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SITUATING BORDERS WITHIN THE MATRIX OF CLIMATE CHANGE :**Analysing the Legal Frontiers of Climate Migration**Mrinalini Kumar¹, Dr. Niru Sharan² & Dr. Srikant Pandey³**ABSTRACT**

With the ‘climate emergency’ defining the boundaries of our existence, there is a need to revisit the construct of borders. While it might be presumed that climate change, having a universal effect, would lead to states coming together in their endeavour to combat it; on the contrary, it has given rise to what Turner and Bailey refer to as ‘eco bordering.’ Herein, the migrant is seen as a threat to the environment, while simultaneously, borders are seen as a panacea. However, rising sea levels threaten to erase countries out of existence, with the Small Island Developing States (SIDS) being cases in point. This highlights how, what Arendt calls ‘the right to have rights’, is taken away from those who are rendered vulnerable in the Capitalocene, transforming the perception of migrants as the ‘cause’ instead of the ‘effect’ of climate change. One can see the blatant disregard for the history of industrialisation in the perpetuation of this ‘climate apartheid’. In this context, this paper seeks to argue that ‘eco bordering’ impacts the narrative of climate migration, further discrediting the tenuous causation between the two. As climate was and is not seen as a reason that can lead to the creation of migrants and refugees, the link between climate change and migration has not been explored in the depth that it warrants. Consequently, this paper seeks to reimagine the legal frontiers of climate migration to fill this vacuum and ascertain the human rights of the vulnerable like Ioane Teitiota.

Keywords: *Borders, Climate Change, Eco Bordering, Human Rights, Migrant*

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INTRODUCTION

With the ‘climate emergency’ defining the boundaries of our existence, there is a need to revisit the construct of borders. As Bettini⁴ argues, the processes of marginalisation get amplified due to climate and environmental change in the present era of capitalism, reducing people’s freedom of choice in the context of mobility and raising questions about human migration. While it might be presumed that climate change, having a universal effect, would lead to states coming together in their endeavour to combat it; on the contrary, it has given rise to what Turner and Bailey⁵ referred to as ‘eco bordering.’ Herein, the migrant is seen as a threat to the environment, while simultaneously, borders are seen as a panacea. However, rising sea levels threaten to erase countries out of existence, with the Small Island Developing States (SIDS) being cases in point. Borders may either be rendered moot or merely create more obstacles in this scenario. This, therefore, highlights how, what Arendt calls ‘the right to have rights’, is taken away from those who are rendered vulnerable in the Capitalocene, transforming the perception of migrants as the ‘cause’ instead of the ‘effect’ of climate change. One can see the blatant disregard for the history of industrialisation in the perpetuation of this ‘climate apartheid’.

In this context, this paper seeks to argue that ‘eco bordering’ impacts the narrative of climate migration, further discrediting the tenuous causation between the two. As climate was and is not seen as a reason that can lead to the creation of migrants and refugees, the link between climate change and migration has not been explored in the depth that it warrants. According to Burkett⁶, over the past two decades since the Intergovernmental Panel on Climate Change (IPCC) initially highlighted the potentially severe impacts of climate change on human migration, there has been a notable absence of substantial legal or political advancements within the international community. Consequently, this paper seeks to reimagine the legal frontiers of climate migration to fill this vacuum and ascertain the human rights of the vulnerable like Ioane Teitiota.

Ioane Teitiota, a Kiribatian, is the first ever person to be associated with the title of ‘climate refugee.’ His story became the highlight of the media in 2015 and 2020, due to the ‘focusing

⁴ Giovanni Bettini, *Where Next? Climate Change, Migration, and the (Bio)politics of Adaptation*, 8 GLOBAL POLICY 33, 33 (1997).

⁵ Joe Turner & Dan Bailey, ‘*Ecobordering*’: casting immigration control as environmental protection, 31 ENVIRONMENTAL POLITICS 110, 110 (2022).

⁶ Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier*, 98 ASIA PACIFIC ISSUES 1, 2 (2011).

events' that took place in both years; rejection of his claim to stay in New Zealand in the former and the UN Human Rights Committee further denying his claims but asserting non-refoulement for any such future claims.⁷ Ioane Teitiota is a middle-aged lower-class man, who attempted to live a normal life with his wife and three kids in Kiribati.⁸ After living under the threat of inundation for most of the 2000s, they finally decided to move to New Zealand in 2007, scraping together their meagre savings.⁹ However, after living peacefully for several years over there, he and his family came under the radar of the government for overstaying their visa in 2010.¹⁰ They fought a several years-long battle with the judiciary of New Zealand, only for their claim of protection to be rejected.¹¹ According to McDonald¹² Teitiota is living 9.8 feet above water which makes inundation seem a day away from taking his life away from him. Despite rainwater being their major source of water, they still have to rely on groundwater which has a high risk of contamination¹³, adding several more layers of precarity to their situation.

In the context of Teitiota's plight, eco bordering becomes a grave issue that requires legal frontiers of migration to be reimagined. Consequently, this paper is divided into four sections. Firstly, it elucidates the concept of eco bordering in this era of climate emergency and its impact on the perception of the migrant. Secondly, it theoretically analyses how vulnerable populations are at risk of losing their right to have rights in the Capitalocene. Thirdly, it situates the current and the reimagined legal narrative in the matrix of the emerging issue of climate migrants. Lastly, it concludes with the thought that legal frontiers need continuous reinventions to stay relevant in dynamic temporal dimensions.

⁷ UN HUMAN RIGHTS COMMITTEE DECISION ON CLIMATE CHANGE IS A WAKE-UP CALL, ACCORDING TO UNHCR, <https://www.unhcr.org/news/briefing/2020/1/5e2ab8ae4/un-human-rights-committee-decision-climate-change-wake-up-call-according.html> (last visited Jan. 24, 2024).

⁸ Tim McDonald, *The man who would be the first climate change refugee*, BBC NEWS (Nov. 5, 2015), <https://www.bbc.com/news/world-asia-34674374>.

⁹ Simon Behrman & Avidan Kent, *The Teitiota Case and the limitations of the human rights framework*, QUESTIONS OF INTERNATIONAL LAW 25, 26 (2020).

¹⁰ Melissa Godin, *Climate Refugees Cannot Be Sent Home, U.N. Rules*, TIME (Jan. 20, 2020), <https://time.com/5768347/climate-refugees-un-ioane-teitiota/>.

¹¹ *Supra* note 5.

¹² *Ibid.*

¹³ *Ibid.*

Climate Emergency Understood Through Eco Bordering: Migrant as a Perceived Threat

The ‘green’ lens of perception is often the lens of deception. Following this, one encounters one of the several deceptions of capitalism, named ecobordering, resulting from the ‘greenwashing’ of borders and anti-immigration policies with the rise of climate migration.¹⁴ According to Turner and Bailey¹⁵ Eco bordering casts immigration as a threat to the environment, either local or national, thereby advocating borders as a panacea to environmental issues. The two lenses employed by it in this endeavour include: a) ‘migration as environmental plunder’¹⁶ which establishes a causal link between immigration and the depletion of natural resources, and exacerbates local environmental issues, thereby augmenting the fears of citizens; and b) ‘migrant as environmental vandal’¹⁷ whereby migrants are labelled as “environmentally irresponsible “” who lack the competence (bred from belongingness to or investment in that land) required to manage natural resources, in contrast to the ‘natives.’ Therefore, eco bordering purports reactionary nationalistic responses as a solution to the present environmental crisis.¹⁸ In this context, Jordan Bardella (a French politician) was quoted as saying “borders are the environment’s greatest ally . . . it is through them that we will save the planet” in 2019.¹⁹

Such fallacious depictions of migrants, accompanied by a parochial view of ecological degradation and the ‘national’,²⁰ make eco bordering a weapon for rationalising securitisation of borders while simultaneously propagating xenophobia. Further, by equating degradation with movement, it creates a false consciousness amongst the citizens that sustains the economic status quo of capitalism. Following this vein of thought, McBrien²¹ argues that characterising our current age ‘Anthropocene’ is merely another way to reiterate that our present predicament of planetary instability stems from human nature and not capital. This perspective posits that humanity’s dominance over the earth empowers it to either destroy it or preserve it, consequently equating humans with the economic organisation through which

¹⁴ *Supra* note 2, at 112.

¹⁵ *Id.* at 111.

¹⁶ *Id.* at 112.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ JUSTIN MCBRIEN, ANTHROPOCENE OR CAPITALOCENE? NATURE, HISTORY, AND THE CRISIS OF CAPITALISM 119 (J.W. Moore ed., PM Publishing 2016).

they act.²² Additionally, McBrien²³ opines that “capital was born from extinction, and from capital, extinction has flowed”, thereby terming the biogeological era, wherein the current human existence is situated, as ‘Necrocene’ or ‘New Death’. It is ‘Capitalocene’s shadow double’.²⁴ He emphasizes that the accumulation of capital is also the accumulation of potential extinction, comprising the gamut of cultures, languages, labour, as well as earth’s resources.²⁵ Furthermore, with borders being used by states, corporations, and landholders to exacerbate degradation and the corollary violence they perpetuate against people seeking refuge or a better life²⁶, the discriminatory discourse of eco bordering becomes self-evident.

Therefore, eco bordering becomes a major obstacle in the establishment of the tenuous correlation between climate change and migration. For the plight of people like Ioane Teitiota to be taken seriously, the practice of eco bordering requires closer scrutiny in the era of Capitalocene that humans currently inhabit.

‘The Right to Have Rights’ in the Capitalocene

In the light of strengthening borders and dissolving land (as seen in Tuvalu, Kiribati, Vanuatu, and so on), the existence of rights becomes precarious. Drawing from Arendt, Cotter²⁷ asserts that rights are neither inalienable nor universal as they stem from the principle of state sovereignty. There is a simultaneous conflict and dependence between state rights and human rights, which leads to the manifestation of refugees.²⁸ With the principle of ‘sovereignty of the individual’ guiding the human rights project, an abstract individual became the source and legitimiser of these rights, rendering any higher authority redundant.²⁹ However, as Arendt³⁰ asserted, “even savages live in some kind of social order,” thereby making this abstract individual a myth. Consequently, post the French Revolution, it was realised that individuals could find the guarantee of their rights in the collective rights of the people governed by sovereign self-government, both collectively and specifically.³¹ Individuals may have rights derived from their virtue of being born as a human; however, rights gain meaning when enforced by a powerful authority (in this case, the state). However, eco bordering disrupts this

²² *Ibid.*

²³ *Id.* at 116.

²⁴ *Id.* at 117.

²⁵ *Id.* at 116.

²⁶ *Supra* note 2, at 125.

²⁷ Bridget Cotter, *Hannah Arendt and “the Right to Have Rights”*, HANNAH ARENDT AND INTERNATIONAL RELATIONS 95, 97 (2005).

²⁸ *Id.* at 100.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

paradigm by stripping away ‘the right to have rights’ from the at-risk populations. Due to the rapid intensification of climate change forcing people to flee their homes due to rising sea levels, extreme weather events, and other environmental factors, the inadequacy of the traditional notion of state sovereignty becomes conspicuous. Ultimately, according to Arendt³², ‘the right to have rights’ assumes the indispensability of the political community as well as its fallibility. For people are embedded beings, the realisation of their rights relies on the community; but in this scenario, this power becomes a double-edged sword, giving the state control over an individual’s body or what Foucault referred to as ‘biopower.’

Owing to this, Foucault defines biopolitics as follows:

“Power over life evolved in two basic forms... One of these poles...centred on the body as a machine: its disciplining, the optimization of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility... The second... focused on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity... Their supervision was effected through an entire series of interventions and regulatory controls: a bio-politics of the population.”³³

In this context, Foucault’s³⁴ conceptualisation of biopolitics as the “administration of bodies and the calculated management of life” can be translated to situate bordering processes in the control of individual bodies and not territorial spaces. This control is established through the process of risk profiling.³⁵ Through the categorisation and classification of individuals into desirable and undesirable groups by employing mechanisms like passports, biometric technologies, travel passes, visas, and so on, certain forms of migration become “regular”, “legal”, and “regulated,” while simultaneously creating “irregular” and “illegal” categories of such movement.³⁶ This translates to the definitions surrounding climate migration and the lack of recognition it receives in the international sphere. With one’s body being seen as undesirable, as asserted by ecobordering, that body loses ‘the right to have rights.’

³² Natalie Oman, *Hannah Arendt's "Right to Have Rights": A Philosophical Context for Human Security*, 9 JOURNAL OF HUMAN RIGHTS 279, 281 (2010).

³³ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Pantheon Books 1978).

³⁴ Nicole Bates-Eamer, *Border and Migration Controls and Migrant Precarity in the Context of Climate Change*, 8 SOCIAL SCIENCES 198, 205 (2019).

³⁵ *Ibid.*

³⁶ *Ibid.*

Legal Frontiers of Climate Migration Reimagined

“Climate change...[will] exert tremendous structural pressures on the very design and implementation of law itself.”

- J.B. Ruhl³⁷

With the rising instrumental application of eco bordering by several countries of the Global North to battle the current realities of climate change, it becomes imperative for us to find solace in law and the legal cocoon. Therefore, this paper employs a qualitative approach to conduct a critical analysis of the current legal discourse through journal articles, while simultaneously searching for solutions.

According to Skillington³⁸, a double disadvantage plagues the climate displaced. Firstly, they are coerced to leave their homes and lives due to their vulnerability to climate adversities, and secondly, they are punished for doing so.³⁹ Burkett⁴⁰ asserts that climate change is a cross-cutting issue, showcasing a complex interconnectedness, which gets erased due to the traditional categorisation of inquiry. Consequently, the law, in its present manifestation, is ill-equipped to deal with climate change and its multitude effects.⁴¹ Skillington⁴² asserts legal responses to climate displacement manifest ‘legal violence’ against the at-risk and suffering population. She opines that this legal violence is rooted in the non-recognition of the climate-displaced and the normalisation of sanctions dismissing their suffering.⁴³ This violence becomes banal due to the passive acceptance of global ecological destruction and its human consequences.⁴⁴ Further, climate change issues’ needs for continuous adaptation often stand at odds with the law’s commitment to finality.⁴⁵ This argument enables us to make the first realisation, i.e., law emerges to fulfil the needs of the time it is legislated in. As problems are ever-evolving, the same is required from the solutions. Law, therefore, requires constant writing and rewriting.

³⁷ *Supra* note 3, at 6.

³⁸ Tracey Skillington, *Climate justice without freedom*, 18 EUROPEAN JOURNAL OF SOCIAL THEORY 1, 6 (2019).

³⁹ *Ibid.*

⁴⁰ *Supra* note 3, at 6.

⁴¹ *Ibid.*

⁴² *Supra* note 35, at 3.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Supra* note 3, at 6.

Following the law's commitment to finality, solutions seem out of one's reach leading to the issue's ignorance and postponement of its addressal.⁴⁶ However, by embracing layers and interlinkages in the climate change and migration context, the law can be positively reinvented.⁴⁷ Koskina et al.⁴⁸ opine that the Stockholm Declaration of 1972 was the first instance where the international concern for climate migration was expressed. Its first principle mentioned the "fundamental right to (...) adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing"; yet its vague wording did not enable its manifestation as a state's obligation.⁴⁹ The second realization one can make here is that the language that expresses any law, carries, and represents the power narratives underlying it. With ambiguity, loopholes abound, helping stakeholders skirt accountability, yet maintain a façade of action. Legal frontiers of the 21st century need language on their side to avoid these loopholes and deal with eco bordering in the era of climate emergency.

Further, according to the United Nations High Commissioner for Refugees⁵⁰, a refugee is a person who has crossed an international border "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". However, it does not recognise 'climate refugees.' The climate was and is not seen as a reason that can lead to the creation of refugees. Consequently, with this narrative in place, Brzoska and Fröhlich⁵¹ bring forth that an accepted understanding or definition of people who leave their homes due to environmental and climate change does not exist. On the contrary, any attempt to give meaning to terms like 'environmental refugee' and 'climate refugee' is harshly contested.⁵² While opponents see mono-causality and a threat to traditional refugees in this terminology, proponents see them as victims of actions beyond their control.⁵³ With the widely held view that environmental factors are merely contributors rather than at the helm of migration, Castles⁵⁴ talks about 'conceptual fuzziness' in determining the extent to which the environment plays a role in migration decisions.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Anthi Koskina, Manolis Plionis, Ioannis Papoutsis, & Gustau Camps-Valls, *Earth observation as a tool to assess climate migration and policy-making: Legal aspects*, 436 E3S WEB OF CONFERENCES 1, 3 (2023).

⁴⁹ *Ibid.*

⁵⁰ UNHCR EMERGENCY HANDBOOK- REFUGEE DEFINITION,

<https://emergency.unhcr.org/protection/legal-framework/refugee-definition#:~:text=%22owing%20to%20well%20founded%20fear,or%20who%2C%20not%20having%20a> (last visited Jan. 24, 2024).

⁵¹ Michael Brzoska & Christiane Fröhlich, *Climate change, migration and violent conflict: vulnerabilities, pathways and adaptation strategies*, 5 Migration and Development 190, 193 (2015).

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Id.* at 196.

Following this line of thought, Hugo⁵⁵ also highlights how environmental causes, many a time, manifest themselves through non-environmental causes. For instance, when agriculture is unable to sustain someone due to land degradation or drought, one seeks to move.⁵⁶ Definitional certainties build the third realisation in this regard. The law can only be precise when the problem it seeks to cater to is precisely delineated. Consequently, the causal links between climate and migration require an in depth delving by scholars.

Furthermore, this reveals a lack of binding rules as well as a comprehensive binding framework to address climate migration.⁵⁷ To fill this void, soft-law instruments were adopted for this endeavour. They included the non-binding UN Guiding Principles on Internal Displacement (1998) or the Cancun Adaptation Framework (2010) which raised a call for cooperation on climate change induced displacement, migration, and planned relocation.⁵⁸ However, laws that are not accompanied by remedies never carry any true meaning. Therefore, these initial soft-law initiatives proved to be a failure and were stepped up through a Task Force for Displacement (TFD) agreed upon at the COP21, the Nansen Initiative of 2015, the Sendai Framework for Disaster Risk and Reduction (2015), and lastly, the Global Compact for Safe, Orderly and Regular Migration (GCSOM) of 2019.⁵⁹ GCSORM aimed to “cover all dimensions of international migration in a holistic and comprehensive manner” to reaffirm the states’ commitment to respecting, protecting, and fulfilling all human rights for all migrants.⁶⁰ In March 2023, Vanuatu, a small island developing state (SIDS) in the Pacific Ocean, spearheaded a resolution in the United Nations General Assembly requesting an advisory opinion of the International Court of Justice (ICJ) on the obligations of states regarding climate change.⁶¹ Due to international anarchy and a lack of a supra-national entity, making an international law is not feasible. However, while soft-law mechanisms have proven ineffective, the fourth realization one can make here is that to change the rhetoric, one needs to be a part of it first. Therefore, legal frontiers can be reinvented by strengthening the mechanisms of soft-law to gain legitimacy and concern from both the affected as well as the unaffected populace.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Supra* note 45, at 4.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ VANUATU ICJ INITIATIVE, <https://www.vanuatuicj.com/resolution> (last visited Nov. 29, 2023).

Nevertheless, a legally binding alternative was proposed by a German climate scientist named Hans Joachim Schellnhuber.⁶² He suggests a potential remedy in the form of a ‘climate passport,’ drawing inspiration from the Nansen Passport designed for stateless individuals, given that the goal of limiting global warming to 2°C will still display several million people.⁶³ This passport would grant individuals, affected by disappearing habitats, access to countries deemed responsible for climate change.⁶⁴ While this idea in its current configuration seems utopian and far-fetched, it does leave us with food for thought, showcasing the dynamism and the possibilities that law has to offer.

Reimagining the legal frontiers of climate migration on these lines will enable us to view borders critically while simultaneously creating a space for the realisation of causal links between climate change and migration.

CONCLUSION

In conclusion, this paper seeks to assert that ecobordering is not a panacea as it is purported to be. Instead, it is a smoke screen that hides the xenophobic inclinations of developed countries, simultaneously legitimising their capitalistic outlook as well as their unaccountability of past climatic wrongs, especially against the Global South. With climate change then perceived as being caused by migration rather than contrariwise, the fledgling understanding of a ‘climate migrant’ or a ‘climate refugee’ experienced a significant setback. As discussed above, as rights emanate from the state, its potential absence (as in the case of Small Island Developing States) or inaccessibility due to strong and discriminatory borders can worsen the precarity of a ‘climate migrant.’ Compounding their fear is the lack of legal initiatives in this direction at the international level. Keeping the suggestions highlighted above in mind, legal frontiers require continual reinvention to maintain relevance within dynamic temporal dimensions. As the climate is changing, border policies must also keep on changing to provide a legal blanket to shield the vulnerable.

⁶² Sarah Louise Nash, *The perfect (shit)storm: Discourses around the proposal to introduce a ‘climate passport’ in Germany*, *Environment and Planning C: Politics and Space* 1, 5 (2023).

⁶³ *Ibid.*

⁶⁴ *Ibid.*