue of custody and repatriation of the child, it is no longer res integra (a question that has not been examined or undecided) that the overriding determinant would be the welfare and interest of the child.

CONCLUSION

India is unlikely to sign the Hague Child Abduction Convention, which makes inter-country abduction of children by parents a punishable offence. It has been observed that signing the Convention may go against the interests of women who escape bad marriages. The solution indicated by the current Government was to implement an internal mechanism to redress complaints from women who have run away from violent marriages and returned to India with their children. The Justice Bindal committee/Chandigarh committee submitted a draft of 'The Protection of Children (Inter-Country Removal and Retention) Bill 2018' to the Ministry of

[518] V C Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflicts* (2nd edn, OUP 2019).
[519] Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021).
[520] *Amyra Dwivedi v Abhinav Dwivedi* (2021) 4 SCC 698; *Yashita Saho v State of Rajasthan* (2020) 3 SCC 67; *Varun Verma v State of Rajasthan* 2019 SCC OnLine Raj 5430; *Kanika Goel v State (NCT of Delhi)* (2018) 9 SCC 578; *Lahari Sakhamuri v Sobhan Kodali* (2019) 7 SCC 311.

Women and Child Development (WCD) on 23 April 2018.[521] The Bill attempts to set the stage for India to sign the Hague Child Abduction Convention.

India is yet to be a signatory to the Convention. The Panel has prepared a draft law to safeguard the interests of children, as well as those of the parents, particularly mothers. Returning a child to the place of habitual residence may result in sending the child to an incompatible set-up. It may overlook the fact that a mother is the primary caregiver of the child. International child abduction is a problem of significant dimensions. The present laws need to be revised in several respects. The broad discretion given to Courts and the general mistrust of foreign judgments by Indian judges severely limits and weakens any positive attributes the initiative taken by the Law Commission and the draft statute by the Ministry of Women and Child Development may have had in the international context.

At best, the Hague Convention will deter child abductions by parents who are either "*located*" by the victimised parent or who attempt to 'legitimise' their wrongdoing within one year of abduction. The Convention's most significant shortcoming, however, is that it is not a recognition and enforcement treaty; thus, courts are still free to exercise discretion and take jurisdiction when it is deemed to be "*in the best interest of the child.*" This, in turn, undermines international stability and certainty in dispute resolution. It is hoped that once India begins to recognise foreign custody decrees, the remedy sought by the injured party can be granted by enforcing the relief provided for in the foreign decree.

[521] Law Commission of India, *The Protection of Children (Inter-Country Removal and Retention) Bill* (Report No 263, 2016) <https://lawcommissionofindia.nic.in/reports/Report263.pdf> accessed 22 August 2022.

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FORM IV

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Place of publication:	Dr. Ram Manohar Lohiya National Law University, Lucknow, L.D.A Kanpur Road Scheme, Lucknow – 226012
Periodicity of Publication:	Yearly
Printer's Name:	Registrar, Dr. Ram Manohar Lohiya National Law University, Lucknow
Publisher's Name:	Registrar, Dr. Ram Manohar Lohiya National Law University, Lucknow
Nationality:	Indian
Address:	L.D.A Kanpur Road Scheme, Lucknow – 226012
Editor's Name:	Dhaman Trivedi
Nationality:	Indian
Address:	L.D.A Kanpur Roach Scheme, Lucknow – 226012
Ownership:	Dr. Ram Manohar Lohiya National Law University, Lucknow, L.D.A Kanpur Road Scheme, Lucknow – 226012

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