The Hague International Law Review

The Hague International 2nd Volume 2022

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Introduction

The Hague International Law Journal officially presents the publication of its second volume for 2022. This is the second volume out of the two that are planned for release for the year of 2022. The volume contains contributions from various authors trained in International Law and coming from a multitude of backgrounds and areas of expertise. It offers to readers a collection of papers that touch on various areas of International and European law, seeking to provide a legal perspective on recent topics that concern not only legal practitioners and academics, but also a broad range of audience interested in law development.

The quarterly theme: *Recent developments in International Law*

The Hague International Law Journal is an innovative publishing platform established in The Hague, the Netherlands by the Corax Foundation. It is developed and run by an enthusiastic team of professionals and law students seeking to contribute to the development and clarification of jurisprudence. Our ultimate aim is to support and enrich the professional discussion regarding International and European law, as well as highlighting up-and-coming areas of International Law.

The objective behind promoting this discussion is to provide a space for law students, young professionals, and early academics to connect with established professionals and academics. We believe that sharing ideas and experiences is a crucial way to encourage the legal community to continue pursuing the notion of justice and spreading awareness on social matters that touch upon everyone.

We offer high-quality contributions and to promote discussions on current, innovative, and traditional topics concerning all fields of law. The Hague International will continue to highlight developments in various fields of law following changes in the international market. Our authors also thematically focus on subjects related to International trade, International Public and International Private Law, Competition Law, Alternative Dispute Resolution, Compliance and International Criminal Law.

Along with the quarterlies The Hague International Law Journal provides for other publication formats. We offer blogs and short articles on a weekly basis, with the purpose of keeping the readers informed on the recent developments. Moreover, we provide the curated Annual Review which comprises of a selection of the best papers in our opinion that are distributed through the quarterlies. The Annual Review is proved in a print version.

For more information you can consult with our website: www.coraxfoundation.com. In case you have any questions, you can contact the Editor in Chief, Deivid Mustafa at:

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Editor in Chief's note

Dear authors, readers, and reviewers of The Hague International Law Review – on behalf of the Editorial Board, it is with great pleasure to officially present you the second volume publication of our second volume of the journal for 2022. It is an honor for me to be part of this project and I thank the authors, editors, and members of the Corax Foundation for their unparalleled support and encouragement.

The Hague International Law Review was established in 2021, a time when most of us discovered the importance and the challenge behind the right to be correctly informed. Our team members met in The Hague, the city of peace and justice, with the aspiration to create a platform that would provide the legal community with an opportunity to access high-quality and original contributions from prominent authors who share our passion in delivering an accurate representation of law and facts. Through the past months, we have been working hard to achieve this objective and despite the many challenges, we will continue to do so.

We invite you to take the time to read through the articles, and if you have any questions for the authors, or the editorial board, do not hesitate to contact us.

On behalf of the team, I wish you a pleasant read!

Deivid Mustafa

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Acknowledgements

Firstly, we would like to thank the authors of the papers for their trust, courage, and patience towards the realization of this publication. On behalf of the team, it has been a pleasure and fruitful experience to work with each and every author and we are truly grateful for their effort and cooperation.

Many thanks go to the Corax Foundation, the establisher and developer of The Hague International. Corax Foundation is a not-for-profit organisation based in The Hague, the Netherlands focusing on supporting law and international relations students; as well as on connecting individuals, companies and organisations across the globe to promote mutual collaboration and growth. Its goal is to facilitate connections for young as well as established talents, whilst promoting the interaction between individuals, companies and organisations from varying sectors and regions. Corax Foundation's projects center around networking opportunities and the growth of skills and knowledge. It provides virtual skills workshops and lectures, whilst also creating a unique platform that promotes an innovative approach to academic discussion and publishing on policies and legislation. Along with The Hague International, Corax Foundations projects include The Hague Inter-University Law Debate Tournament (English speaking competition) and the Concours Inter-Universitaire de Débat de La Haye (Competition en Français).

We take this opportunity to express our deep and sincere gratitude to the directors of Corax Foundation, co-founders, and co-organizers of the three main projects, Mr. Aurelien Lorange and Ms. Anna Maria Urbanova for their continuous and generous support towards The Hague International. While possessing high standards of professionalism and team-management skills they have accompanied The Hague International Team in every step of the publication process, provided guidance, as well as helped in shaping the structures and values of the team. We are thankful for their patience, encouragement, and motivation that led to the realization of this endeavor.

We would also like to thank our team members for their relentless and outstanding efforts put towards the publication of the 2nd Quarterly 2022. This would have been impossible without their performance, determination, and cooperation. We are grateful for the work of every member including:

- Editor in Chief, Deivid Mustafa – LL.M. Candidate International and European Tax Law, Maastricht University; LL.B. Graduate, International and European Law, The Hague University of Applied Sciences.

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The Transboundary Framework Regime of the Ganges River between India and Bangladesh

By: Merel Terwisscha van Scheltinga[*]

Introduction

The general area of the Ganges river basin has at least approximately 400 million people living in its region. A recent study found that poverty is substantially higher in such rural areas where agriculture is the main livelihood.[1] This statement concerns the Ganges river area where agriculture is a prominent sector to the extent that the people living in this region are mainly dependent on this sector.[2] Lacking regulation to protect the river will not only be of environmental detriment but also enhance the already substantial displacement and migration caused by increasing concerns on food security and poverty in the Ganges area.[3] To review the transboundary river framework regime between India and Bangladesh, this paper will focus its research entirely on the Ganges river as it is the only river currently enjoying a transboundary water agreement.

The following paper will be divided into three sections. The first section will delve into the governance of the India-Bangladesh relations in relation to river governance and the relevant general river legislation. Moreover, it provides an overview of the transboundary issue of the Ganges river's Farakka Barrage. Such focus is important to understand the background of thebilateral framework regime between India and Bangladesh. This research will not go into detail about Bangladesh's water management policy as it is not of direct concern to the transboundary governance of the Ganges. Continuing, section two will examine the existing Ganges framework regime and case law establishing further rights for the Ganges River. The third section will highlight the expected and necessary future changes of their transboundary river governance.

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[1] Nilanjan Ghosh, 'Challenges to environmental security in the context of India–Bangladesh transboundary water relations' (2015) Indian Institute of Management Calcutta 42(2) 214.

[2] ibid.

[3] Md. Munsur Rahman and others, 'Ganges-Brahmaputra-Meghna Delta, Bangladesh and India: A Transnational Mega-Delta' (eds), *Deltas in the Anthropocene* (Palgrave Macmillan 2020) 24.

The main focus of the research of this paper will be to examine the law of the transboundary Ganges river. Utilising the doctrinal method of research, this paper shall critically examine the legislation and case law to expose any tensions in the regulatory system of the Ganges river.

Section 1: India-Bangladesh Transboundary River Governance

a. History of India-Bangladesh's Transboundary River Relations

The transboundary element of the Ganges river regulation is a relatively new topic compared to the ancient origin of the river.[4] As India and Pakistan separated in 1947, the Ganges river established its transboundary character residing in the bordering states of India and Bangladesh which were then East Pakistan. To match the need for food security due to the increasing population of East Asia, the Indian subcontinent commenced "rapid expansion of water development projects" in the 1960s.[5] In these projects, the political role of the bordering states in the redistribution of river waters was largely informal as domestic water policies were limited.[6]

A trait of water-related projects first introduced by the British and still in place in post-colonial India is traditional river engineering.[7] As knowledge gaps and institutional governance issues have not yet been addressed, traditional river engineering has created a fragmented river governance regime causing hydro-political tensions on a national and transboundary level.[8] The water development project governing system in place also disregards the impact it may have on economic development and ecosystem services-livelihoods such as fishing which is concerning both environmentally and socially.[9] The Ganges Treaty has also implemented such an approach of disregard as its sole focus is on the volumetric allocation of the Ganges river instead of concerns for environmental or economic drivers of the river and adaptation to any effects on the hydrological regime.[10] These concerns hint at the multi-level character of the problem through its both transboundary and inter-state scope as well as its intersectoral conflict whereby the economic

[4] Ghosh (n 1).
[5] ibid.
[6] ibid; Ankita Shrestha and Rucha Ghate, 'Transboundary Water Governance in the Hindu Kush Himalaya Region Beyond the dialectics of conflict and cooperation'(HI-AWARE Consortium Secretariat 2016) 4.
[7] Ghosh (n 1).
[8] Nilanjan Ghosh and Jayanta Bandyopadhyay, 'Governing the Ganges and Brahmaputra: Beyond Reductionist Hydrology' (Observer Research Foundation 2020) 1.
[9] Ghosh (n 1).
[10] Kazi Saidur Rahmana and others, 'A critical review of the Ganges Water Sharing arrangement' (2018) 1(18) Water Policy 15.

and environmental needs have to be balanced.[11] With the continuing water-related project system, the overarching problem of environmental security is becoming increasingly complex and an inescapable reality. The problem of environmental security has been especially difficult to tackle as the river management by India focuses significantly on the water quantity rather than quality.[12] Accordingly, the Ganges river's water quality is suffering from untreated sewage and industrial effluents.[13]

b. River Management Policy of India

It can be understood that there is a disconnection between the current river management regime in India and its utility to the country. The Comprehensive Mission Document of the National Water Mission still traces its practice of understanding river water resources allocation to traditional engineering through National Water Policy (NWP) principle vii.[14] Although the NWP 2012 has improved by mentioning environmental needs for rivers and the need for mitigation strategies for ecosystems-livelihoods at risk, NWP principle vii still allows for a fragmented river regulation regime for the Ganges river.[15] NWP 2012 clause 12(4) calls for planning, development and management of water resources of a river (sub-)basin to be done as a unit. However, there are no explicit obligations laid down to tackle such inter-state cooperation. Moreover, the practice of this clause is unlikely in India's legal, social, and political disunity in inter-state cooperation on river management.[16] Although the aim of clause 12(4) is to break the cycle of fragmented river management across states, creating harmonious practice of a river basin of 861.452 km² is an extremely complex task.[17] According to the Constitution of India Article 246 and List-II Entry 17, water resources are a state subject.[18] The failing implementation of NWP derives from the lack of pragmatism as better care should have been extended to implement basin-level planning, and inter-state and transboundary cooperation in the NWP implementation process.[19] Considering that the

[11] ibid 218.
[12] Chetan Pandit, 'India's National Water Policy: 'feel good' document, nothing more' (2019) 35(6) International Journal of Water Resources Development 5.
[13] Chakresh Kumar and others, 'Seasonal dynamicity of environmental variables and water quality index in the lower stretch of the River Ganga' (2021) 3 Environmental Research Communications 3.
[14] Ghosh (n 1).; National Water Policy of India (2012) Principle vii.
[15] National Water Policy of India (2012) Clause 14(1), 8(4).
[16] Pandit (n 12) 11.
[17] National Water Policy of India (2012) Clause 12(4).
[18] The Constitution of India (1950) Article 246, List-II Entry 17.
[19] Pandit (n 12); The Constitution of India (1950) Article 246, List-II Entry 17.

Ganges river is of state competence, these points must be addressed to create a functioning regulatory network for the entirety of the Ganges river.

Another issue with the water management in India is the continuing use of traditional engineering practices.[20] Better use of river engineering practices in India will be of absolute necessity for Bangladesh as the consequences of water management in India will be of direct concern to Bangladesh as the downstream state. Remedying communication gaps will also have a foreseeable effect on the relevant policy areas, as it will create a better platform for the discussion of the transboundary regulatory situation of the Ganges river. Overall, improvement to the river engineering practices for the Ganges river must go hand-in-hand with inter-state and transboundary communication to allow for water quality improvement for the entirety of the Ganges river.

c. The Ganges River's Farakka Barrage

One of the most historic moments for India-Bangladesh's transboundary hydro-political relations was the barrage project in Farakka, an Indian town bordering Bangladesh.[21] The Ganges river flows from the Himalaya in the Indian state Uttarakhand and splits before the Bangladeshi border into the two distributaries downstream from the Farakka barrage.[22] The project was strongly opposed by the government of East Pakistan which, after 1971, reorganised itself as the government of Bangladesh.[23] This opposition was rooted from the concern of a possible decrease of the water flow of the Ganges river into Bangladesh in the dry season which would be detrimental for Bangladesh's economy.[24] The project's construction still commenced in hopes of "improving the status of the navigation channel approaching the port of Kolkata" as this barrage was expected to reduce the sedimentation in the river to ensure good passage of the ships navigating through the Ganges river.[25] However, the sedimentation problem remains till date regardless of the Farakka Barrage.[26]

Bangladesh's concerns, on the other hand, did become reality as the Farakka Barrage caused a definite decrease of the freshwater resources flowing from the Ganges river into

[20] Ghosh (n 1).
[21] ibid 218.
[22] ibid, 214.
[23] ibid.
[24] ibid.
[25] ibid.
[26] ibid.

Bangladesh during the dry season, negatively affecting "agriculture, navigation, irrigation, fisheries and allowing salinity intrusion within Bangladesh".[27] The National Adaptation Programme of Action of 2005[28], Bangladesh Climate Change Strategy and Action Plan of 2009[29], and Bangladesh Climate Change and Gender Action Plan of 2013[30] guide Bangladesh to adapt to the Farakka Barrage whose effects left the Bangladeshi population with an uncertain future in terms of environmental security and economic prosperity.[31] To address all affected sectors by the Farakka Barrage, the guiding documents provide all necessary principles for adaptation, namely, "risk reduction, community- and ecosystem-based adaptation, migration and gender".[32]

However, as the adaptation plans tend to be limited to short term results and are sector-specific, the function of the guiding documents is lacking.[33] The establishment of a new framework is, therefore, arguably, necessary to allow "coordination among the sectoral approaches from climate change perspective by setting sectoral priorities and identifying key sectors for immediate attention".[34] As the Ganges river is dependent on rainfall in the monsoon season and glacial ice-melt from the Himalayas, the increasing concern of climate change can be expected to intensify the need for adaptation and disaster management on both sides of the border. There is, therefore, great value in communicating and exchanging experience for both India and Bangladesh. It is especially recommended for India to be involved in the creation of the new adaptation guidelines document to the extent of sharing knowledge on climate change adaptation which would be beneficial for parties and possibly encourage better communication on transboundary river management. For example, India has a better gender sensitivity and inclusive approach to its adaptation policy for climate change and disaster management compared to Bangladesh.[35] This is because women are left more vulnerable to climate change and have generally more difficulty recovering from adaptation than men in Bangladesh because of "their family care responsibilities, sector-specific employment and lower wages".[36] This shows the value of communicating with India on a strategy for tackling such angles of adaptation which are also necessary to be addressed

[27] ibid 35.

[28] Ministry of Environment and Forest Government of the People's Republic of Bangladesh, 'National Adaptation Programme of Action' (2005).

[29] Ministry of Environment and Forest Government of the People's Republic of Bangladesh, 'Bangladesh Climate Change Strategy and Action Plan' (2009).

[30] Ministry of Environment and Forest Government of the People's Republic of Bangladesh, 'Bangladesh Climate Change and Gender Action Plan' (2013).

[31] ibid 35-36.

[32] ibid 36.

[33] ibid.

[34] ibid.

[35] ibid.

[36] ibid 36, 39.

in adaptation management for the Ganges river. Communication will also be beneficial for India as the Farakka barrage has also caused problems for its own state. Namely, as the Farakka barrage changed the Ganges stream courses, and land reallocation caused an interstate border dispute, locals became refugees.[37]

Despite the Ganges Treaty regulating the dry seasons water flow from Farakka and the adaptation guidelines, the Farakka build continues to disrupt the river's flow. Disruption of the flow of a river is concerning, as it may change the water quality, quantity, flow, and river dynamics.[38] As the aim for its construction could not be realised, and the benefits of the barrage are limited, an assessment must be made to see whether the structure of the barrage is actually of any benefit to either state. Instead of focusing merely on adapting to the situation, India and Bangladesh must consider mitigating measures such as re-examining the construction of the barrage.

Section 2: Legal Framework Regime of the Ganges River

a. Ganges Water Sharing Treaty

The Ganges Treaty was formed because of the Farakka dispute and is the only signed agreement between India and Bangladesh for a transboundary river even though the two states share the water resources of fifty-three other rivers.[39] The Ganges Treaty states the aim of its commencement in article 2 as the water quantity allocation regulation between the two states to guarantee Bangladesh with a minimum of water resources in the dry season.[40] Even though the 1996 Treaty was established after numerous negotiation efforts and short-term agreements, its substantive character is lacking. It does not take a basin-wide approach nor acknowledge the possible effect upstream water use could have for the water quality and availability further down the stream.[41] Further fault is evident in the Treaty's ambition to include the no-harm rule while not divining the actual threshold to reach a 'harmful' situation.[42] The presence of the notion of no-harm may however still be of use to strengthen the Ganges Treaty's principles of equity and

[37] Ghosh (n 1).
[38] Vijay P. Singh and others 'Environmental Degradation: Challenges and Strategies for Mitigation' (2022) 104 Water Science and Technology Library 498.
[39] Rahman (n 3).
[40] A.T. Wolf and others, 'Understanding and overcoming risks to cooperation along transboundary rivers' (2014) 16(5) IWA Publishing 9; Ganges Water Sharing Treaty (1996) Article 2.
[41] Muhammad Mizanur Rahaman, 'The Ganges water Conflict: A comparative analysis of 1977 Agreement and 1996 Treaty' (International Water Law Project 2006) 274.
[42] Kimbery Thomas, 'Water Under the Bridge? Int'l Resource Conflict and Post-Treaty Dynamics in South Asia' (South Asia Journal, 2012); Ganges Water Sharing Treaty (1996) Article 9.

fairness.[43] Moreover, the Treaty does not address comprehensive dispute resolution guidelines. Such issues may be solved by the consulting body of the India-Bangladesh Joint River Commission, which was established in 1972.[44] However, this body is not flawless. In 1976, negotiations on the Ganges river in the Commission were in such a dire condition that the UNGA became involved and called for negotiations on a Ministerial level instead.[45] This concludes that not only is the text of the Ganges Treaty problematic but also the dispute mechanism which is supposed to handle issues caused by the vague Ganges Treaty provisions.

b. Case Law

In 2017, the High Court of Uttarakhand, the state where the Ganges river originates from the Himalaya, ruled that the Ganges river enjoys legal rights as legal entities.[46] Besides designating the Ganges river with a legal personality, the Court referred to the Uttarakhand's state government as its guardian.[47] In 2019 the government appealed to the Indian Supreme Court by arguing that the responsibilities as its guardian was unclear and especially concerning because of the interstate and transboundary nature of the river. The Supreme Court agreed, and the Ganges river was once again left without a legal standing to help improve its environment's protection.[48]

On the other hand, the Bangladesh High Court, in the Turag River Case of 2019, granted the Ganges river the right to a legal personality which it has enjoyed since.[49] The Ganges river's prosperity in Bangladesh is dependent on the good practice of the river's protection in India. It is, therefore, advised to discuss the readoption of the Ganges river's rights in India at the Ganges Treaty negotiations in 2026.

[43] Ganges Water Sharing Treaty (1996) Article 9.
[44] Rahaman (n 41).
[45] Wolf (n 40).
[46] Mohd Salim v. State of Uttarakhand & others (2017); Erin O'Donnell, 'At the intersection of the sacred and the legal: rights for nature in Uttarakhand, India' 30 Journal of Environmental Law 136.
[47] ibid.
[48] Ashley Westerman, 'Should Rivers Have Same Legal Rights As Humans? A Growing Number Of Voices Say Yes' (The Daily Star 2019) <https://www.npr.org/2019/08/03/740604142/should-rivers-have-same-legal-rights-as-humans-a-growing-number-of-voices-say-yes> accessed 19 May 2022; Gauri Noolkar-Oak, 'Transboundary cooperation key to enforcing rivers' legal rights in Bangladesh' (The Daily Star 2019) <https://www.thedailystar.net/opinion/environment/news/transboundary-cooperation-key-enforcing-rivers-legal-rights-bangladesh-1784641> accessed 19 May 2022.
[49] ibid; Supreme Court of Bangladesh Appellate Division, Judgement on Civil Petition for Leave to Appeal No. 3039 (2019).

Section 3: The Future of the Ganges River's Transboundary Management

Considering the unstable transboundary regulatory situation, guidance should instead be taken from applicable international principles to understand the stance to be followed in solving disputes regarding the Ganges river. Careful consideration must be made of the Sustainable Development Goal 6 encouraging cooperative management systems between nations for the preservation and use of water bodies.[50] Moreover, the Convention on the Law of the Non-navigational Uses of International Watercourses (UN Watercourses Convention) Article 6 strongly recognises the importance of considering the lifestyle of the affected local population of a water body and environmental stability when adopting water management policies.[51] Through UN Watercourses Convention Article 20 further emphasis is put on protecting and preserving the ecosystems of watercourses which include river basins such as the Ganges river.[52] Lastly, considering UN Watercourses Convention Article 21 stating its advocacy for preventing and reducing pollution of watercourses, the Ganges Treaty 2026 negotiation should further emphasise its focus on water quality management.[53]

Regarding the quantity of the water resources of the Ganges river, the two main issues are climate change and the Farakka Barrage. Amendments advised to be discussed are: transboundary cooperation and communication in adaptation to climate change and the reevaluation of the structure of the Farakka Barrage. Moreover, with regards to the water quality of the water resources of the Ganges river, the main issue to be addressed is: the protection of the ecological integrity of the transboundary basin which is of relevance to the environmental and food security of both states, water quality regulation and biological objectives.[54] As water demand has increased on both sides, sustainable use of the limited water resources is pivotal. Both the quality and quantity of the Ganges water must be addressed in the 2026 treaty negotiations as the regulation of both elements is necessary for the Ganges river to prosper.

[50] UNEP, 'Goal 6: Clean water and sanitation' (*unep.org)* <https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-6> accessed 13 September 2022.
[51] Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entry into force 17 August 2014) 51 UNTS 49 (Watercourses Convention) Article 6.
[52] ibid Article 20.
[53] ibid Article 21.
[54]Kazi Saidur Rahmana, 'A critical review of the Ganges Water Sharing arrangement' (2019) 21 Water Policy 273.

Conclusion

The most important point from this paper that must be repeated is that there needs to be better mitigation and adaptation measures to handle the Ganges river's management. Because of the worrying inter-state and transboundary cooperation, the river's adaptation policy and disaster management is fragmented and therefore impractical. By seeking a basin-level planning approach, those dependent on the Ganges river's water resources prosperity may be better guarded from the increasing intensity of climate change. With regards to the necessity for an improved mitigation approach, careful consideration of better river engineering practice must be made.

In the 2026 treaty negotiations, improved ecological protection of the Ganges river must be addressed by reevaluating the Farakka barrage's structure instead of adapting to the persistent environmental and having economic havoc caused by the barrage asa discussion point. Throughout the reevaluation of the Farakka barrage careful consideration must be made to including the no-harm rule including the definition of a 'harmful' situation. The acknowledgement of the possibility of certain harmful upstream water use being problematic for the water quality and availability further down the stream may spark further discussion of the need to reevaluate the Farakka barrage's structure and benefit. Overall, better communication and cooperation will be key to create a well-functioning treaty from the 2026 negotiations.

Gun Policy: A Comparative Analysis

By: Jacqueline Thomas[*]

Introduction

With a rise in mass shootings, firearm-related deaths, and gun violence in general in the United States in recent years, debate over more restrictive laws surrounding the weapons has reignited throughout the country. Specifically in the weeks and months following shootings at an elementary school in Uvalde, Texas and a supermarket in Buffalo, New York, many have paused to reconsider the appropriate scope of the Second Amendment right to bear arms outlined in the U.S. Constitution. More light can be shed on this complex and widely polarizing legal issue through the lens of comparative law by analyzing past and current gun laws in the U.S. with those of some nations that are fairly culturally and legally comparable in other ways. This article will discuss firearm varying policy in the United States, the United Kingdom, and Switzerland, which present varying cases of lax and strict policy further complicated by differing public cultures toward guns. By weighing the respective historical and cultural backgrounds and ultimate effects of each country's approach, this piece seeks to answer the question: What factors drive the rise and fall of gun laws, whether they be cultural, political, or strictly legal? Additionally, following those findings and the comparison with the United Kingdom and Switzerland, what are some possible next steps in the United States?

United States

The U.S. presents a unique case in the context of gun law, as it is one of just three nations with the right to keep and bear arms currently enshrined in their national constitutions, alongside Guatemala[1] and Mexico[2]. In the United States, this constitutional legal protection is defined as: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep

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[1] Guatemalan Constitution of 1985, Article 38.

[2] Constitución Política de los Estados Unidos Mexicanos 1917, Article 10.

and bear Arms, shall not be infringed".[3] Ratified in 1791, the amendment originally existed in the context of the American Revolutionary War and its fallout. This period caused early citizens of the United States to feel it necessary to protect state and regional militias, as this was the primary way the colonists' fought in the war against the British.[4]

In more recent times, prevailing legal interpretations of this amendment, and the Constitution more generally, have primarily fallen into two camps. The first angle is referred to as the originalist perspective, which argues generally that the language of the Constitution should be interpreted in a literal sense, taken as written at the time of its ratification.[5] As such, originalists argue that the right to bear arms cannot be legally regulated or limited, in line with the literal wording of the original amendment. The second, the non-originalist or intentionalist perspective, holds in contrast that constitutional interpretation should be primarily guided by the intent of the framers of the Constitution, rather than its literal meaning in the text.[6] In the case of the Second Amendment, non-originalists contend that factors like historical context, advancements in firearm technology, and the modern irrelevance of the militia, should allow for legal limits on gun ownership. It is important to note, too, that there is debate over the degree to which the amendment should be held or bent within the two perspectives. The differences between and within these ideological interpretations, rooted in the very nature and scope of personal liberties held by many Americans as part of their national identity, lead to the heated debate in issues like that of the Second Amendment without an easy path toward compromise.

Thus, current gun policy debate and legislation proposals exist against the backdrop of this historical legal context, with intense public and legislative polarization leading to a lack in restrictive laws. However, this is not to say that gun control policy is non-existent in the U.S. Such legislation has its origins in the National Firearms Act (NFA), originally enacted in 1934, which limited the transfer of firearms, taxed individuals and businesses importing or manufacturing firearms, and required the universal registration of firearms with the U.S. Secretary of the Treasury.[7] The next major piece of gun control law was passed via the 1968 Gun Control Act (GCA), which built upon the NFA by expanding more specific definitions and regulations of "destructive devices" and machine guns and banning the import of firearms without "sporting purpose." Additionally, the GCA restricted the purchase of firearms by minors, those with drug convictions, and individuals

[3] United States Constitution 1788, Amendment 2 (ratified 1791).

[4] Robert E. Shalhope, 'The Ideological Origins of the Second Amendment' in *The Journal of American History,* Vol. 69, No. 3 (Oxford University Press 1982).

[5] Robert W. Bennett, 'Originalism and the Living American Constitution' in Robert W. Bennett and Lawrence B. Solum *Constitutional Originalism: A Debate* (Cornell University Press 2011).

[6] John B. Gates and Glenn A. Phelps, 'Intentionalism in Constitutional Opinions' [1996] PRQ 245-261.

[7] National Firearms Act 1934.

deemed "mental incompetents".[8] In the 1990s, further laws were passed to require background checks before the gun purchases from licensed dealers[9] and to temporarily ban assault weapons in the Public Safety and Recreational Firearms Use Protection Act of 1994.[10] Congress elected not to renew the ban after it reached its ten-year limit, and it expired in 2004.

U.S. gun laws since 2000 have served largely to lessen restrictions. In addition to the allowance for the temporary assault weapons ban to lapse, laws were passed making it more difficult for the public to access data surrounding firearm sales to criminals[11] (limiting this knowledge to law enforcement and prosecutors) and outlawing the naming of gun manufacturers in civil suits by those victimized by a weapon manufactured by those companies.[12]

Most recently, a new bill passed through both houses of Congress with bipartisan support and was signed into law by President Biden on June 25, 2022 to enact new, stricter restrictions on firearms in the United States for the first time in decades. Titled the Bipartisan Safer Communities Act, it provided funding for crisis intervention in states to identify individuals who may be a danger to themselves or others to seize weapons before gun violence occurs. Additionally, it dictated that those convicted of any domestic violence crime against a romantic partner cannot purchase a firearm, along with tightening seller licensing requirements in attempts to curb unlicensed and unregulated gun sales. Aside from provisions related to guns specifically, the Bipartisan Safer Communities Act also allotted funds to states to bolster school security and mental health programs.[13] Some legislators and members of the public argue that these two provisions could solve many of the problems related to gun violence in combination with stricter firearms laws (or in lieu of them altogether), while others contend that they cannot hold the same significance as rigid restrictions on guns themselves. The tangible effects of this law and its specific parts will be seen in coming years.

[8] Gun Control Act 1968.
[9] Brady Handgun Violence Prevention Act 1993.
[10] Public Safety and Recreational Firearms Use Protection Act 1994.
[11] Tiahrt Amendment 2003.
[12] Protection of Lawful Commerce in Arms Act 2005.
[13] Bipartisan Safer Communities Act 2022.

United Kingdom

Gun control laws in the United Kingdom draw a sharp contrast to those in the United States—whereas the U.S. has arguably some of the most lax gun laws in the world, the U.K. has some of the strictest. This has not always been the case, however, with increasingly restrictive measures being passed over the course of the past century often in reaction or response to massive acts of violence and developing firearm technology. Such legislation began in the early 20th century with the requirement of a license to purchase pistols, laying the groundwork for future regulation on manufacturing, sales, and use of firearms.[14] Following World War I, lawmakers further limited access to guns, requiring a certificate approved by police and providing adequate reasons necessitating the certification in order to purchase the weapons.[15] This act was further built in 1937, in which self defense was invalidated as a valid reason for a firearm certificate and the legal age to own a gun was raised.[16] Importantly, U.K. law's exclusion of self defense as a viable reason to bear arms marks a notable difference from gun law and public attitudes in the United States.

Decades later, following a mass shooting dubbed the Hungerford massacre in which a gunman used a semi-automatic rifle to kill 16 individuals, the 1988 Firearms (Amendment) Act was passed. This consequential piece of legislation prohibited the ownership by civilians of semi-automatic, self-loading, and pump-action firearms, along with rocket launchers and other assault-style weapons and ammunition.[17] Similarly spurred by a mass shooting, another act was passed the following decade, prohibiting "short firearms" (also known as handguns) with few exceptions in individual cases.[18] The 1988 and 1997 acts served as sweeping laws drastically reducing gun ownership in the U.K. In the years since, new legislation has been passed to clarify previous laws, draw out minimum sentences for non-compliance, and further restrict firearm access in the United Kingdom, with a ban on bump stocks and realistic imitation firearms in 2006 and 2019.[19]

Following collective legislation throughout the 20th and early 21st centuries, the path to gun ownership in the U.K. is a difficult one, requiring official approvals, strict background checks, specific and vetted reasons for ownership, and references (along with adherence to the bans on many firearms). Predictably, the acute increase in restrictions on firearms in the past four decades

[14] Pistols Act 1903.
[15] Firearms Act 1920.
[16] Firearms Act 1937.
[17] Firearms (Amendment) Act 1988.
[18] Firearms (Amendment) Act 1997.
[19] Violent Crime Reduction Act 2006; Offensive Weapons Act 2019.

has led to a dramatic decrease in guns in circulation and consequent drop in gun violence and gun-related homicides.[20]

Switzerland

The reality of gun control in the U.S. shows lax restrictive legislation with a high rate of firearm ownership (an estimated 120.5 civilian firearms per 100 people in 2017, according to the Small Arms Survey), and the U.K. example shows very strict legislation with a low rate of ownership (about 5.03 civilian firearms per 100 people).[21] Switzerland's case, however, represents a third situation: stricter regulation than that of the U.S. while retaining a high rate of gun ownership per capita. Switzerland ranks among the the top 25 countries and territories in gun ownership rates among civilians at 27.6 firearms per 100 citizens,[22] but its gun control policy is stricter than that of the U.S., for example, especially as Swiss lawmakers have passed legislation in the past two decades to remain in compliance with European Union directives.

To that point, it is important to lay out the baseline firearm regulations required by European Union directives since some gun policy began to be harmonized throughout the EU in 1991. Passed that year, "Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons" aimed to address concerns that individuals may travel to countries with less strict gun laws to obtain firearms and travel back to stricter countries upon the abolition of internal border controls within the Schengen Zone, harmonizing federal gun laws to a degree.[23] The enactment of the UN Protocol Against the Illicit Manufacturing of and Trafficking in Firearms in 2005 by member states led the EU to amend Directive 91/477/EEC through Directive 2008/51/EC to enact stricter registration requirements and address the rising issues of converted weapons and internet firearms purchases.[24] Much stricter action was taken by the EU the following decade in Directive 2017/853, which prohibited all firearms classified "Category A,"

[20] Office for National Statistics, 'Offences Involving the Use of Weapons: Datatables,' Table 01, 2021.
[21] Aaron Karp, 'Briefing Paper: Estimating Global Civilian-held Firearms Numbers' *Small Arms Survey* [June 2018].
[22] ibid.
[23] Council Directive 91/477/EEC on control of the acquisition and possession of weapons [1991] OJ L 256.
[24] Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons OJ L 179.

including automatic weapons and other assault-style weapons, among some others.[25] These amendments to the original directive were officially codified in Directive 2021/555.[26]

With an understanding of EU baseline laws and requirements, one can now turn to Switzerland more specifically. While it shares an obligation to the EU's directives discussed above with the United Kingdom and other member states, Switzerland is a notably unique example compared to many other countries, including the U.S. and U.K., as it holds a national stance of "armed neutrality" through obligatory military training and service for all capable men beginning at age 18. Traditionally, soldiers received a semi-automatic rifle or handgun to be kept at home in their personal possession during the period of service and could be bought and kept after their time in the military after a period of training that had to be reviewed every several years.[27] For much of Switzerland's history, the legal restrictions on gun ownership were fairly liberal.

In 2008, however, the Swiss government passed more restrictive legislation to align its national policies with the EU Schengen Treaty to retain membership in the Schengen area, particularly in regards to those weapons in possession of active military personnel versus civilians. Lawmakers enacted policy passed through a referendum vote to store military ammunition at central armories rather than at soldiers' homes[28], and further revisions to Switzerland's Weapons Law legally confined ownership of most firearms—especially automatic and semi-automatic firearms—to those licensed by the military.[29] The acts also dictated that civilians seeking to buy the majority of weapons and ammunition must be granted a weapon acquisition permit, be over age 18, and not have a history of violent crime convictions in order to purchase firearms.

Most recently, Swiss citizens voted in 2019 to adopt stricter gun laws, spurred by pressure to align with requirements laid out in the newly-revised EU Firearms Directive of 2017.[30] Changes included more rigorous requirements for labeling and registering weapons owned by private citizens, as well as added requirements that those purchasing semi-automatic firearms must prove that "they regularly train with them."[31]

Overall, while Switzerland's gun control laws remain more lenient than some other European countries (like the United Kingdom, for example, as discussed earlier), key policies

[25] Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons OJ L 137.
[26] Directive (EU) 2021/555 of the European Parliament and of the Council of 24 March 2021 on control of the acquisition and possession of weapons OJ L 115.
[27] LAAM, Article 2; SR 510.10.
[28] Matthew Salmarsh, 'Swiss Get Ready to Vote on Stricter Gun Controls' *New York Times* [February 2011].
[29] WG, LArm; WV, OArm; VPAA, OEPM.
[30] Council of the EU, 'EU Strengthens Control of the Acquisition and Possession of Firearms'.
[31] Raphael Minder, 'Swiss Vote to Tighten Gun Laws to Align With E.U. Rules' *New York Times* [May 2019].

including wide licensing requirements for most firearms and restricted access to ammunition and many assault-style weapons set it apart from the laws in the United States. Additionally, cultural factors like mandatory arms training for most men and some women at the time of military conscription points public perception of guns away from a means of personal self-defense (as is the case in the U.S.) to that of national security, as argued by a Swiss soldier in an interview with the *BBC* in 2013.[32] Though direct causes are debatable, whether they be strictly legislative, cultural, or otherwise, the 2019 Swiss firearm homicide rate was just 0.18 per 100,000 people, compared to 0.04 in the U.K. and a staggering 4.12 in the U.S., according to the Institute for Health Metrics and Evaluation.[33]

Reflections and conclusion

Comparing gun legislations and cultures across the United States, the United Kingdom, and Switzerland shows the drastic differences in motivation and efficacy behind various approaches to gun control from country to country. Regarding current figures of firearm homicide and gun-related crime rates in the three countries does certainly suggest that straightforward restrictions on access to firearms limits gun violence, as seen in the United Kingdom. However, concluding that a U.K.-style ban (or near-ban) can be the solution to gun violence in any other country, especially in the United States, would unfortunately be an oversimplification of the historical, cultural, and political realities surrounding gun control in the U.S.

Bearing in mind the treatment of the right to bear arms as an essential personal liberty enshrined in the Second Amendment by a significant portion of the populations of both citizens and legislators in the United States, an arms ban of any kind is unlikely to be passed in the country's current legislative and political climate. Notably, too, opposition to stricter gun control in the U.S. is not only ideological, it is also financial for many lawmakers. As one example, the National Rifle Association is a major campaign contributor for Republican politicians, with one senator receiving over 13 million dollars from its lobbying arm over the course of his career.[34] The NRA and groups like it lobby against any action against access to firearms, and their financial influence within the Republican Party makes them powerful, adding even more to the unlikeliness of a ban passing and lasting.

[32] Emma Jane Kirby, 'Switzerland Guns: Living With Firearms the Swiss Way' *BBC* [February 2013].
[33] IMHE 2019.
[34] Brady Campaign to Prevent Gun Violence, 'Which Senators Have Benefited Most from NRA Money?,' 2022.

Even when an assault weapons ban was temporarily enacted 1994, as discussed previously, that ban was passed very narrowly by Congress controlled by the Democratic Party and allowed to expire as soon as it was able to by the 2004 Republican-leaning body. As shown by the Public Safety and Recreational Firearms Use Protection Act's case, even smaller scale bans do not seem sustainable in United States federal law. Even much more recently, the House of Representatives introduced a bill in late July of this year to ban the manufacturing and sales of assault weapons once again.[35] Though it passed the House, it lacks the necessary support to pass in the Senate (as would be necessary for the bill to be signed into law per the American legislative system).

Beyond bans' questionable political and legal feasibility and sustainability, an assault weapons ban alone—even if it was politically sustainable—would not be enough to curb gun violence in the U.S. on a large enough scale to align it with peer countries' firearm homicide rates. The relatively meager effects of such a ban were outlined in a 1997 report by the Office of Justice Programs within the United States Department of Justice evaluating the effectiveness of the Public Safety and Recreational Firearms Use Protection Act assault weapons ban. Specifically, the report stated that while the ban did contribute to a decrease in gun homicides compared to the expected trends without it from 1994-1995 (a fall of between 6-7%), its scope is inherently limited due to the relatively low number of gun violence cases that assault weapons are involved in, as opposed to the many other types of firearms available in the United States.[36] Thus, substantial changes to gun violence statistics via a ban would require something of a far greater scope than assault firearms alone, an idea that would be even less politically palatable to lawmakers and even less likely to pass.

If a firearms ban cannot be the way forward at this time, then, what realistic legal steps may American lawmakers take to reduce gun violence in the U.S.? It may seem natural to turn now to Switzerland as an example, considering its high rate of gun ownership with a low rate of gun violence. However, it is important to acknowledge certain fundamental cultural differences once again, this time concerning the differing public attitudes toward guns in Switzerland versus the U.S. Specifically, the point made by a Swiss soldier in an interview mentioned earlier that Swiss soldiers and citizens tend to see guns as a matter of national security rather than personal self defense sets it apart from the United States. Many Americans that hold the Second Amendment in high esteem, especially those with an originalist perspective, understand the right to bear arms as a personal, individual liberty that they must protect *against* the federal government, rather than use as a means to protect it. Thus, public support for stricter gun legislations, seen in Switzerland

[35] Bill No. H.R. 1808, 2022.

[36] Jeffrey A. Roth; Christopher S. Koper, 'Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994: Final Report,' 1997.

in multiple referendum votes in the past several decades, seems unlikely to be replicated in the United States.

In the coming years, the U.S. may continue to take small steps toward more restrictive gun laws in the form of more thorough background checks and waiting periods to purchase guns, or perhaps an increase in the minimum buying age from 18 to 21, all ideas that have been discussed by lawmakers in recent months and years. However, in order for more sweeping legislative changes to be possible (and to have an extensive effect on gun violence in the country), it is possible that an ideological shift may be necessary in the United States. Cultural and ideological factors have given rise to an incredibly partisan environment surrounding gun law, giving rise to organizations like the NRA which exercise massive influence over legislative actions through financial contributions. Unfortunately, it seems unlikely that such a radical shift in American cultural and political norms can occur without more tragedy to necessitate it.

Analyzing the Dimensions and Limitations of Due Process in Transnational Arbitration Disputes

By Rishav Ray and Subhadeepa Sen[*]

Introduction

In its recent pronouncement, the UK Privy Council put forth that in order to understand what constitutes a violation of due process; it must be assessed by applying international standards but in conformity with domestic requirements.[1] Therefore, it has become pertinent to understand what *due process* in arbitration means as per the international standards. This raises two important issues. First, whether there is any specific international standard for due process. Second, whether due process in international arbitration is based upon the general state practices.

This paper seeks to explore the answer to these issues. It aims to study the different state practices of due process and, its evolution and its adaptation at the international level. The paper is divided into 5 sections. The first section lays down the basic understanding and foundation of the concept of due process. The second section discusses the meaning and scope of due process in arbitration under various domestic regimes. The third section puts forth the understanding of due proces in international arbitration and explores its various facets. The forth section seeks to understand whether due process can become a weapon which can be abused. The last section attempts to arrive at a conclusion and puts forth certain suggestions with regard to usage of due process in international arbitral proceedings.

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[1] Case 0086/2022 Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) (Respondent) v Matlin Patterson. Global Opportunities Partners (Cayman) II LP and others (Appellants) (Cayman Islands) [2022] UKPC 21.

Meaning and Concept of Due process

The idea of *due process* was first embodied in the 39th Chapter of the Magna Carta.[2] The original idea provided that no adverse action would be taken against a person "unless by lawful judgment of his peers and by the law of the lands".[3] Under the international regime, the concept of due process has been defined as the embodiment of minimum standards in the administration of justice.[4] It has been stated by the renowned international law scholar and author, Alwyn Vernon Freeman that due process guarantees the right to a fair trial and prohibits arbitrary and discriminatory conduct by the judicial or governmental authorities.[5] This concept has been adopted and ingrained by multiple countries around the world. The Federal Constitution of the USA states that "No person shall be deprived of life, liberty and property, without due process of law".[6] The Supreme Court of India has interpreted the due process of law as a process which would have to pass the following tests – (i) it should be just; (ii) it should be fair; (iii) it should be reasonable; (iv) it should not be arbitrary.[7] It can thus be inferred that due process is the basic foundation or standard to ensure due administration of justice. Any legal procedure, be it the enactment of a legislation, execution of an administrative order, exercising of state power or the resolution of disputes, cannot be bereft of the due process of law. Arbitration in the current age and time is no longer an 'Alternative method of Dispute Resolution' but rather the 'Preferred method of Dispute Resolution'.[8] Due process is undoubtedly an intrinsic and indispensable concept in an arbitral proceeding.

Understanding Due Process in Arbitration at the Domestic Level

The concept of due process is omnipresent in practically all arbitration jurisdictions. Even though the interpretations may differ from region to region, the concept at the core level remains the same containing common elementary features irrespective of jurisdiction. A primary reason for the

[2] Hannis Taylor, 'Due Process of Law'(1915) 24 The Yale Law Journal 353.
[3] ibid.
[4] A.O. Adede, 'A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law,' (1977) 14 Canadian Yearbook of International Law/Annuaire Canadien de Droit International 73.
[5] Alwyn.V. Freeman, The International Responsibility of States for Denial of Justice (London and New York: Longmans, Green and Company 1938).
[6] Frank C. Newman, 'The Process of Prescribing "Due Process"' 49 California Law Review 215.
[7] *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.
[8] Tariq Khan, 'Making Alternative Dispute Resolution the Primary Mode of Dispute Resolution'(SCC Blog, 26 April) https://www.scconline.com/blog/post/tag/tariq-khan/ accessed 21 August, 2022.

similarity is that the UNCITRAL Model Law[9] forms the basis of domestic arbitral practice in more than 115 jurisdictions.[10] For instance, jurisdictions such as Canada, Australia among others, have described due process in arbitration as the 'representative of the mandatory requirements of procedural fairness which apply to international arbitrations in most jurisdictions'.[11] Under the Indian Arbitration regime, it is a mandatory requirement that procedural fairness is maintained throughout, that is, the tribunal should be impartial, equal and full opportunity should be given to each party to present his side in all stages of the proceedings.[12] The DIS Rules provide for the requirement of equality and impartiality as the essentials of due process in arbitral proceedings.[13] A reference may be drawn to the interpretation of the term *due process* by the New Zealand High Court,[14] where it has been held that rules of natural justice provide the legal basis for due process. The *natural justice* concept entails that justice should be impartial, fair, equal for all and ensuring protection of individual rights against arbitrary procedures and miscarriage of justice by the authorities.[15] In other words, it is the soul of the body of justice and foundation on which delivery of justice is based.[16] This definition of natural justice aligns with the understanding of the concept of due process which has been elaborated in the above discussion.

Jurisdictions whose domestic arbitration laws are not modelled on the UNCITRAL Model Law have curated their concept of due process in arbitration.[17] It is imperative to say that even these conceptualizations are not too far from those of the above discussed jurisdictions. The provisions of the English Arbitration Act,[18] for instance reflect a strong presence of the requirements for fairness, impartiality, and opportunity to each party to present the case fully.[19] The principles of due process hold a strong position in the French arbitral proceedings as well as

[9] 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006).

[10] Dr. Mohammed Zaheeruddin, 'Due Process of Law in International Commercial Arbitration with Special Reference to Production of Documents' (2016) 4 JLCJ 89.

[11] Gary Born, International Commercial Arbitration (3rd edn Kluwer International 2021).

[12] Arbitration and Conciliation Act 1996 (Act No 26 of 1996).

[13] The German Institute of Arbitration (DIS) Rules 1998.

[14] *Trustees of Rotoaira Trust v. Attorney General* [1998] NZLR 452.

[15] Amit Gupta, 'Doctrine of Natural Justice' (Tax Guru, 28 July) <https://taxguru.in/income-tax/doctrine-natural-justice.html> accessed 22 August, 2022.

[16] ibid.

[17] Simon Sloane, Daniel Hayward and Rebecca McKeeFieldfisher, 'Due Process and Procedural Irregularities: Challenges' (Global Arbitration Law Review 3 January, 2019) https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/1st-edition/article/due-process-and-procedural-irregularities-challenges accessed on 22 August, 2022.

[18] English Arbitration Act 1996, s 33.

[19] Justin Williams, Hamish Lal and Richard Hornshaw, 'Arbitration Procedures and Practice in the UK (England and Wales): Overview' (Thomson Reuters Practical Law 1 July, 2022) https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)&firstPage=true accessed on 22 August, 2022.

reflected in article 1510 of the French Code of Civil Procedure.[20] It can be understood that due process finds its place in the laws of all leading arbitration jurisdictions. It is well observed that *fairness* and *impartiality* have been the common elements across all jurisdictions examined in this paper.

Due Process in Transnational Arbitration

Due process stands as an imperative aspect of international arbitration. The rules of due process act as a protective guard for parties in a dispute, so that no unfairness is meted out to them in any contentious proceeding. It not only makes sure that the exercise of the tribunal's jurisdiction is constrained but also upholds the principles of natural justice such that a reasonable opportunity is given to the parties to present their case. The requirement of *due process* as a constitutional guarantee has been prevalent during the development of Anglo-Saxon and Continental Laws as a fundamental right of the citizens.[21] The foundational basis of any arbitral proceeding mandates submission to the principles of "equality, fair hearing and the right of contradiction."[22] In order to adhere to the *due process* requirement in international arbitral proceedings, arbitrators must construct their awards in a way that makes them enforceable. This implies that they shall use all reasonable measures to guarantee that their awards are enforceable if the party entitled to do so desires to, and that they are not subject to annulment at the location of the arbitration.[23] The arena of international arbitration has within its fold, a plethora of international treaties, including the 1958 New York Convention and the 1965 Washington Convention. With respect to arbitration, treaties must constitute the starting point from where the due process requirements can be adjudged and analysed.[24] However, deliberating upon what would institute a mandate in due process requirements can be a highly discretionary subject matter. According to his or her interpretation of due process, the arbitrator should assess whether a decision can be necessary or, on the other hand, disallowed in light of the facts.[25]

It is noteworthy that in different institutional standards and domestic arbitration statutes, the concept of the requirement of due process is expressed differently. However, at its core is a

[20] French Code of Civil Procedure Article 1510.
[21] Bernardo M. Cremades, 'The Use and Abuse of "Due Process" in International Arbitration' [2016] PL 662.
[22] Born (n 11).
[23] ibid..
[24] ibid
[25] Khushika Setia, 'Principle of Natural Justice in Arbitral Proceedings' (19 April, 2020) https://blog.ipleaders.in/principle-natural-justice-arbitral-proceedings/ accessed on 22 August, 2022.

party's right to be treated fairly and to have a fair opportunity to state their case and address that of their adversary as has been discussed above. The following are certain recurrent elements in due process related disputes: (1) the right to a hearing, (2) the denial of opportunity and (3) objectivity.

Right to a hearing

The Model Law mandates that the tribunals must conduct hearings if it has been requested by the parties. If the parties are refused this right, it will constitute a deprivation of their right to be heard. However, there may not necessarily be a due process violation when there is no oral hearing. Although the requirements of the Model Law are applicable, a tribunal need not have an oral hearing if neither party requests one.[26] Whether a tribunal orders that a hearing shall take place remotely, rather than 'in person' against a party's desires, is violative of due process has emerged, to be a current subject in light of the COVID-19 pandemic. A remote hearing will typically provide, in all material ways, the same opportunity to hear as a physical one.[27] Due process challenges based on this justification have often been unsuccessful.[28]

The ICSID has recently rejected Spain's application to disqualify a tribunal on the grounds that the tribunal's decision to conduct a virtual hearing in the middle of the COVID-19 pandemic lacked impartiality and the *high moral character* demanded by the ICSID Convention.[29] Spain alleged that the tribunal has made misrepresentations and misleading statements demonstrating lack of moral character and impartiality. The first limb of the argument was that the tribunal's decision to hold the hearing virtually on the ground that one of its arbitrators could not travel from Costa Rica to the Hague for a physical hearing because the borders of Costa Rica were closed was a dishonest statement. They argued that it had been announced by the government of Costa Rica that the borders were going to open and the residents of Costa Rica could travel abroad. The Tribunal rejected the claim of the respondent (Spain) saying that it was not a speculative decision. The decision to hold the hearing virtually was made by doing a due risk assessment. It can be opined that the Tribunal was justified in rejecting the claim of Spain since it was a reasonable decision owing to the circumstances and situations prevailing at the given time. Additionally a virtual

[26] *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2006] SGCA 41.

[27] Dylan Mckimmie, 'Online Dispute Resolution and electronic hearings', (October, 2017) https://www.nortonrosefulbright.com/en/knowledge/publications/71e0aa1e/online-dispute-resolution-and-electronic-hearings accessed on 23 August, 2022.

[28] Sloane (n 17).

[29] *Landesbank Baden-Württemberg and others v. Kingdom of Spain* (ICSID Case No. ARB/15/45).

hearing would not take away any of the rights that the party would have had during a physical hearing.[30] Therefore a virtual hearing is not a breach of due process.

a) Denial of opportunity to present the case through arguments and evidence

A due process violation is likely to arise when a party is deprived of its right to present its case or present evidence and arguments on a relevant issue. Successful challenges based on *evidentiary rulings*,[31] however, are uncommon. The tribunal, which, after all, is primarily tasked with judging the issue fairly, has discretion over topics like time extensions, the admission of further evidence, and document disclosure.[32] Tribunals have a lot of discretion in deciding whether or not evidence is required and admissible, while keeping in mind the relevant laws of the seat of arbitration and the institution's norms, where appropriate.[33] If a tribunal rejects evidence or arguments that have been properly presented or bases its judgment on arguments or evidence that have not been discussed throughout the hearings, this might be considered a violation of due process.[34]

In the case of *Fleetwood Wanderers Limited v. AFC Fylde Limited*,[35] the English High Court determined that an arbitrator had violated due process by failing to inform the parties of his communications with a third party on a pertinent issue or give them the opportunity to respond or make submissions.[36] In *Kazakhstan v. World Wide Minerals Ltd.,*[37] it was established that granting damages without giving either of the parties the opportunity to make submissions was a violation of due process.[38] However, such an argument will not be useful if the evidence germane to the issue and an argument pertinent to the same, was 'in play' but remained unutilised by the parties or if the parties decide not deal with it.[39]

[30] Mckimmie (n 27).
[31] Born (n 11) 3453.
[32] *China Machine New Energy Corp. v. (1) Jaguar Energy Guatemala LLC, (2) AEI Guatemala Jaguar Ltd* [2020] SGCA 12, Civil Appeal No. 94 of 2018.
[33] *K v. S* [2019] EWHC 2386 (Comm).
[34] Peter Strauss, 'Due Process', (Cornell Law School) https://www.law.cornell.edu/wex/due_process accessed on 27 August, 2022.
[35] *Fleetwood Wanderers Limited (t/a Fleetwood Town Football Club) v. AFC Fylde Limited* [2018] EWHC 3318 (Comm).
[36] ibid.
[37] *The Republic of Kazakhstan v. (1) World Wide Minerals Limited*, (2) Paul A Carroll QC [2020] EWHC 3068 (Comm).
[38] ibid.
[39] *CDX and another v. CDZ and another* [2020] SGHC 257.

b) Absence of objectivity

One of the two pillars of natural justice, together with the right to be heard, is the right to "a neutral and unbiased tribunal".[40] The *CDX* case laid down that the tribunal is required to be neutral and unbiased in its approach at all times during the proceedings.[41] As a result, if an arbitrator does not treat the parties fairly and impartially, the decision may be contested. The burden of proof for such an accusation is heavy, therefore courts would hesitate before concluding that a party was treated unfairly because of a procedural decision.[42] In the case of *BSG v. Vale,*[43] the applicant claimed that an LCIA tribunal's refusal to admit the 2,000-page transcript of concurrent ICSID proceedings into evidence three months after the hearing in the LCIA proceedings had ended constituted an 'apparent bias' before the English High Court.[44] This argument was not given much weight by the Court. Rather, the Court determined that the decision to admit the evidence was within the authority of the Tribunal, and that "*new and dramatic evidence was needed to be put before the Arbitrators in order to persuade them to take the exceptional step of admitting further evidence and opening up the arbitration*".[45] On the basis of the facts, the Court was satisfied there was no obvious prejudice, no procedural irregularity under section 68, and, in any event, no significant unfairness or injustice had been meted out.[46] It can be thus inferred that though a tribunal is required to be objective in its approach, when a slight deviation is made due to necessity - for upholding justice, it cannot be said to be a violation of due process.

Due process – A shield or a sword?

Due process is undoubtedly an integral part of international arbitration and arbitration as a whole. It protects the parties from unfairness and arbitrary action, and can be described as a protective wall or shield of fairness. It serves as the primary check on the exercise of power and jurisdiction by the arbitral tribunal. It also ensures that no party is treated unfairly, and that each party is presented with a reasonable opportunity to present its case.

[40] ibid, para. 34(a).
[41] ibid.
[42] Sloane (n 17).
[43] *Vale S.A. v. BSG Resources Limited*, LCIA Case No. 142683.
[44] ibid.
[45] BSG Resources Limited v. Vale S.A., Filip De Ly, David A.R.Williams, Michael Hwang [2019] EWHC 3347 (Comm), paras. 12 and 19 to 20.
[46] ibid.

On one side, the concept of due process acts as a shield, while on the other side, parties have started using it like a sword. The abuse of due process rights by the parties has increased and has led to the obstruction of justice via the use of guerilla tactics.[47] Manifoldly, leading to an obstruction of the dispensation of justice by use of guerrilla tactics.[48] Advancing unnecessary or late procedural applications, raising due process objections regarding minute issues, pressurising the tribunal using threat of award annulment are few among many methods in which due process right is abused.[49] The abuse of the concept of due process has led to the birth of yet another phenomenon which is commonly known as 'due process paranoia'.[50]

Due process paranoia may be understood as "a perceived reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully".[51] In the present times, given the high volume of arbitration proceedings taking place every day around the globe, this issue has become a substantial threat to conducting arbitration proceedings efficiently. This issue has drawn the attention of courts in several jurisdictions as well. For instance, the Malaysian High Court, while dismissing a due process challenge, held that the right to be heard could not be abused by the parties so as to entitle them to receive responses to all submissions and arguments presented.[52] Similarly, the Singapore Court of Appeal dismissed a challenge to an award on grounds of natural justice, holding it to be frivolous.[53] The Court went on to state that such practices by the parties must not be condoned since they are done with an intention to "improperly attack the award".[54] It was held that such a challenge "undermines and cheapens the real importance of due process" and could "erode the legitimacy of arbitration". The Court of Appeals also laid down the guidelines that are required to be followed when a party brings forth a challenge to an award on the grounds of due process violations. The Court has clearly put forth that the Court shall not consider arguments challenging the award which were not made right from the beginning. The arguments must be raised in a timely manner during the arbitration. In case a new argument is raised, it is critical to ensure that the other side is afforded a reasonable chance to respond. These guidelines are to be kept in mind when challenging an award on grounds of due process violation.

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[47] Klaus Peter Berger and J. Ole Jensen, Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators, Arbitration International, Volume 32, Issue 3, September 2016, Pages 415–435. See also Singapore Court of Appeal Decision in China Machine New Energy Corp v Jaguar Energy Guatemala [2020] SGCA.

[48] Lucy Reed, 'Ab(use) of due process: sword vs shield' 33 Arbitration International 361.

[49] ibid.

[50] Jasmine Feng & Benjamin Teo, 'Judicial Support against Due Process Paranoia in International Arbitration' (Kluwer Arbitration Blog, 16 June 2020) http://arbitrationblog.kluwerarbitration.com/2020/06/16/judicial-support-against-due-process-paranoia-in-international-arbitration/#:~:text=Due%20process%20rules%20act%20as,opportunity%20to%20present%20their%20cases accessed on 28 November 2022.

[51] ibid.

[52] *Allianz General Insurance Company Malaysia Berhad v Virginia Surety Company Labuan Branch Originating Summons* No. WA-24NCC(ARB)-13-03/2018.

[53] *CAJ v. CAI* [2021] SGCA 102.

[54] Reed (n 48).

Conclusion and suggestions

The idea of this paper was to provide insight on the scope of the *due process*. Initially, it established that the foundational basis of due process stems from the principles of natural justice, serving as a fundamental safeguard against irrational, arbitrary and capricious law. As it was seen throughout the paper, countries and international tribunals employ this standard in their own respecitve way. However, the due process requirements at the international level are not very disparate from those at the domestic level as many countries have chosen to employ international standards laid down in treaties such as the UNCITRAL Model Law into their legislation. For instance, Article 18 of the UNCITRAL Model Law states that, "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." Now looking at India's Arbitration and Conciliation Act, 1996, it can be observed that its Section 18 also mandates that, "the parties shall be treated with equality and each party shall be given a full opportunity to present this case." This is indicative of the fact that both are in similar lines.

Nevertheless, the ability to invoke a *due process* claim can be used as an agressive sort to the extent that it can compel the tribunal to accept specific procedural claims. Where parties choose to abuse such due process rights by making unwarranted claims of violation, the entire pursuit of arbitration could be hindered. The essence of arbitration is in efficient and expeditious settlement of disputes, however, according to the Singapore Court of Appeal,[55] unfounded natural justice arguments now run the danger of tarnishing arbitration's reputation as a legitimate and effective dispute settlement method.[56] A bulwark against excessive and unjustified conduct by an arbitral tribunal is the right to due process. However, this right is not meant to grant a party the power to have every aspect of the procedure decided in accordance with its preferences or to shield a party from its own mistakes and strategic decisions. Hence, due process ought to be restricted in its ambit by primarily preventing arbitrary, unfair, unreasonable action of the tribunal and nothing more.

[55] Richard Allen, Nandakumar Ponniya & James Kwong, 'Singapore: Court of Appeal sets aside arbitral award for breach of natural justice' (Global Arbitration News, February 15, 2022) https://www.globalarbitrationnews.com/2022/02/15/singapore-court-of-appeal-sets-aside-arbitral-award-for-breach-of-natural-justice/.

[56] *CAJ* (n 53).

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