Volume IV January - December 2018

HNLU JOURNAL OF LAW & SOCIAL SCIENCES

HNLU PRESS

ABOUT HNLU PRESS

Hidayatullah National Law University is all set to launch its publications division – **'HNLU PRESS'** on Sunday 4th October, 2020. The 'HNLU PRESS' is first of its kind publication division among the law schools in the country which is dedicated to bring out Journals, Monographs, Case Law Compendiums, Audio books, Multimedia content on law, social sciences and other subjects interfacing with law. The platform will stabilize existing publications of **HNLU** and will foray into other avenues of dissemination of research materials. The **HNLU PRESS** will connect with veteran contributors as well as young talents from across the country and abroad for content. The publications will have 'Faculty Edited' and 'Student Scholar Edited' content and HNLU will be forming 'peer review editorial board' to scale up the quality and rigour of the content.

Speaking on the launch HNLU PRESS - **Prof. V. C. Vivekanandan, Vice Chancellor of HNLU** remarked, *"The research front of law schools in India require innovative invigoration to disseminate the fast-emerging Indian Jurisprudence in various branches of Law.* ***HNLU PRESS*** *is an innovative platform which will open up an avenue for young faculty, student scholars for their expressions with a professional approach and a dedicated financial outlay."*

The launch of "HNLU PRESS" will take place on Sunday, 4th October 2020 with a panel discussion titled **"Cartographing the future of Research Publication of Indian Law Schools"** to be addressed by **Honourable Justice Shri G Raghuram**, **Director of National Judicial Academy, Bhopal, Prof.(Dr.) C. Rajkumar, Vice Chancellor, Jindal Global University and Shri Sumain Malik, Founder & CEO of SCC Online and Executive Director of EBC** with **Prof. V. C Vivekanandan, Vice Chancellor of HNLU as the Discussant**. The HNLU Journal of Law and Social Sciences (HNLU JLSS) IVth and Vth edition will be launched as electronic edition during the programme.

HNLU JOURNAL OF LAW & SOCIAL SCIENCES

(HNLU JLSS)

An Annual Journal Published by

HNLU PRESS

(A Media Division of Hidayatullah National Law University)

(A UGC Approved Journal)

HIDAYATULLAH NATIONAL LAW UNIVERSITY

Raipur, Chhattisgarh

January – December, 2018 Volume: IV

Mode of Citation: HNLU JLSS 2018 (IV) <Page No.>

HNLU JOURNAL OF LAW & SOCIAL SCIENCES (HNLU JLSS)

The HNLU JLSS is published by Hidayatullah National Law University, Raipur, Chhattisgarh. The Journal is in the UGC Approved Journal with serial no. 41107. This journal is being published with the objective to provide a platform to judges, jurists, academicians and legal practitioners to express their views on topics of contemporary significance in law and social sciences. We solicit contributions in the form of articles, notes and case-comments on emerging areas in law and social sciences. The call for papers will be advertised in the website. However submissions received after the due date will be considered for the subsequent issues of the journal.

Rate of Subscription

Category	**Single Copy**	**Annual (2 Nos.)**
Institution	Rs. 300	Rs. 600
Individual	Rs. 250	Rs. 500
Foreign Institution	15$	30$
Individual	10$	20$

Payment for subscription should be sent by a Demand Draft issued by a Nationalized Bank drawn in favour of **"Registrar, Hidayatullah National Law University, Raipur"** and payable at Raipur.

All correspondence should be addressed to:
Registrar
Hidayatullah National Law University
Atal Nagar, Raipur, Chhattisgarh – 492002
Email: jlss@hnlu.ac.in

Printed by: THE PRINT HOUSE
H. No. 1-8-677/E/1, Padma Colony,
Nallakunta, Hyderabad-500044, India.
Tel: 040-27620747 Mobile: 9246585350
Website : www.theprintthouse.com

Printed in India

HNLU JOURNAL OF LAW AND SOCIAL SCIENCES (HNLU JLSS)

An Annual Journal Published by

HNLU PRESS

(A Media Division of Hidayatullah National Law University)
(A UGC Approved Journal)

HIDAYATULLAH NATIONAL LAW UNIVERSITY
Raipur, Chhattisgarh
January – December, 2018 Volume: IV
Mode of Citation: HNLU JLSS 2018 (IV) <Page No.>

VICE-CHANCELLOR'S MESSAGE

"Justice in the life and conduct of the State is possible only as first it resides in the hearts and souls of the citizens."

Plato

It is a matter of immense pleasure for me to introduce the first issue of the fourth volume of the HNLU Journal of Law and Social Sciences (HNLUJLSS) 2018, published by the Hidayatullah National Law University, Atal Nagar, Raipur, Chhattisgarh. It is a product of dedication of involved faculty members under the able guidance of the renowned advisory board.

With the aim to cater the need of intellectual satisfaction in intersectional areas of law and social sciences, the present volume of the journal consists of research papers from diversified areas of interest.

Especially, I would like to thank the contributors of research papers for being patient during the process of publication and congratulations to the authors of the selected papers. I am sure that the present and upcoming volumes of the HNLU Journal of Law and Social Sciences (HNLUJLSS) will find place in academic discussions and deliberations at a wider scale. At last, the credit for the successful publication of the Journal goes to the committed editorial board.

Hon'ble Shri Justice Chandra Bhushan Bajpai
(Former Judge of the High Court of Chhattisgarh)
Vice-Chancellor
Hidayatullah National Law University
Atal Nagar, Raipur, Chhattisgarh

EDITORIAL MESSAGE

It is a matter of great pleasure for the Editorial Board of HNLU JLSS to introduce the fourth volume of the HNLU Journal of Law and Social Sciences. This issues of HNLU JLSS deals with various topics from diverse fields of law and social science. Such wide range of thought-provoking articles would provide a very enriching experience to readers.

"Antitrust Interventions: A Doctrinal Perspective" is an article where the authors **Prof. (Dr.) R L Koul and Rakesh Kumar Sehgal** have aimed at to exploring and demystifying the evolution of anti-trust theories which guided the courts in interpretation and enforcement of the anti-trust law regimes. The article discusses the "per se" rule and "rule of reason" and has done case analysis to find out the dependency by the court on either or one more preferred than other.

Dr. Madhubrata Mohanty in his article "**Pith & substance of the Indo- Pak water dispute- A bird's eye view**" has highlighted the reasons for conflict between India and Pakistan regarding sharing of river water. The author has adopted a study on the historical background as well as the international organizations role in solving this conflict over river water sharing in South Asian regions.

"**The Exclusion, Expulsion & Discrimination of Transgender Persons in India And Proposed Transgender Persons (Protection of Rights) Bill, 2016**" is an article by **Dr. Ramesh Kumar Verma** which focuses on the treatment of transgender in India and the grey areas, loop holes, vulnerabilities and insufficiencies of the existing laws regulating the needs and rights of transgender with special reliance on the 2016 proposed Transgender Bill. Issues like rights to rehabilitation, identity, inclusion under welfare policies and safeguards as well as employment opportunities has been highlighted by the author in this article.

In the article "**Regulating Competition: Analysis of CCI Decisions with Reference to Abuse of Dominant Position and Anti-Competitive Practices Adopted by Industries**" the primary issue the authors **Mr. Shripad Merchant, Dr. Rajesh Pednekar and Dr. D. B. Arolkar** have focused on is the approach of Competition commission of India in relation to deciding of cases premised on abuse of dominance or other anti-competitive practices which are adopted from across various industries like infrastructure, smart phones, financial services, automobiles, etc... and therefore the author has heavily relied on relevant cases to substantiate.

In the article "**Media as progenerator of knowledge and information in the light of reasonable restriction: An overview**", the authors **Ms. Shalini Dwivedi** and **Mrs. Vineeta Agrawal** have discussed the significance of press or media in a democratic state and then discussed how Article 19 (2) of the Constitution of India can act as a check on media's role as an unruly horse as well as can be manipulated by rich and powerful people for crippling the media or press. The arguments can be advanced through comparative analysis of Indian and China's position on freedom of media or press.

The article titled **Indian Constitution and Right to Peaceful Protest** revisits the right to peaceful protest in a new light. **Dr. Dipti Gala** makes a comparative and analytical study in which the right to protest was exercised by people in the olden days and how now it is exercised. Traditionally used in the non-violent mode and recently exercised by practicing and demonstration of violent activities the right to protest has gone through the sea change. The paper also highlights the role of policemen to stop the violent protest and their modus operandi to control the situation which leads to violation of human rights and dignity.

The author **Dr. Ali Muhammad Bhatin** in his article "**Hamas in Palestine: Role and Future**" discusses how the situation in Palestine is troublesome and can explode any time. The paper mainly focuses on dramatic advent of Hamas and its role in solving the Palestinian conflict.

"**Renewable energy sources and environmentally sustainable smart cities**" is an article by **Ms. Ritu Dhingra and Dr. Kanupriya** which studies the role of various policies at domestic as well as international level like the National policy on biofuels 2018, National Wind-Solar Hybrid Policy, 2018, the 2017 EU-India cooperation on Urban Development, UN 2030 agenda, etc... and how they aim to achieve renewable energy sources as a environmentally sustainable option for smart cities.

"Bollywood: Original or Copied?" is a very interesting article by **Ms. Isha Bansal** on creative content made for Bollywood whether films, or songs or scenes and the debate over copied from other industries or original by advocating on the theories such as Indianizing, cross culture, fair use and creativity. The article has enough thought-provoking examples and case studies to keep the reader captivated.

Access And Benefit Sharing: A Welfare Measure Lacking Implementation is an article by **Mr. Ebee Antony** which

underscores Access and Benefit Sharing (ABS), a scheme that came into picture with full thrust act the Convention of Biological Diversity, the purpose of such a measure was to compensate the traditional knowledge holders of the loss that they would face, as a result of scientific and technological advancement. A pertinent issue facing all the authorities under the act is the determination of the value of the biological resource.

The authors **Mr. Padmesh Mishra and Mr. Arkaj Kumar** in their article "**On The Run, But Not Lost; An Enquiry Into The Fugitive Economic Offenders Ordinance, 2018"** discuss the background and the need for an Ordinance to clamp down on White Collar Criminals who are defrauding the Government, the public and the banking sector at large and fleeing to legal jurisdictions and examines the salient features of Fugitive Economic Offenders Ordinance, 2018 to find out the efficiency of the Bill in tackling the above problem.

The article titled **Rape: A Threat to Mankind** authored by **Ms. Shirley Mody** and **Ms. Poorva Sharma** highlights the sexual crimes committed on the female gender as well as male gender. This research paper studies the complexity of rape as it has been ignored and mischaracterized. Only a small number of perpetrators are brought to justice despite changes in the legislation, practice and procedure in the investigation, high profile coverage in the media, and support available to the victims. It also focuses on recommendations to mitigate rape and seeks to explore the negative impacts faced by the rape victims.

Ms Bedpriya and Dr. Ayan Hazra in their paper **'The People No Country Wants: National Register of Citizens - Assam's Citizenship Crisis'** analyze the NRC updation in Assam under the supervision of the Supreme Court. This paper throws light upon the process which seems to threaten millions of people stateless without any semblance of a subsequent plan. This paper also points out the relevance of the Citizenship (Amendment) Bill of 2016, and highlights the anti-Muslim narrative in the country.

Dr Deepak Srivastava, in his paper **'Impact of Globalization on Indian Legal Profession'** casts light on the steady influence of globalization on Indian legal profession with a brief historical comparison before the independence and after the independence with the establishment of constitutional supremacy in India with an obligation to provide social, economic, political justice for all sections of the community with Equality of status and opportunity. Therefore, legal profession became the issue of national debate

and globalization led this debate at international level. As a signatory to the General Agreement on Trade and Services (GATS), India is under obligation to liberalize its legal sector but has not been able to make much progress in this behalf due to stiff opposition from Indian lawyers' representative bodies. In this backdrop, this article explores the possibility of liberalization of legal services in India in the contemporary globalized world.

In the paper titled **'Linkage between Human Rights and Climate Change: An Analysis in International Perspective'** the authors **Dr. Rana Navneet Roy and Ms Manan Dardi** highlighted the link between Human Rights and Climate Change. Authors raise the important issue of climate change in the present international perspective and depicted it as a serious threat to the enjoyment and exercise of human rights around the world. Authors also mentioned the Effect of Climate Change on the Realization of a Range of other Human Rights and concluded with the requirement of reduction of activities majorly responsible for climate change.

The paper titled **'Unveiling the Concept of 'ISR' (The Individual Social Responsibility)** aims to view ISR from a fresh perspective. The author, **Mr Vishal Dixit**, maintains that the concept of 'Individual Social Responsibility' (or ISR) may help us synchronise the whole picture pixels for the best end results. The present article attempts to discuss the basis and significance of 'ISR'. It attempts to distinguish 'ISR' from its twin misnomer 'shared morality'. Besides, a brief reflection upon its real-world utility is also made by the researcher albeit in the restricted sense (considering the word limits prescribed for the present article) from the Indian social landscape only.

Ms Priya Mathur in her article **'Foucault Notions of Law: A Reading of Discipline and Punish'** highlights the notion of power and law as central in the works of Michael Foucault. The theme is especially central in Discipline and Punish where, through the analogy of prison, Foucault explains how law and power together play a central role in disciplining body as well as the soul to establish order in society. However, this straightforward argument has time and again come under a critical scanner from the likes of Hunt and Wickham to Tadros. This paper aims to analyses the validity of both criticisms through a reading of Discipline and Punish in order to demonstrate how discipline is also a 'legal tactic' employed by state to establish common average behaviour as normal.

The paper **'Need for Witness Protection Programme in India'**, under the authorship of **Mr Kshitij Gupta and Mr Shivam**, highlights that witnesses play the most crucial role in this process by bringing evidence to light and assisting the judiciary in balancing the scales of justice which as we all know automatically paints a target on the witness's back and therefore, protection of witnesses is of utmost importance in the present day criminal justice system. This article finally concludes with the current challenges that are faced in the implementation of the Witness Protection Program along with a model witness protection program which tackles these challenges efficiently and the road ahead in the development of Witness Protection in India.

The article **'Decisional and Informational Privacy: India's take on Medical Abortions and Data Protection'**, authored by **Mr Wilfred Synrem**, tries to inculcate the effects of the new adjudication and also discusses two unattended issues relating to privacy, such as medical abortions and data protection in India. Medical Abortions deal with the 'decisional' aspects of the "triangle of privacy", and data protection comes under the ambit of a new form of technological privacy; Informational Privacy. Hence, the author through this piece analyzes the Medical Pregnancy of Termination Act and the Information Technology Amended Act, in order to ascertain whether the respective legislations have soundly preserved the new fundamental right of Privacy.

The paper **'Plight of the Workers in Unorganized Sector and their Rights'**, penned by **Mr Ashutosh Tiwari and Ms Barkha Joshi**, underscores that the principal factor of production of a nation is in its labour force and the size of nation's labour force is determined by the size of its adult population, and extent to which the adults are either working or prepared to offer their labour for wages. This research paper does a comparative analysis of the laws enacted by the Government of India and also attempts to recommend solutions and suggestions as to how the rights of these labourers can be protected and their basic necessities like pension and health insurance could be ensured.

Ms Akanksha Yadav and Mr. Srijan Somal in their article **'POCSO and the Age of Consensual Sex in India'** discuss the laws related to sexual offences against children in India, with a purpose of to revisit such laws because there is no provision that may allow consensual sex by a person who is below 18 years of age. This paper also provides some suggested changes in the current laws. This paper also highlights the harassment faced by innocent people due to discrepancies.

In the short article titled **'Litmus Testing on The Impact of Globalization on Legal Profession in Indian Scenario'**, the authors **Dr Y Papa Rao and Mr Ankit Awasthi** attempt to trace the impact of globalization on legal profession in Indian scenario. The authors go on to discuss the that legal profession as an independent profession emerged due to British rule through consistent efforts in the form of various regulations, however after independence and more specifically due to the wave of globalization Legal profession transformed in a significant manner. This transformation can be traced while throwing some light on the historical background, education system, job, and opportunities with some critical contemporary issues.

Mr Mrinal Singh discusses the much debated and discussed topic **'Poverty: A Threat To Holistic Development of Individuals And Nations'** where he maintains that in the present era, beside and beyond the comfort and warmth of socialization, urbanization, liberalization, globalization and modernization, there exists a society and group of individuals, for whom these modern day concepts and the so called "progressive world" means nothing as their life starts and ends at earning proper meals every day. This particular class or group of individuals suffer a lot economically, mentally, socially and physically compared to the various other individuals of the society. The dire need of the hour is to confront the situation whole heartedly and bringing such possible mechanisms which are capable of eliminating the poverty to its fullest.

'A Critical & Comparative Analysis Of Shariah Compliant Banking: With Special Reference To Its Scope In Indian Banking Sector', an article by **Mr Ghulam Yazdhani and Mr Abhishek Gupta** is an attempt to introduce to its readers the principles of Islamic banking and examine the influence of Islamic banking institutions with reference to U.K., India and Malaysia on the modern banking business in today's globalized world. This paper assesses the rise of complex financial transactions, the general principles of banking law which has undergone a major change. The *Shariah* compliant banking is governed strictly in accordance with the Islamic economic jurisprudence. The Islamic banking model at national and international level is new, dynamic and in the process of evolution.

Dr. Kaumudhi Challa
Executive Editor
HNLU Journal of Law and Social Sciences
Atal Nagar, Raipur, Chhattisgarh

HNLU JOURNAL OF LAW AND SOCIAL SCIENCES

Vol. IV January-December 2018 ISSN: 2347-839X

ARTICLES

Antitrust Interventions: A Doctrinal Perspective

***Prof. (Dr.) R L Koul**
****Rakesh Kumar Sehgal**

Introduction

The foundation of antitrust framework has emerged for legal regulation of business conduct for deterring unfair business practices through effective public enforcement of private action to promote competition. The legal standards to determine nature of business misfeasance has oscillated in tandem with creating a market order to enhance the policy objectives of consumer sovereignty, consumer welfare, innovation and efficiency considerations[1]. The antitrust legislations have developed keeping a holistic balance of the *ex-ante (*condemning certain business conduct due to perceived inherent legal risks arising out of nature of restrain to trade)as also*ex-post* (assessment of a actual business conduct by judicial authorities) framework.

The antitrust enforcement procedures are primarily guided on case to case basis and are primarily judge made law based on jurisprudential theory of American Realism School. It is also contextually important to see the transition from *rule per se* to *rule of reason*and how such transition has fared in protecting legal rights of market players and stakeholders. Veritably the jurisprudence in the area has emerged significantly inUSA and the paper highlightssignificant milestones in evolving jurisprudence of anti-trust and the need for shift from"r*ule per se"* signifying outright condemnation of Business Practicesto a rational"r*ule of reason"* based on evidence of consumer harm, harm to competition based on detailed economic analysis.

The purpose of this research paper is to identify legal underpinnings guiding the prognosis to arcane business conduct[2]. Such wrongful business misfeasances have the potential to impede competition and have been related to practices of economic conspiracies of coordination as collusion and monopolisation causing antitrust infringements, consumer harm and affecting the level playing field. The paper endeavours to explore and demystify the evolution of anti-trust theories which guided the courts in interpretation and enforcement of the anti-trust law regimes.

---

1 H.L.A. Kooijman, *The many faces of consumer welfare,* Tilburg Law School – Tilburg University, [Jun 2015]

2 Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, Catholic University Law Review, Volume 49, Issue 3 Spring 2000

Why this piece of Article is important today; is in light of forces of privatisation, liberalisation and globalisation unleashing adominant trend towards *laissez faire* market. A *laissez faire* market by structure and definition would leave the market to correction by itself with least regulatory intervention. The paper seeks to unravel evolution of regulatory framework and doctrines which were the guiding force to enhance and achieve the desired outcome of creating a just and equitable order in the business ecosystem and in particular to demystify the ambivalence in theories of antitrust regulations which have influenced the law making and enforcement.

It All Started With Application Of *Rule Per Se*

We live in an enlightened world of trade regulations today wherein much of the regulatory jurisprudence in antitrust framework is yet fully evolving. The frame of reference to a large extent has moved from outright condemnation of restraints of trade and their illegitimacy up till 1960-70as the courtsin earlier years of Anti-Trust enforcement, preferred a simple and predictable legal standard of *per se* illegality. The court under the application of *per se* illegality eramade up its mind on the likely legal risks for the predictable liability. It was an*ex ante* touchstone for the restraint and held such restraint to be prima-facie legal or illegal. The limitations were expressed in Illinios Brick case[3] wherein the Supreme court did not want detailed economic and statistical analysis to come in the way of decision making under an adversarial system of justice. There has been a gradual transition, since that era,starting with period beyond 1970,to a more reasoned and effect based analysis of the alleged pernicious activity starting with the emergence of behavioural antitrust theories of "effect analysis".

The enactment of Interstate Commerce Act 1887 and Sherman Act 1890 started the interface of regulation and competition. The Interstate Commerce Act primarily dealt with the regulation and operation of interstate rail-roads and the competition thereof in terms of rate setting and addressing discrimination arising out of undue preferences[4]. On the other hand, the Sherman Act was envisioned to deal with the increasing antitrust failure across spectrum of business activities and was described by Supreme Court as Magna Carta of Free Enterprise[5].

In the 1892 case of Trans-Missouri[6], an action was brought to disband the Trans-Missouri Freight Association as the rates setting

3 *Illinois Brick* Co. v. *Illinois*, (1977)431 U.S. 720 [USA]

4 Dennis W. Carlton and Randal C. Picker, *Antitrust and Regulation,* Working paper 12902, National Bureau of Economic Research, February 2007

5 *United States v. Topco Assocs*., (1972)405 U.S. 596,610 [USA]

6 *United States v. Trans-Missouri Freight Ass'n*, (1897)166 U.S. 290 [USA]

aspect was not covered under Interstate Commerce Act. Taking cognizance of unreasonable restraint of rate fixing by the private interest; an antitrust violation was triggered invoking Section 1 of the Sherman Act which condemned "*Every contract, combination , or conspiracy, in restraint of trade or commerce..... to be illegal. "*The then view under Trans-Missouri was that Sherman Act is not restricted to only unreasonable restraints of trade but covers every restraint. In Cincinnati[7] case, the Supreme Court held that the Interstate Commerce Commission had only the power to examine the reasonableness or otherwise of the rates set but did not have the legislative power to be a rate setting authority. This highlighted the authority of the Sherman Act, as an antitrust regulation, for overall competition policy space notwithstanding regulatory framework under the umbrella of Interstate Commerce Act already available.

The test of legality of restraints had started dwindling and in a way evolving as well, when in the case of Addyston Pipe[8], the 6th circuit Court made a distinction between the ancillary restraints of trade and the naked restraints of trade whose purpose was to largely decimate the competition. The naked restraints, based on their character and not intensity, were prima facie held illegal.

Dawn of Era of *Rule Of Reason*

In hindsight, a plain reading of Sherman Act gives *per se* illegality to a business conduct without detailed evidence and investigation resulting through effect of such business conduct. Whereas Section 1[9] declares a contract/combination/conspiracy in restraint of trade to be illegal, Section 2[10] makes actual/attempted monopoly or conspiracy thereof to be illegal.

Going further a general realisation started erupting that application of the provisions of Sherman Act merely looked at the form and not the substance. In Dr Miles case[11], the court condemned resale price maintenance and alienation of territories as *per se* illegal without

---

7 *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, (1897). 167 U.S. 479 [USA]

8 *Addyston Pipe and Steel Co. v. United States*, (1899)175 U.S. 211 [USA]

9 Section 1: Sherman Act 1890- *Every contract, combination in the form of trust or otherwise, or conspiracy, inrestraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal....*

10 Section 2: Sherman Act 1890 - *Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.*

11 *Dr. Miles* Medical Co. v. John D. Park & Sons Co. :: (1911)220 U.S. 373 [USA]

analysis of the effect of these restraints. Through the decision of the Supreme Court in 1914 in Standard Oil[12], a new dimension to the antitrust framework was added when the court decided to make a distinction between 'reasonable' and 'unreasonable' restraints to trade. The court held that the word "every" in Section 1 of the Sherman Act declaring "every"... restraint of trade to be illegal; a literal interpretation should be avoided. Only unreasonable restraints were categorised to be illegal. Moving on from a structure view of monopoly looking into size and market share, the court looked into both the structure and the conduct of predation arising out of the total dominance of the Standard Oil. This case marks the onset of demonstration of rule of reason for commenting on the legality of the restraint. The court had held that a detailed examination of pro-competitive and anti -competitive effect of the restraints need to be examined and then a view holistically needs to be arrived at whether the restraint tended to promote or destroy the competition. The approach suggested by the court provided for a rational analysis of restraint and its effect on business and whether such restraint may have actual or probable impact and the intent for adoption of such restraint in context of the business misfeasance[13]through the restraint in question. In the ALCOA[14]case the Supreme Court had held that monopolisation and resulting market dominance should also be coupled with an unlawful behaviour more than the mere structure of monopoly.

The early era of Sherman Act enforcement saw the courts applying *rule per se* without any differentiation to horizontal restraints as well as the vertical restraints.

1914 also saw the enactment of the Clayton Act[15]which sought to prevent anticompetitive practices in their incipiency stage and therefore prophylactic to any probable conduct tending to distort competition. Section 7 of the Clayton Act prohibited such mergers where the anti-competitive effect of the merger may result in lesser competition or monopolisation in a product market or the geographic market. That the overall purpose of the competition law is to protect competition and not competitors was greatly discussed in the proposed merger of Brown[16] and Kinney, the 2 retail shoe chains. Here in court laid that the merger must be condemned because it may affect the competitors by the resultant capacity of proposed for a horizontal Merger though

12 *Ibid*

13 Cavanagh, Edward D., *The Rule of Reason Re-Examined* (February 1, 2012). Business Lawyer, Vol. 67, p. 435, February 2012; St. John's Legal Studies Research Paper No. 12-0012.

14 *United States v. Alcoa*, (2d Cir. 1945)148 F.2d 416 [USA]

15 The Clayton Antitrust Act of 1914 [USA]

16 *Brown Shoe Co., Inc. v. United States*,(1962) 370 U.S. 294 [USA]

the consumer may also gain through the competitive effects of the merger coming through. Similarly in the case of Philadelphia National bank,[17] the court despite the favourable effects of the possible merger was guided by the likely anticompetitive effects and to preserve the competitive economy, did not approve the merger of the two larger banks in USA.

The application of the Sherman Act dealt around size which was achieved through acquisitions/combinations (horizontal, vertical and conglomerate), a monopoly and its abusive effects and business conduct arising out of vertical market restrictions namely price fixation, exclusive dealing arrangements, tie in arrangements, territorial restraints and predatory pricing.

Prior to Alcoa[18], which dealt with the issue of illegality without evidence of abuse and on efficiency considerations; this gave rise to a new jurisprudence as against the earlier positions taken in Standard Oil[19] (wherein the fusion of power and control was treated as a presumption to maintain dominance). Similarly in Corn Products case[20], wherein the court debated the existence of control to supply and fix prices and whether exercise of power caused antitrust injury. Striking down the decision by the Trial Court, the Supreme Court has held that the Call rule fixing the rates in advance for the grain to arrive after non-market hours is a reasonable restraint of trade. While doing so, the Court kept into the account, the nature, scope and effect of Call rule on the overall market. However, in Trenton Potteries[21]case, the price fixing arrangements between horizontal players was held to be unlawful. Going further, in similar price fixing case between horizontal players, in Appalachian Coals,[22] the Court had a distinct view from the *ratio* of Trenton Potteries case in absence of anti-competitive effects of the agency arrangements proposed. The earlier era had its focus on price element as core to operation of anti-trust framework and once horizontal price fixing was established the reasonableness or otherwise was not put to scrutiny. When linked with the objectives of the Sherman Act, along with efficiency it came to a scenario wherein size and monopoly which would have been illegal; the ALCOA case puts it in purview of the firm to justify the growth and efficiency combination. In the case of Griffith[23], it was held that a monopoly power which is used to generate monopoly attracts provisions of Sherman Act; thus

17 *United States v. Philadelphia Nat'l Bank*, (1963)374 U.S. 321 [USA]

18 *United States Vs Aluminium Co. Of America*, (2d Cir.1945)148 F. 2d 416 [USA]

19 *Standard Oil N.J. V United States*, (1911)221 U.S. 1,75 [USA]

20 *United States V. Corn Products Refining Co.*, (S.D.N.Y. 1916)234 Fed. 964. 1011 [USA]

21 *United States v. Trenton Potteries Co.*, (1927) 273 U.S. 392 [USA]

22 *Appalachian Coals, Inc. v. United States*, (1933) 288 U.S. 344 [USA]

23 *United States Vs. Griffith,* (1948) 334 U.S. 100 [USA]

highlighting the shift of the stance taken in Alcoa to Griffith wherein exclusionary practices were linked to misuse of power.

Unravelling Chicago School On Antytrust

The foundations of the Chicago School Work on Antitrust started in 1950 through Aaron Director[24] and dealt with matter with consequence of price discrimination resulting from tie in (to induce second line of monopoly profits), as a vertical restraint resale price maintenance (through excusive territories and outlets) and predatory pricing to drive out new entrants and moved on the key assumptions that people are rationale profit maximisers. The manifestations through Aaron Director teachings have undoubtedly paved the way for being the touch stone of interpreting the legal provisions of the Sherman Act[25] and laid down the foundation for judicial testing of the legal standards coupled with restraints arising out of market power, its abuse and collusion; these three being the core for enforcement of Anti-Trust Laws.

The Chicago school has believed in the assumption that markets be left to themselves as they are self-correcting and both firms/consumers are rationale profit maximisers. Assigning allocative efficiency to be the only goal of anti-trust laws[26], the Chicago School proponents relate restraints and corrosive restrictions under horizontal conduct as a mode to induce price discrimination. Relating the earlier evidence of judicial decision-making based on *per se* condemnation of certain horizontal business restraints, it can be said that such restraints of price-fixing would have led to higher prices, lower outputs and resource misallocation and therefore warranted intervention. The price fixing has been stated to be illegal *per se* without evidence on its effect on the market.

The ambivalence of anti-trust enforcement lies in the consequences of monopolisation and the treatment of predatory pricing. The consumer may want lower and lower prices but would such an era call for a regulatory intervention of illegality[27] as such super low prices may create an entry barrier for the new entrants and drive the competition totally out of the market[28]. Whether it is size, its resultant abuse and collusion; the ganging up as a cartel conduct or bullying to manipulate prices[29], the state of mind as anti-competitive intent is difficult to be

24 Aaron Director & Edward H.Levi, *"Law and the Future Trade Regulation"*, CPI, Competition Policy International, Volume 8, Number 1, Spring 2012

25 Sherman Anti-Trust Act, 1890 [USA]

26 Hovenkamp, Herbert, *Antitrust Policy After Chicago* (May 1, 2009). U Iowa Legal Studies Research Paper No. 09-21; Michigan Law Review, Vol. 84, p. 214, 1985.

27 Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 266 (1981)

28 Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925.(1979)

established. On the pricing, it would have been a general corollary that a firm would sell above its marginal costs variable costs[30], the presumptive notion of injury is something which Antitrust Authorities are still grappling with.

The Chicago School believed in a free market based on voluntary transactions as self-correcting measures and the state intervention to comes down on businesses for economic conspiracies of coordination as also de-concentrate the monopolistic tendencies arising out of concentration of power. However, gradually the concern on efficacy of Chicago economic theory started appearing dovetailed with their concerns on unnecessary impact of Government regulation on businesses as a threat to individual political freedom vis a vis the limitations of the behavioural economics aiding the legal standards. The courts were concerned with the false positives relying on the economic theory. This was evidenced in cases relating to mergers, the anti-trust injury to indirect purchasers causing economic analysis of recreating business conduct in courtrooms as also the class-action claims.

In view of Richard Posner[31], more than the monopoly power through unilateral action by a firm; which view on Antitrust can be considered to be a conservative and liberal view in regard to interventionist measures; a reference to price discrimination and price theory seems to be more guided by industrial organisation of 1950/1960 era.

Emergence of Harvard School of Thinking on Antitrust

As per Robert H Bork [32], the goal of Antitrust Law while being efficiency and maximisation of consumer welfare; remains an important public policy instrument and deals primarily with the issue of entry barriers and while Chicago School learning's were in vogue there emerged a Harvard School of Thought on Antitrust which tried to cover up some of the irrationalisation in the price discrimination theory by linking it to barriers to entry theory in case of tie ins, vertical integration and restrictions on distribution.

The two Schools of Thought have primarily while being academic positions have also been applied progressively to the domain of legal formulations as well. As an example, the pre sale costs such as advertisement expenses which were considered as social evil;

---

29 Steuer, Richard, *The Simplicity of Antitrust Law* (February 8, 2012). University of Pennsylvania Journal of Business Law, Vol. 14, No. 2, p. 543, Winter 2012.

30 Phillip Areeda& Donald Turner, *Predatory Pricing and Related Practices under Section.2 of the Sherman Act*, 88 Harv. L. Rev. 637 (1975)

31 Richard A. Posner *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979)

32 Robert H. Bork, *The Antitrust Paradox: A policy at War with Itself*. Basic Books, Inc. New York, 1978

in the Harvard School; its welfare effects have been seen to be on a positive tone. The two Schools have their variance on the element of concentration and it is the Harvard School which has driven the legal thought process to conscious parallelism and goes on to suggest restructuring of such concentration.

The pivotal point of Chicago intervention has been its dismay over Government Regulations and intervention to tackle anti- trust issues and instead favour market dynamics to combat such infirmities arising out of large concentrations.

While there would have been conflicting positions on anti-trust and the type of legal standards for application; the Chicago and Harvard Schools of thought which have generated much debate and intellectual curiosity and the propositions have gone through much of evidence testing to determine their co-relational context.

As Daniel A Crane[33], points out that while Chicago School favours free robust markets with minimum regulatory intervention, the Harvard School addresses another dimension of institutional limitations of Regulators, Judges and Jury for addressing market failures and ultimately both the Schools point out to what would have been consequences of non-intervention measures. The core to Chicago School has been its conviction of free and robust markets guiding competition and the limitation of judicial interventions in enforcing competition culture.

The analysis of both the Chicago and Harvard Theories make it clear that while both have not been very effective in regulating anti-trust regime; nevertheless they give points of benchmarking for judiciary to look into anti-trust enforcement from a relative frame of reference; both Schools having their limitation and as the complexities of business arise; the legal regulation of economic enterprises while promoting competition would always remain a zone shrouded by obscurity.

Are the Markets Really Self-Correcting?

Judge Easterbrook[34] has highlighted that markets are self-correcting and will themselves rule out anti-competitive practices and makes a case for false positives. Going further, he also adds that over judicial reach to an otherwise competitive behaviour may return the very rigor of dynamic market participants. This concept in support

33 Crane, Daniel A. "*Chicago, Post-Chicago, and Neo-Chicago." Review of How Chicago Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, by R. Pitofsky, editor. U. Chi. L. Rev. 76, no. 4 (2009),pp 1911-33

34 Frank H. Easterbrook, "*The Limits of Antitrust*," University of Chicago Law Occasional Paper, No. 21 (1985)

of self-regulation was contested by a 1996 publication[35]which had warned the consequences of liberalism and the deleterious effect that this untested liberalism for American society-which can be equated in context of a *laissez faire* market where the market regulation is left to the conduct of market forces and market players.

Both the theory and the facts have co-relational context and while theory is needed to identify facts and propose hypothesis vice-versa, the facts support a hypothesis. Whereas the Chicago School moved on ideology of Competitive market forces sufficient capable enough to protect businesses and consumers; in the process it underscored the Governmental regulations and this rhetoric of a *laissez faire* ultimately leading to some of the major disasters which resulted from deregulation[36]. A view also emerged that due to its over exaggerated stand on anti-intervention; the anti-trust enforcement was reduced to much being mundane as basing on influence of Chicago School many of the judgements were Summary once without according due evidence to the facts in case.

In hindsight what started as a chorus for least Government intervention towards regulations of markets; the statement by Ronald Reagan[37] that Government is not the solution over problem; Government is the problem; and what followed thereafter in terms of promoting *laissez faire* based economy through deregulation was the cause for financial depression of early 2000 era. The Gramm-Leach-Bliley Act[38](Financial Services Modernization Act of 1999) repealed The Glass-Steagall Act 1933[39] in USA which separated banking from brokerage and investment banking as a measure of reflection of the market driven economy. What followed thereafter in nature of the sub-prime melt down and the financial market cauldron during the first decade of 21st century in United States and its fallout on global financial markets demonstrated the role of regulation towards creating a resilient framework as the epicentre for regulation of public interest more than balancing market forces in areas which govern the public interest. The statement by Robert H Bork in his epic publication[40] was a classical reflection to American realism as against the legal positivism.

---

35 Robert Bork, *Slouching towards Gomorrah,* Harper Perennial Publishers, USA, 1st edn., 1996)-*"the enemy within is modern liberalism, a corrosive agent carrying a very different mood and agenda than that of classical or traditional liberalism. That the modern variety is intellectually bankrupt neither its vitality not the danger it poses"*

36 Kenneth M. Davidson, *Reality Ignored, How Milton Friedman and Chicago Economics Undermined American Institutions and Endangered the Global Economy* (2011)

37 *"In this present crisis, government is not the solution to our problem; government is the problem."-January 20, 1981*: From Reagan's Inaugural Address.

38 Gramm-Leach-Bliley Act, 1999 [USA]

39 Glass-Steagall Act, 1933 [USA]

40 Ibid

What Next……

Unlike other branches of legislation, the anti-trust framework being multi-disciplinary with strong interface towards economics, contains provisions that are subject to interpretation based on economic analysis coupled with varying legal standards and therefore the behavioural dynamics play a crucial role. Ever since the economic conspiracies started getting recognised in the matters of trade, the changing Standards of Common Law have been incorporated in the Anti-Trust Act. Therefore Courts are to fix the standard for each case and what exactly is the goal of anti-trust that the legislation is trying to achieve i.e. whether it is competition in markets, competition for markets, innovation, efficiency or consumer welfare; and a larger focus now is emerging on preservation of competition[41].

The era of conservatism has waned away to pave way for a market based regulation and laid down the foundation of very radical judgements in the realm of enforcement and adjudication of anti-trust cases in America with more focus on enhanced deregulation and to allow the market to correct itself.

We need to move to an era which strikes a right balance between applications of *per se rule* and *rule of reason*. A *per se* application of the rule has the tenacity to shroud a business conduct as being unlawful even though it may bring in competitive benefits.In a dissenting opinion given by Justice Marshall in Container Corporation case[42], the *rule per se* in current social evolution is symbiotic of uncertainty and haziness as no occasion is accorded for the trade-off between pro-competitive and anti-competitive effects apart from creating false positives. The Supreme Court in Leegin Case[43] overturned the application of *per se rule* illegality to the resale price maintenance and its more reasoned application under the *rule of reason.* The application of *rule per se* through cases of non-priced vertical restraints is yet an area which need further look albeit in GTE Sylvania[44], the Court had applied economic approach and opted for *rule of reason*.

Nihilism around adjudication and enforcement of anti- trust area apart; there can be no denial that both Chicago and Harvard Theory have laid out certain benchmark rules and the need is to work towards a more calibrated and globally acceptable normative standard which could deal with the so called chicanery and legerdemain around the unfair business practices are dealt with an epistemic authority. A key

41 Barak Orbach, *How Antitrust Lost Its Goal*, 81 Fordham L. Rev. 2253 (2013)

42 *United States v. Container Corp.*, (1969) 393 U.S. 333 [USA]

43 *Leegin* Creative Leather Products, Inc. v. PSKS, Inc., (2007) 551 U.S. 877 [USA]

44 *Continental Television v. GTE Sylvania*, (1977)433 U.S. 36 [USA]

issue in anti-trust enforcement as per Chicago exponent Robert Bork has been misunderstanding of the competitive process in consumer welfare[45].Coming back to the famous averment that goal of competition is to protect competition and not competitors, we need to assess if there could be any competition without competitors. While both Chicago School and Harvard School had positive reverberations on the development of anti-trust theories and the legal principles guiding the anti-trust intervention strategies; they had their limitations in terms of treatment of economies of scale leading to monopolisation and resultant abuse through market power[46]. Nevertheless both Chicago and Harvard to a large extent were instrumental in outright judicial overreach for condemning specified business conducts and laid a pathway for examination of such conduct on a detailed economic reason analysis and thus bringing in rationality to the anti-trust framework.

As a epilogue; presupposing rectitude on part of business which have so far had limited focus on the societal impact through their business conduct may not lead to a fair trade regulation and which can be actuated through putting in place legal standards to make anti-trust regulation achieve the desired public policy objective. Anti-trust authorities world over have been guided by the developments in the American system of anti-trust jurisprudence as case studies for replication of best practices to their legal system and therefore the above developments provided benchmark for continual evolution of approaches to anti-trust interventions and enforcement nationally.

45 Fred S. McChesney, *Antitrust And Regulation: Chicago's Contradictory Views*, Cato Journal, Cato Institute, vol. 10(3), pages 775-798,(1991)

46 Horton, Thomas J. "*Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*," University of Baltimore Law Review: Vol. 41: Iss. 4, Article 2. (2012)

Pith & Substance of the Indo- Pak Water Dispute- a Bird's Eye View

***Dr. Madhubrata Mohanty**

Abstract

The present Article is an attempt by the Author to share an overview on the root cause of the conflict in the South Asian region over the sharing of river-water, especially between India and Pakistan. Though several attempts were being made by the external sources including the World Bank ending with several treaties, still the matter remain as an unsolved puzzle due to the absence of sincere efforts to resolve the conflict from both the counter parts.

Introduction-

The lifeline of any civilization depends upon the availability of water. Scarcity of water takes no time to destroy the entire civilization within a very short span of time which is considered to be thousand times more dangerous than any destruction caused due to war. The entire South Asian region is now engulfed by the danger of scarcity of water which is increasing day by day affecting drastically the inter-relationship between the nations belonging to this region. The reason being, this region is mostly dependent upon the four river basins originated from the Himalayas, but the growing population of these areas demanding huge amount of water affects adversely the basic sectors like agriculture, industry and domestic spheres. It results in the increase of conflicts amongst the people and countries of the South Asian region, the worst affected being the countries like India, Bangladesh, Pakistan and Nepal. Time and again several

water treaties were signed between the neighbouring countries like India and Pakistan, China and Nepal, still the conflicts over water sharing in these areas always remains at its peak. Only a few of them turned into successful, whereas others converted into full fledged conflicts due to growing mistrust of one government upon the other.

The entire world knows the tension that exists between India and Pakistan for several reasons day in and day out. Dispute regarding water seems to aggravate the situation to a large extent which would affect the entire South Asian region adversely. The partition of the once united country divided not only the nations but also the Indus river basin upon which considerable numbers of States of both the countries depend. "The Indus river begins in the Himalayan mountains

* Associate Professor, Faculty of Legal Studies, Siksha 'O' Anusandhan (Deemed to be) University, Bhubaneswar, Odisha

of Kashmir on the Indian side, flows through the arid states of Punjab and Sindh, before converging in Pakistan and joining the Arabian Sea south of Karachi. The Source Rivers of the Indus basin remained in India, leaving Pakistan concerned by the prospect of Indian control over the main supply of water for its farmlands. The newly formed states could not agree on how to share and manage the cohesive network of irrigation, which was impossible to partition." (Hazarika 2001) Most of the parts of India and Pakistan already suffer from water stress having internal disputes between states and provinces over water management and these pressures are likely to be more in the coming future.

The Northern states of India like Himachal Pradesh, Delhi, Punjab, Haryana and Rajasthan have disputes regarding sharing of water from the Sutlej and Yamuna rivers, whereas Madhya Pradesh and Bihar dispute over the Son river and Odisha and Chhatishgarh over the Mahanadi. In Pakistan also there are conflicts amongst the provinces like Balochistan, Sindh, Khyber-Pakhtunkhwa with Punjab for diverting the water from the Indus river for providing benefits to its own farmers. The major reason of conflict for water is due to the fact of these countries being mostly dependent upon agrarian economies. The scarcity of water has not only hampered the economic development of these countries internally, but the entire South Asian region as a whole.

The beginning of the Indo-Pak water dispute

Though from the time of partition of the two countries, the dispute regarding water was there, but it became more visible during the early 1960s. The dispute was tried to be mitigated through the Treaty between the two countries, the Indus Water Treaty, 1960 which provided an understanding between the two countries for sharing of water. As per the geographical position of the two countries, both are connected by six rivers flowing from India to Pakistan, those are- The Indus, Beas, Sutlej, Ravi, Chenab, and Jhelum. The treaty categorically divided the rivers equally for the use of the two countries like India having the Beas, Sutlej and Ravi and Pakistan having access to the Indus, Jhelum and Chenab. The entire system of irrigation in Pakistan is regulated by the canal systems dependent upon the Indus Basin. Thus any step from the Indian side to block the water would completely devastate the country's economy as most of the people in Pakistan live on agriculture and the major exports of the country include cash crops. In 1990, a hydro-electric plant was constructed by India along the river Chenab, which was designated to Pakistan for use as per the Indus Water Treaty. This act of India created a hue and cry amongst the leaders of Pakistan as a move by India to control the water of Chenab thus affecting the country's economy. As the source point of all the rivers are in India, it always enjoys a position over Pakistan so far as the regulation of water

is concerned- by blocking the water it can cause drought, by releasing excess water it can cause flood. This is a major reason conflict relating to water resources between the two countries.

Conflict over the Indus Water Treaty

As per the Indus Water Treaty neither of the two countries is allowed to obstruct the flow of water as stated in the treaty. The treaty also needs both the countries to take each other into account when planning or taking any step for constructing on any of the rivers. One of the major provisions in the treaty is the exchange of information between the two countries, which in practice seem to be totally absent. The major discontent from the Indian point of view regarding the treaty is that it debars the country from constructing any project on the western rivers for storage purpose. Though the treaty has altogether not declined any such construction for storage purpose under exigencies, still the internal rivalry between the two countries doesn't allow any such effort to be made by India. Another reason for conflict is the flow of western rivers through the disputed region of Jammu & Kashmir, which is the most serious subject of dispute between the two countries since the time of Independence.

The most discussed conflict of current time is about the construction of the 'Baghlihar Hydroelectric Power Project' on Chenab River in the Doda district of Jammu & Kashmir. The project after being approved in 1996, started to be constructed in 1999. Soon after Pakistan alleged the construction of the project as a gross violation of the terms of the Indus Water Treaty as it caused the reduction of water flow to fill up the project causing huge loss of agriculture for the farmers in Pakistan. The allegation had lead to the project being referred to a Neutral Expert being appointed by the World Bank, which had played a major role in the finalization of the 1960 Indus Water Treaty. Though the Expert approved three of the objections of Pakistan out of four, but upheld India's design to build spillway gates, which Pakistan opposed vehemently. The matter was subsequently resolved in the meeting of the two countries before the Permanent Indus Commissioners in 2010. There are lots of other examples of conflicts related to the provisions in the treaty, where either India or Pakistan happens to be the offender of the treaty- be it regarding the construction of the sluice gates in Salal Hydroelectric Project or about the height of the dam of the Dul Hasti Project.[1]

The Role of World Bank in the Indo- Pak Water Treaty

India due to its geographical condition claims a very peculiar position with regard to the Transboundary Rivers in the South Asian

1 (Sharma S.P. 2006)

region. It enjoys upper riparian status against Pakistan in sharing the Indus and its tributaries and against Bangladesh in sharing the Ganges, Brahmaputra and many other rivulets including Teesta, whereas it has lower riparian status against China in sharing the Brahmaputra & the Sutlej and against Nepal the Koshi and Gandaki and some other rivulets. This dual status of India being both a lower & an upper riparian country has put it into a delicate position in terms of developing balanced and practicable legal and technical arguments in justifying its requirement for water usage.

In 1951 the then Prime Minister of India Mr. Jawaharlal Nehru invited David E Lilienthal, the Chief of Tennessee Valley Authority to visit the Indus region in India & apprised him regarding the Indo- Pak conflict on the sharing of the Indus basin. He then suggested the World Bank to play the role of negotiator in resolving the conflict which was being accepted by both the countries. It was the concerted effort of the World Bank, India and Pakistan that resulted the adoption of one of the most Important International Treaties, the Indus Water Treaty in 1960. In the same year the Permanent Indus Commission was established to deal with the disputes between the two parties. The World Bank remained as a signatory to most of the provisions of the treaty making it responsible for the successful implementation of the treaty.

Factors responsible for conflicts over water sharing

1. Rapid growth of Population

The most important factor responsible for the aggravation of the conflict is the rapid growth of population putting heavy pressure on the natural resources, most particularly on water. Excess utilization of water leads to its scarcity in many areas. The available water resources when exhausted due to growth of population, the needs of people are not fulfilled that gives rise to conflict. The population of these countries being based upon agrarian economies mostly depends on water for their bread and butter. Initially the conflict starts internally subsequently giving momentum to an international conflict.

2. Treaties having weak provisions

Sometimes weak provisions inserted in the treaties not foreseeing the future problems lead to serious conflicts amongst the nations regarding use of natural resources. The provisions of such treaties are mostly ambiguous and having lots of lacunas. The ambiguity of the terms gives scope to either of the parties to interpret the provisions in its own favor, thus giving rise to more conflicts. When any of the parties doesn't find any favorable outcome, very quickly tries to go back from the treaty. For example, at the time of adopting the Indus Water Treaty in 1960, it was not perceived properly regarding the quantum

of requirement of water would be for both the countries for decades to come. As per the treaty, either of the countries is not allowed to obstruct the flow of water as stated in the Indus Waters Treaty and also to take each other into account when planning and eventually constructing on one of the rivers. Exchange of information between both the countries was one of the main conditions in the treaty but in practice this does not seem to be totally enforced due to lots of other internal conflicts.The result is that none of the countries are able to construct dams for preservation of water to be used during the lean periods when there is scarcity of water. The worst sufferers are the people relying on water from these rivers for agriculture, which is the cause of their sustenance.

3. Rapid change in the Climatic Conditions

Rapid change in the climatic conditions leading to global warming is a serious concern across the world. It has drastic impact on the available natural resources causing all kinds of natural calamities including flood, tsunami, draught, landslides etc. During summer, when water resource is limited, due to lack of sufficient water conservation measures, conflict arises amongst the nations. India and Pakistan both are victim of this problem as both oppose each other in constructing any dam on the rivers for conservation purposes as per provisions of the 1960 Treaty. As a result the country is unable to satisfy the demands of its citizens' for water.

4. Lack of Efficient leadership

Good leadership always tries for better coordination amongst the bordering states so far as distribution of natural resources is concerned. It is the need of the day that all the leaders throughout the globe should work for the welfare of the majority population. It depends upon the efficiency of a leader how one utilizes the available natural resources of the nation in an effective manner so as to satisfy the needs of the country, whereas in the absence of efficiency maximum chances are there for misutilization of the resources causing wastage and harassment for all. Such cases subsequently lead to conflict over the limited water resources amongst nations. In case of India and Pakistan, the more emphasis by the leaders on non- issues rather than effectively resolving the continuous conflict over the water sharing issues, aggravates the conflict over it. Both India and Pakistan seek to exclude any intra-State conflict or dispute from the purview of formal adjudicatory bodies like courts, including their Supreme Courts. As elaborated in their respective Constitutions, any such conflict will have to be resolved through the establishment of Tribunals or Commissions which will be comprised of water engineers and legal experts. The lack of sincere effort by the leaders aggravates the conflict more and more.

5. Co-relating any Internal conflict to the Water-sharing Issue

Each citizen of both the countries is well aware of the condition daily going on through the border of India and Pakistan. The sensitivity of the area is due to the issues which are perpetuating since the partition of the countries. But the most important matter of concern is that each conflict concludes with the threatening by both the countries to violate the water treaty. Like the recent case regarding the declaration of death penalty to Kulbhusan Yadav, former Indian Navy Officer, who was alleged of being involved in spying for India's Intelligence Agency by the Pakistan Court, the matter went to the International Court of Justice that stayed the death penalty. The case is aggravated more due to the denial of consular access to Kulbhusan Yadav by Pakistan even after continuous request from India. At one point of time India threatened Pakistan to go back from the Water- sharing Treaty and to stop flowing Indus water to the country. Similar situations arise number of times between the two countries aggravating conflicts amongst the two to a large extent.

Conclusion

Keeping in view the various factors responsible for water- conflicts in the region, it is high time to think for the improvement of water resources judiciously. It can be done taking into account several factors such as social, ecological, and environmental implications of water resources development and considering the views of diverse stakeholders. Strategic environmental assessment including detailed studies of technical and economic feasibility are required to identify potential hydropower areas and to demarcate fragile zones where heavy construction must be avoided, for example at high altitude and in vulnerable watersheds[2], Similarly, resettlement of affected people should be well planned and managed so that their lives could improve further and their ownership is built. Joint research and fact finding are critical to support informed decision-making at trans-boundary level. In developing water resources, it is not enough to develop physical infrastructure alone; development of institutional capacity is also critical as weak institutional capacity not only poses a major obstacle for planning and implementation of complex trans-boundary project but also causes serious damages as happened in the breach of Koshi Dam in 2008. The catastrophe of the dam breach could have been avoided with timely repair and maintenance of the weak part of the dam, which was identified well in advance. Making water a part of

2 (Rasul 2014Rasul, G., 2014. Food, water, and energy security in South Asia: a nexus perspective from the Hindu Kush Himalayan region. *Environmental Science & Policy*, 39, 35–48. doi: 10.1016/j.envsci.2014.01.010[Crossref], [Web of Science ®]

economic development calls for multidisciplinary research, not only on technological issues but also on issues of social, economic, legal, and environmental concerns, as the problems of water resources management are multidimensional. Sustainable water development in the mountains and the mitigation of natural disasters in river basins depend on large-scale measures to protect upstream water sources, forests, and soils in mountain areas. Protection and conservation of the mountain environment are thus critical for long-term sustainable economic development of downstream areas. At present, there is no such policy or institutional mechanism for sharing the benefits generated from mountain water and hydropower resources. If these issues are addressed, water cooperation has the potential to change the economic and social landscape of the region as well as serve as a means to improve trust and peace-building in the region.

In order to resolve the dispute in the region permanently certain more initiatives are also to be taken. But there are possibilities that some initiatives may influence the region in a positive way whereas some may affect adversely giving rise to different kinds of other problems triggering existing as well as new conflicts. After the problems become clear, the findings could give some cause for optimism. Many Researchers are working on to solve the problem by finding out the exact type of storage projects that could help creating new approaches to solve the international water issues including rainwater harvesting, basin management and community participation in decision-making. The shift of the over-arching approach to water management, both in domestic and international sphere, requires greater mobilization of political will. The initial step would be to stop blaming water shortages on upstream actions rather than on local mismanagement. Then the problem of implementation and scaling-up of successful approaches for the projects are to be adhered. For example many projects across the region have demonstrated the potential of less water-intensive irrigation. As a considerable amount of water is being consumed by agriculture across the region, this significantly increases pressure on water resources. The solution to this effect could be done by imposing more tax on the urban and rural consumers for the water being utilized by them. Attempts could also be made to regulate water supply to the consumers by limiting supply to them for certain hours each day. In many locations off-grid water solutions to water management could be done by expanding rainwater harvesting. In addition to all these solutions, the approaches of the corresponding governments of both India and Pakistan through their sincere efforts to resolve the water dispute by bilateral talks would matter greatly to the long standing conflict.

The Exclusion, Expulsion & Discrimination of Transgender Persons in India and Proposed Transgender Persons (Protection of Rights) Bill, 2016

***Dr. Ramesh Kumar Verma**

From the British Period till today the transgender are treated with mistrust and suspicion. This seclusion and mistrust of the society have made their life pathetic. As a practice they are harassed by the society and often become the victim of violence. The exclusion, expulsion and discrimination of the transgender in India have compelled them to speak against and fight in their own ways for recognition of their rights. However it seems that the battle is long and painful one because outcome of the over-coming views and outlook of the society is the real challenge. As a matter of suffering, they are fighting for rights to rehabilitation, identity, inclusion under welfare policies and safeguards as well as employment opportunities. Apart from judicial recognition of their identity, the transgender are still in a critical and vulnerable state devoid of any benefits, humanitarian considerations or societal support. Despite of some legal achievements, the ground reality is appalling. This paper tries to explore the gray areas, loop holes, vulnerabilities and insufficiencies of the existing laws regulating the needs and rights of transgender. To highlight the needs and rights of transgender, an attempt has been made to critically examine whether the proposed Transgender Bill is adequate enough or is caught in the quagmire of ambiguity.

Introduction

The transgender persons have been part of our community since times immemorial but have never been considered as an integral part of our society. On the contrary, they are mocked, laughed, publicly humiliated, derogatorily termed as hijra, kinnar, chakka and even called the non-performing meek males of the society. These 'eunuch' or 'third gender' or the transgender community as a whole are still laughed and humiliated for those in which they have no contribution or without any fault. In spite of all odds being against them, they are surviving with faultless stigma which has come a long way. Today we can see few of them even in the political arena, in corporate sectors, film industries and even in police/ other forces yet it is pity that our society has not accepted them with open heart on the same footing as just another person in our social groups and a distance with them has always been maintained.

** Associate Professor, Faculty of Law, University of Lucknow.*

As such despite of their every positive effort, they are still struggling and fighting for their dues, apt and proper right within our society and in the eyes of our government and legislature. However, it is a positive signal that despite of all the circumstances being adverse and against them, the transgender people have taken their fight and struggle to another level which has made the judiciary, government, legislative as well as the society to sit up and strive to do something conducive for their welfare and acceptance within the society as a human being. The struggle for rights and the efforts on part of transgender even if insufficient as yet continue on the part of the governments.

Our history, mythology and ancient texts are full of mentions of transgender[1]. Our *Vedas* are full of mention of three genders in totality. Our *Puranas*, *Vedas*, *Epics* and *Folklores* are full of words like 'third-nature', 'napunsaks' and 'shikhandi' *etc.* They were referred as 'Hijras, Eunuchs, Kothis, Aravanis, Shiv-Shaktis and Jogtas/Jogappas *etc.*[2]

> It is believed that Lord Rama while going to exile urged all his followers who followed him to return back to the city but hijras decided to stay with him. It is also said that noticing their loyalty, Lord Rama gave them 'Vardan'(power to confer blessings) that they would have the power to confer blessings to people on all auspicious occasions like marriage and childbirth *etc.*[3]

The *Kamasutra* written between 400 BC and 200 AD talks about third nature termed as 'tritya-prakriti' or 'pumsprakritstri-prakriti'. *Manu Smriti* which was evolved between 200 BC – 200AD mentions that a transgender being recognised by birth in which the male and female seeds are equal.[4]

Conceptually, the term 'transgender' is an umbrella term which embraces within itself a wide range of identities and experiences including but not limited to pre-operative/post-operative trans sexual people who strongly identify with the gender opposite to their biological sex *i. e.,* male/female.[5] In Indian context they are called 'Hijras' which is equivalent to the western concept of transgender/transsexual (male-to-female) persons. Hijras are biological males who reject their masculine identity in due course of time to identify either as women or not men or in between man and woman or neither men nor women.[6] Though, there are regional variations in the use of terms referred to Hijras such as Aravanis & Thirunangi, Kothi, Shiv-Shakthis and Jogtas/ Jogappas

1 *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438.

2 *Id.*, at para 12

3 *Id.*, at para 13.

4 M. Michelraj, "Historical Evolution of Transgender Community in India" 4 *Asian Review of Social Sciences* 17 (2015).

5 *Supra* note 1 at para 81.

6 *Id.*, at para 44.

etc. Hijras in Tamil Nadu are identified as 'Aravanis and Thirunangi'. Aravanis are biological males who self-identify themselves as a woman trapped in a male body.[7] Kothis are heterogeneous groups. They can be described as biological males who show varying degrees of situational 'femininity'.[8] Shiv-Shakthis are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression.[9] Jogtas/Jogappas are those people who are dedicated to and serve as a servant of Goddess Renukha Devi (Yellamma) whose temples are present in Maharastra and Karnataka.[10]

Right from the beginning the transgender were known to be extremely dependable and loyal. During the Mughal period, they were placed as political advisors, administrators and guardians of harem (inner female domain) *etc*., and occupied other prominent positions as well.[11] However, the real problem started during the British Period with the enactment of Criminal Tribes Act, 1871 which categorized hijras (transgender) as criminals and started a period when they became being considered as a social disgrace.[12] This led many of them to prostitution, begging and other degradable ways to earn money for their livelihood. Though, the said Act was repealed in 1952 when India gained independence yet the prejudice against the hijras continued. This prejudice can well be judged from the fact that the Karnataka Police Act, 1964 which was amended in 2012 provided for registration and surveillance of 'hijras' indulging in kidnapping of children and unnatural offences *etc*.[13]

From the British Period till today the eunuchs, hijras or other transgender persons are treated with mistrust and suspicion. In spite of being a major part of the 'Lesbian, Gay, Bisexual and Transgender' (hereinafter referred as LGBT) community, their fight for rights to rehabilitation, identity cards inclusion under welfare policies and safeguards as well as employment opportunities, the transgender are still in a critical and vulnerable state devoid of any benefits, humanitarian considerations or societal support.

As well as their pathetic conditions are concerned, the seclusion and mistrust of the society on the transgender started from the British

---

7 *Ibid*.

8 *Id*.

9 *Id*.

10 *Id*.

11 *Id*., at para 15; see also, Gayatri Reddy, *With Respect to Sex : Negotiating Hijra Identity in South India*, Yoda Press, (2006), p.22.

12 Nousheen Zeeshan, *Transgender people as a third-gender-social recognition*, Available at, http://womennow.in/transgender-people-third-gender-social-recognition/, Last visited on 11. 4. 2018.

13. Section 36A, Karnataka Police Act, 1964.

Period. While the Criminal Tribes Act, 1871 was an act of repulsion towards the transgender community, the Andhra Pradesh (Telangana Area) Eunuchs Act or the Telangana Eunuchs Act, 1919[14] proved another nail in the coffin. This Act empowered the Police and the State Authorities to maintain 'Registers of Eunuchs' in the State of Telangana and criminalized the dancing and wearing clothes typical of the opposite sex. It is relevant to point out that recently a PIL has been filed before the Andhra Pradesh High Court challenging the constitutional validity of the said Act of 1919. Significantly another petition was filed in 2015 by the Karnataka Sexual Minorities Forum against the constitutional validity of section 36A of the Karnataka Police Act, 1963[15] which delegates powers to Commissioner of Police to prevent, suppress or control undesirable activities of transgender.[16]

The issues are diverse but some of which are constantly plaguing the transgender community. For example, the issue of social exclusion faced by them at all levels is prominent one. Still, they are not socially accepted and prohibited from social and cultural life. The dressing up or activities of a male person in our country as a woman is not accepted by the families and transgender within families are considered as a matter of shame and humiliation. As such they often become a target of harassment and human right violation. They are rejected and thrown out by their families and have to face adverse issues like lack of employment, health facilities and other sources of livelihood and lack of basic necessities. So in practicality, the social welfare schemes of the government fail to benefit them in reality.

As a practice the transgender are harassed by the society and police alike and often become the victim of anti- LGBT homicides and violence. Practically, there is no facility of housing, rehabilitation and health care *etc.*, for them. They are facing so many problems and issues. There is no way to express their concerns and rights, be it the mockery and rejection at public places, enunciating them with child kidnapping or prostitution. Due to ill mentality of the society the emotional, physical and sexual abuse of a transgender begins at an early age when their gender is detected or noticed by family and members of the society.

As well as their demographic data as per Census of 2011 is concerned, there are about 4.88 lakh transgender in our country.[17] In a survey conducted in 2016 by Swasti Health Recourse Center, a Bangalore based NGO, the shocking results have been revealed. This

14. WP (PIL) No. 44/2018.

15. Inserted through amendment and came into force *w. e. f.,* 26th April 2011.

16. WP No. 1397/2015; see also, *supra* note 13.

17. Rema Nagarajan, "First Count of third gender in Census : 4.9 lakh", *Times of India* May 30, 2014; see also, *Transgender in India*, Available at https://www.census 2011. co.in/transgender. php, Last visited on 02.06.2018.

study was conducted in the State of Maharashtra, Tamil Nadu and Karnataka. As per study report, 2169 respondents reveal that four out of every ten transgender faces sexual abuse before attaining the age of 18 years. The abuse begins at the age of 5 years but most vulnerable atrocities are done between the ages of 11 and 15 years. Shockingly 44.7% respondent faced 2811 incidents of violence and many of them faced other forms of physical and emotional violence. Some of them faced expulsion from school.[18] According to a study by the Medical Journal *Lancet* almost two-thirds of transgender in India have no access to treatment for HIV/AIDS or other sexually transmitted diseases.[19]

The expulsion, exclusion and discrimination of the transgender in India have compelled them to speak against and fight in their own ways for recognition of their rights. However it seems that the battle is long and painful one because outcome of the over-coming views and outlook of the society is the real challenge.

The Transgender Persons (Protection of Rights) Bill, 2016

The positive development for recognition of the needs and rights of transgender got notice and importance through a landmark judgement in *National Legal Services Authority* v. *Union of India,*[20] when the Supreme Court declared that the transgender be recognized as 'third gender' and affirmed their fundamental rights under the Constitution. Remarkably, where the legislature and the government failed to raise the issue a public spirited Member of Parliament (hereinafter referred as MP) of Rajya Sabha from a regional political party DMK, Mr. Tiruchi Siva formulated a Private Bill on the rights of transgender persons. As a rare happening, his privately drafted 'Rights of Transgender Persons Bill, 2014' was introduced in the Rajya Sabha as a Private Member's Bill in December 2014. Though it was unanimously passed by the Rajya Sabha but it never reached to the Lok Sabha. Thereafter the Government became active and drafted the 'Rights of Transgender Bill, 2015' which was actually a diluted version of Bill of Mr. Tiruchi Siva and was introduced before the Lok Sabha in August 2016 as the 'Transgender Persons (Protection of Rights) Bill, 2016'. The Bill was referred to the Standing Committee on Social Justice and Empowerment which submitted its report in July 2017. The Bill is still pending and awaiting to be passed and implemented as an Act.

---

18. Sumit Chaturvedi, *Abuse of Transgender Indians Begins in Early Childhood*, Available at, www.indiaspend.com, Last visited on 03.06.2018.
19. Sreemoyee Chatterjee, "Only 21% of HIV positive transgenders, 33% of sex workers have access to treatment", *The Times of India,* November 30, 2016.
20. *Supra* note 1.

Notably, the Bill of 2016 defines a transgender person as one who is neither wholly female nor male, or a combination of female and male or neither a female nor male and includes trans-men and trans-women and a person whose sense of gender does not match with the gender assigned to that person at the time of birth.[21] It is significantly in contrast with the Private Member's Bill of 2014 where the person has the right to choose his option and the Standing Committee also recommended that the above said definition is primitive and a person should have the right to choose himself as a man, woman or transgender without going through any surgery or hormone transplant. Moreover to be included under this definition, a person would have to go through medical examination which is degrading and against basic human rights.[22]

It prohibits discrimination or unfair treatment against a transgender person in educational establishments, healthcare services, employment, occupation, right to movement, right to property, holding of public or private office or in Government and private establishments.[23] The Bill provides a mechanism for right to 'self-perceived gender identity' by way of an application made to the District Magistrate for issuing certificate of identity as a transgender person.[24] The application would further be referred to the District Screening Committee consisting of Chief Medical Officer, District Social Welfare Officer, a Psychiatrist or Psychologist, a Government Official and a Representative of Transgender. Further, the appropriate Government is bestowed with the obligation to secure and take steps for effective participation of a transgender, their inclusion in society, protection of their right and interests, access to welfare schemes, their rescue, protection and rehabilitation issues.[25]

Any establishment, which includes a body or authority established, owned or controlled by Central Act or a State Act, a company, body corporate, association, agency or trust *etc.*,[26] would have the obligation to ensure non-discrimination of transgender in relation to employment, right to residence without undue interference and directs for the constitution of a 'grievance redressal mechanism' in an establishment of hundred or more people.[27] The Bill even has provisions which aim at educational, social security and health related issues of transgender protecting thereby the fundamental right to education, non-discrimination, health and welfare schemes. It also provides for

21. Section 2 (i), The Transgender Persons (Protection of Rights) Bill, 2016.

22. Smriti Kak Ramachandran, "Centre to reintroduce transgender bill with suggested changes", *The Hindustan Times,* February 19, 2018.

23. Section 3, The Transgender Persons (Protection of Rights) Bill, 2016.

24. *Id.*, Sections 4 - 8.

25. *Id.*, Section 9.

26. *Id.*, Section 2 (b).

27. *Id.*, Sections 10 – 13.

covering medical expends of Sex Reassignment Surgery by way of Insurance Schemes and directs for separate HIV Sero Surveillance Centers and other Medical Care.[28]

As well as legal mechanism is concerned, the Bill stipulates setting up of a National Council for Transgender by the Central Government consisting of Union Minister, Ministry of Social Justice and Empowerment as Chairperson and the Minister of State, Ministry of Social Justice and Empowerment as Vice Chairman and other Members from NITI Aayog, Ministries of Health and Family Welfare, Home Affairs, Human Resource Development *etc.*, as well as a representative from National Commission for Women, National Human Rights Commission, Members of Transgender Community and other Members who would advise the Government on formulation of policies, programmes and legislations related to transgender persons and also review, monitor and evaluate the implementation of such policies.[29] As a protective measure, the Bill criminalises the compelling and enticing of a transgender person to begging, forced or bonded labour or denial of right to passage to any public place. Forcing a transgender person to leave his house or village and subjecting them to physical or sexual abuse, economic or verbal abuse etc. has also been made punishable.[30]

While the Transgender Persons (Protection of Rights) Bill, 2016 as introduced by the Government of India is mainly based on the Private Member Bill of 2014 but some of its provisions are very weak and ineffective on certain fronts. The definition of transgender itself takes away one's right to be by self-choice recognised as a transgender. While the Private Member Bill, 2014 distinctly laid down 'discrimination' as exclusion or restriction on the basis of gender which severely restricts enjoyment or exercise of human rights, freedom whether social, economic or political *etc.*, at par with other gender people, the Bill of 2016 lacks in giving firm basis to defining discrimination thereby hampering exercise of right by transgender under certain circumstances. Moreover, the definition of 'establishment' does not cover private sectors or unorganized sectors where the rights of transgender thus can be violated without any law to protect it. There is no provision of complaint mechanism also for establishment of less than 100 persons. Moreover, the Members of National Council to advise

28. *Id.*, Section 14 – 16.

29. *Id.*, Sections 17 & 18.

30. *Id.*, Section 19.

the Central Government are from such wide fields that the decision making process is bound to be slow.[31] However, undoubtedly this step is a welcome one so for so that the Government has tended to awaken towards its need to secure the rights of transgender community and this effort of enacting and prosing a Bill is the first step.

Some NGOs like Sangini India,Tarshi, Nazariya and Niranter (New Delhi), Sappho for Equality (Kolkata), Umang (Mumbai), Sampathik Trust (Pune), Sarathi Trust (Nagpur), Orinam (Chennai), Srishti Madurai (Madurai & Chennai), Swabhava Trust, Maya 4 Women M4W-(Bangalore) and Sahayatrika (Kerala) *etc.*, have associated themselves with the LGBT and transgender people assisting them to not only fight for their fundamental right but also helping them in various issues like rehabilitation, legal and psychiatric counseling, health support and other needs.[32] As such by struggling, crossing various hurdles, overcoming from adverse circumstances and by sheer determination, many of transgender have succeeded in becoming a prominent major part of the Indian society and setups.

The positive effects of such initiatives, supports and judicial recognition of their status can well be perceived by the success stories of these communities. The success stories include that of Joyita Mondal Mahi, who was appointed the first transgender judge of Lok Adalat (Civil) in July 2017 in Islampur in the North Dinajpur, West Bengal[33]; K. Prithika Yashini, who became the first transgender Sub-Inspector of Police in Tamil Nadu[34]; Nitasha Biswas, who bagged the first Miss. Trans Queen 2017 title in a beauty peagent and shall represent India in Miss Trans Queen International in Thailand[35]; Kajal, who became

31. Manasi Bhushan, *Analysis on Transgender Persons (Protection of Rights) Bill,2016*, Available at, www.indialawjournal.org/analysis-on-transgender-persons.php, Last visited on 08.06.2018; see also, Danish Sheikh, *The New Transgender Bill Fails the Community,* Available at, https:// thewire.in/gender/failures-of-the-new-transgender-bill, Last visited on 08.06.2018.

32. Gaysi, *Indian Ngos/Support Groups For LBT Persons You Need To Know*, Available at, https://gaysfamily. com/ 2017/08/16/12-indian-ngosupport-groups-lbt-persons-need-know/, Last visited on 11.06.2018.

33. Sumanta Ray Chaudhuri, *In another first, Bengal gets a transgender Lok Adalat judge*, Available at, https:///www.hindustantimes.com/kolkata/west-bengal-gets-a-transgender-lok-adalat-judge/story-PoFwwMctcQtQ8UFJiT13MK.html, Last visited on 11.06.2018.

34. Pramod Madhav, *Prithika Yashini, India's first transgender police officer, wins acceptance,* Available at, http://www.indiatoday.in/india/story/prithika-yashini-india-first-transgender-police-officer-tamil-nadu-969389-2017-04-04, Last visited on 12.06.2018.

35. Vidya Raja, *In Coversation with Nitasha Biswas, India's First Transgender Beauty Queen*, Available at, htpp://www.thebetterindia.com/113594/conversation-nitasha-biswas-indias-transgender-beauty-queen, Last visited on 12.06.2018.

first transgender Radio Jockey in Karnataka[36] and Ganga Kumari who became first transgender police officer in Rajasthan.[37] Significantly, the Kochi Metro Rail Ltd., Kerala has recently employed 23 transgender persons in their setup.[38] All these success stories have not only inspired the community but has brought the transgender people to integrated them in our society which is really a remarkable achievement and would go a long way in changing the outlook of the society towards this neglected community.

Judicial Response and Rights of Transgender Persons

The landmark judgement delivered by the Apex Court in *National Legal Services Authority* v. *Union of India,*[39] is one of the best glowing examples of judicial creativism and judicial sensibility for the welfare of these neglected people. It compelled the Government of India to setup, take notice and enact the Transgender Person (Protection of Rights) Bill, 2016. In this case the Court upheld the rights of transgender at par with other genders. The Court in detail described as to what comprised a transgender describing them to include hijras, non-emasculated men and inter-sexed persons including those who had gone through sex re-assignment surgery.[40] The Court thoroughly delved the history of transgender connecting it to *Vedic* and *Ramayana* Period as well as *Jain Texts* and *Mahabharata*.[41]

Giving due importance to humanity, the Court declared gender identity as one of the most fundamental aspects of life which refers to each person's deeply felt internal and individual sense and experience of gender.[42] The Court also observed that each person's'self-defined sexual orientation' and 'gender identity' is integral to their personality and is one of the basic aspects of dignity, freedom and self-determination.[43] The Court identified various legal principles

36. Chethan Misquith, *Coastal Karnataka's first transgender RJ to go on air*, Available at,https:// timesofindia.indiatimes.com/city/mangaluru/coastal-karnatakas-first-transgender-rj-to-go-on-air/articleshow/61582704.cms, Last visited on 12.06.2018.

37. Javita Aranha, *After a 2- Year Battle, Ganga Kumari to Become Rajasthan's First Transgender Cop*, Available at, http://www.thebetterindiSa.com/120884/rajasthan-cop-transgender-ganga/, Lastvisited on 14.06.2018.

38. Priyanka Agarwal, *Kochi Metro brings 23 transgender workers on board*, Available at, http:// www.cntraveller.in/story/kochi-metro-brings-23-transgender-workers-board/, Last visited on 14.06.2018.

39 *Supra* note 1.

40 *Id.*, at para 11.

41 *Id.*, at paras 12-15.

42 *Id.*, at para 19.

43 *Id.*, at para 20.

and foreign judgements concerned about transgender rights[44] as well as gave reference to various acts which created oppression of transgender in the country.[45] The Court even weighed transgender rights on the threshold of international human right principles and the constitutional provisions under Articles 14, 15, 19 and 21.[46] Historically, the Supreme Court declared that Article 19 (1) (a) of the Constitution of India states that all citizens have the right to freedom of speech and this includes one's right to expression of his self-identified gender.[47] Citing laws of various foreign countries,[48] the Court upheld the right of transgender to self-identification and their equal treatment and recognition under the constitutional rights even in absence of any existing statutory provisions. The Court also instructed the Central and State Governments to address the issues of education and health care *etc.*, of transgender community.

It is significant to pursue that more than a century back in *Queen Empress* v. *Khairati,*[49] the Allahabad High Court in a case where a transgender person was prosecuted under section 377 of the Indian Penal Code, 1860 on suspicion of having committed sodomy, acquitted the accused on appeal. While the decision in *National Legal Services Authority Case*[50] is a historical and guiding one, the later decisions of the various High Courts across the country either display that

44 *Corbett* v. *Corbett*, [1970] 2 All ER 33 (United Kingdom); R v. Tan, [1983] QB 1053, 1063-1064 (United Kingdom); *R* v. *Harris & Mc Guiness*,[1988] 17 NSWLR 158 (Australia); *A. B.* v. *Western Australia,* [2011] HCA 42 (Australia); *Bellinger* v. *Bellinger*, [2003] 2 All ER 593 (United Kingdom); *Re JG, JG* v. *Pengarah Jabatan Pendaftaran Negara*,[2006] 1 *MLJ* 90 (Kuala Lumpur); *Norrie* v. *NSW Registrar of Births, Death and Marriages*,[2013] NSWCA 145(Australia); *Christine Goodwin* v. *United Kingdom*, Application No. 28957/95/judgement dated 11th July, 2002(European Court of Human Rights); *Pretty* v. *The United Kingdom*, Application No. 2346/02/judgement dated 29th April, 2002, 62(European Court of Human Rights); *Mikulic* v. *Croatia*, Application No. 53176/99/judgement dated 7th February, 2002, 53(European Court of Human Rights) ; *Van Kuch* v. *Germany*, Application No. 35968/97/ ECHR judgement dated 12.09.2003(European Court of Human Rights); *Sunil Babu Pant & others* v. *Nepal Government*, Writ Petition No. 917/ 2007 (Nepal); *Dr. Mohammad Aslam Khaki & another* v. *Senior Superintendent of Police (Operation) Rawalpindi & others,* Constitution Petition No. 43/ 2009 (Pakistan).

45 *Supra* note 1 at paras 45&46.

46 *Id.*, at para 53.

47 *Id.*, at para 62.

48. General Recommendation Act, 2004(United Kingdom); Equality Act, 2010 (United Kingdom); The Mathew Shepard and James Byrd Jr. Hate Crimes Prevention Act, 2009, (United States of America- Federal Law); Sex Discrimination Act, 1984 (Australia); Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013, (Australia); Alteration of Sex Description and Sex Status Act, 2003 (South Africa); German Civil Status Act, 2013 (Germany); Law on Gender Identity, 2012 (Argentina); Equal Treatment and Promotion of Equal Opportunities Act, 2003, (Hungary); European Union Directive 2006/54 EC(European Parliament & Council).

49 (1884) ILR 6 All 204.

50 *Supra* note 1.

the courts have not been able to wisely interpret the said decision of the Supreme Court or even at times display the proper and judicial application of principles of upholding of transgender rights.

In *Nangai* v. *Superintendent of Police, Karur District,*[51] referring to the decision of Supreme Court in *National Legal Services Authority Case,*[52] the Madras High Court reinstated a Police Constable who was terminated by the Superintendent of Police, Karur on the basis of intersex variation. The High Court also directed the authorities to provide separate toilet facilities for the trans-sexual.[53] However in the said decision, the Court identified the said constable as woman and not 'trans-gender' thus creating ambiguity and confusion. Citing the instances of mistreatment and violation of privacy in cases of Pinky Pramanic who won ASIAD gold medal in sprinting and was charged from committing rape of a girl and convicted even when she asserted that she was always a woman, and the case of Shanthi Soundarajan who won 800 meters race silver medal in 2006 Asian Games, Doha but was stripped of her medal when it was found she was not a female on medical examination.The High Court observed that all these incidences show that the rights of trans-sexual are not adequately taken care of by the government or the society even after the advent of Universal Declaration of Human Rights, 1948.[54]

Upholding the right of equality for transgender the Allahabad High Court (Lucknow Bench) in *Ashish Kumar Mishra* v. *Bharat Sarkar,*[55] recognised the rights of transgender to ration card and food security. Likewise, the Madras High Court in S. *Tharika Banu (Transwomen)* v. *The Secretary to Government,*[56] declaring leniency to be shown in entrance examinations under a special category for transgender and to provide special reservation for them as well as the Calcutta High Court in *Arti Kar* v. *Union of India,*[57] allowing the right of transgender to participate in selection process of State Bank of India are some of the glowing examples of it.[58]

The humanitarian supports, initiatives and judicial recognition of their status has encouraged the morale of these communities to fight

---

51 (2014) 3 CTC 497: (2014) 4 *MLJ* 12.

52 *Supra* note 1.

53 *Id.*, at para 39.

54 *Id.*, at paras 21-23.

55 Misc. Bench Case No. 2993/ 2015.

56 W.P. No. 26628/2017 ; W.M.P. Nos. 28349 & 28350/ 2017.

57 W.P. No. 6151 (w)/ 2017.

58 See also, *State* v. *Bobby Kinnar*, Session Case No. 63/2014, Unique Case ID No. 02404 R0065762012; *Shivani Bhat* v. *State of NCT of Delhi*, WP (CRL) 2133/2015; *K. Prithika Yashini (Transgender)* v. *The Chairman, Tamil Nadu Uniformed Services Recruitment Board*, W.P. No. 15046/ 2015.

against exclusion, expulsion and discrimination. So far as the rising up and awakening of these neglected and ignored needy communities are concerned, over the last few years the transgender community inspired by their will and commitment to do something for their rights as well as supported by some external aids have brought about a positive and noticeable change in their recognition among the society.

Conclusion

No doubt, the transgender community as well as the trans-sexual has from times immemorial being subjected to exclusion, harassment and exploitation in different degradable forms and ways. Considering the reality that they are also human beings and thus entitled to equal rights of freedom, livelihood, education, health care and other welfares at par with other common member of the society and taking into consideration that the many earlier laws of British Period tend to refer to transgender as criminals and offenders, it is high time that in a democratic country like India, their equal rights under the Constitution should be recognized and given effect to. The Transgender Persons (Protection of Rights) Bill, 2016 is a positive effort of the Government of India in this direction. While the Bill still awaits and witnesses the obvious delay in becoming an Act after being duly passed by the Houses. Though the judiciary has already by way of judicial creativism secured and recognised constitutional rights of transgender by way of some of its landmark decisions. An awakening for making their presence felt and marking their contribution to the Indian society, many transgender have already made a name for them and excelled in every field which earlier was considered to be only an arena for man or woman.

However much is yet to be done on the practical side for the social and economic elevation and encouragement as well as for the welfare of the transgender community. When we analyse the present situations we find that not all can be accomplished by the government policies, laws and the judiciary. There is a long road ahead before the members of the transgender community are accepted into the mainstream. The integration of transgender in the workforce is still a challenge. For this, a conducive environment needs to be created in entire society for their socialisation. This can only be achieved by sensitizing the workforce in protecting the rights and fulfilling the needs with dignity of these ignored community. In order to fill the gap between the law and reality, there is an urgent need to strengthen the transgender rights by recognizing their self- defined gender identity. Much of the changes can be brought through the awakening and arousal of the society with the help of NGOs and social activists. As a responsible citizen each of us has to contribute in our own way to eradicate the plight of these people through social acceptance.

Regulating Competition: Analysis of CCI Decisions with Reference to Abuse of Dominant Position and Anti-Competitive Practices Adopted by Industries

***Shripad Merchant**
****Dr. Rajesh Pednekar**
*****Dr. D. B. Arolkar**

Indian retail industry is booming and likely to increase by around 50 percent from Rs. 47,000 crore in 2016 to Rs. 71,000 crore in 2019. Consumerism, infrastructural facilities, network of roads and railways, stellar growth in sales of the smartphones, sharp drop in data access costs and strong economy is also contributing to the emergence of a new India providing many opportunities of growth. However, big wig online retailers and a few dominant players in specific industries are using huge investor capital in providing deep discounts to acquire greater market share by killing competition in the market. The predatory pricing often results in eliminating some of the competitors in the market. The anti-competitive agreements lead to exploitation of consumers. Present paper analyses important CCI decisions regarding several anti-competitive practices like predatory pricing strategies and business models adopted by various companies including the abuse of dominant position.

Introduction

The competition Act (CA) was passed by the parliament in the year 2002 .The law was introduced mainly to check the anti-competitive agreements and abuse of dominant position by companies. The Competition Act helps in preventing unhealthy practices which adversely affect competition in the free market economy. It protects the consumers interest and ensures freedom of trade by monitoring anti-competitive agreements, deceptive marketing, review of merger and acquisition, joint venture, equity transfer and monopoly.

Anti-competitive agreement has an appreciable adverse effect on competition. These agreements between the companies relate to limiting the production or supply of goods or services, sharing of markets and bid rigging or collusive bidding. It also covers the agreements for exclusive rights for supply and distribution of goods between the companies. Dominance refers to the position of strength which helps an enterprise

* Assistant Professor, Dnyanprassarak Mandal's College and Research Centre, Assagao – Goa.

** Associate Professor, Dnyanprassarak Mandal's College and Research Centre, Assagao – Goa.

*** Principal, Dnyanprassarak Mandal's College and Research Centre, Assagao – Goa.

to operate independently of the competitive forces in the free market. Abuse of the dominant position includes predatory pricing, limiting the production or market or technical development, creating artificial entry barriers and denying the market access and using dominant position in one market to take advantage in other markets.

To determine anti-competitive conduct in a market, the CA provides that Relevant Geographic Market (RGM) and Relevant Product Market (RPM) is to be taken into consideration. RGM is the area in which the conditions of the competition for supply of goods or services are distinctly homogeneous. It can be distinguished from the conditions prevailing in the neighboring areas. The Relevant Product Market consists of all those products or services which are regarded as interchangeable or substitutable by consumer because of the characteristics of the products or services, their prices and use.

In the present paper we have analyzed important CCI decisions regarding several anti-competitive practices like predatory pricing strategies and business models adopted by various companies including abuse of dominant position.

Objectives : The main objective of the research work is

- To analyze the cases decided by CCI on complaints against companies regarding abuse of dominant position, anti-competitive agreements and predatory pricing.
- To examine the impact of the decisions of CCI on industry and consumers.

Methodology: The research is based on the secondary data including the orders passed by the CCI, newspaper reports and the research papers

Literature survey:

Global Landscape of competition and anti-trust framework

Competition and anti-trust laws enacted by various countries across the world can be attributed to the Sherman Anti-trust Act[1-2] passed by the US congress in 1890 in under the presidency of Benjamin Harrison. The Act played an important role in protecting trade and commerce against unlawful restraint and monopolies. It serves as a weapon to preserve competitive marketplaces and protect the consumers from abuses[3].

1 Sherman Antitrust Act, Wikipedia http://em.m.wikipedia.org

2 William E. Kovacic and Carl Shapiro, Antitrust Policy: A century of Economic and Legal Thinking, Journal of Economic Perspective –Vol.14, No.1, 2000.

3 Competition Law and Consumer Protection, Cseres, Katalin Judit (2005) Kluwer Law International, pp.291-293, ISBN 9789041123800

The Clayton Anti-trust Act was passed in 1914, which added certain provisions to the Sherman Anti-trust Act. It included provisions against price discriminations, creating monopolies, exclusive dealings, tying arrangements and mergers which resulted in reducing market competition. The Act was further amended in the form of Robinson Patman Act of 1936 which covered certain anti-competitive practices involving manufactures engaged in price discrimination. Anti-trust – IP Licensing provisions in the US Act deal against refusal to license, exclusive licenses, royalty provisions, price restructuring and tying arrangements which restricts healthy competition.

The six European countries like Belgium, France, Italy, Luxemburg, Netherlands and West Germany Signed a Treaty of Rome on 25th March, 1957 giving birth to European Union. The articles 101 and 102 of the European treaty of Rome are similar to the section 1 and section 2 of the US Sherman Anti-trust Act[4]. Anti-monopoly Law of the Republic of China follows the European model to protect the competitive market environment[5]. It includes the rules that prohibits restrictive agreements creating monopolies, abuse of dominant position, mergers and acquisition, which restricts competition and prohibits abuse of administrative power limiting competition. The competition commission in the United Kingdom was setup in 1998 which regulated mergers and monopoly power, replacing age old Monopolies and Mergers Commission. The Office of Fair Trading (OFT) enforces the rules recommended by competition commission. Competition Regulator in Germany was set up in 1958 and was managed by Federal Ministry of Economy and Technology. New Anti-trust Act effective from June, 2013 is more user friendly and transparent increasing the efficiency of the German Anti-trust ecosystem.

Russian competition law was amended on 26th July, 2006, which prohibits unfair competition. The *Third Anti-Monopoly Package*, amendment to the competition law was made on 6th of January, 2012 strengthening the Russian Competition Law. Japanese Fair Trade Commission guidelines were issued on 30th July, 1999 that are, mostly, similar to the US Anti-trust laws. Major provisions of the law are focused on licensing by dominant firms, pooling of the patents for maximizing market share and patent tying. Most of the anti-trust laws in the US, European Union and other developed countries are linked to the robust economic development promoting technology transfer, innovation and research.

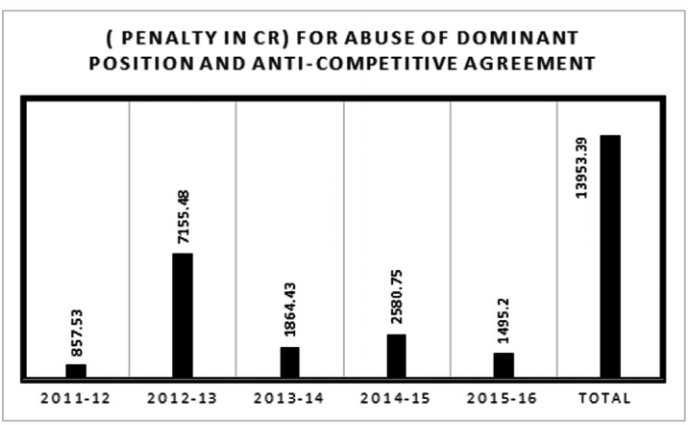
---

4 M. Burnside, A Guide to EC Block Exemption Regulations, Les Nouvelles, p.166 (December 1988)

5 Anti-monopoly law of the People's Republic of China, August 30, 2007, Presidential order No.68 ("AML) August 2008

Competition Commission of India (CCI) is a statutory body of the Government of India established to enforce the provisions of the CA, 2002. With the changing business environment, The old Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, was replaced. CCI was established with a vision to promote and sustain an enabling competition culture making businesses fairly competitive and innovative. The CCI is empowered to prohibit anti-competitive agreements that include agreements in respect of, storage, distribution, supply, acquisition or control of goods or provision of service that cause appreciable adverse effect on competition in India. Such agreements should not directly or indirectly determine purchase or sale prices, limit or control production, supply, markets, technical development, investment or provision of services , sharing of the market or goods or services or customers or source of production or provision of services by way of allocation of geographical area of market. The agreement in nature of tie-in arrangement, exclusive supply agreement; exclusive distribution agreement, refusal to deal, resale price maintenance are also forbidden.

The CCI aims to promote robust competitive environment through proactive engagement with all the stakeholders, including consumers, industry, government including international jurisdiction. Since 2009-10 till 15-16, the CCI received 586 complaints regarding anti-competitive agreements and abuse of dominant position. Total amount of penalty levied during this period is 13,980.57 crore (Fig.1) with several landmark judgments



Sectors	PENALTY	No. of cases
Real Estate Sectors	632,41, 50,000/-	2
Financial services	726,55, 00,000/-	2
Automobiles	2555,64,41,000/-	3

Media , Entertainment &Sports	64,86,86,534/-	6
Energy sector	1996,87,65,713/-	3
Travel and Aviation	257,93,00,000/-	2
Pharmaceutical / Healthcare	84,94,80,074/-	7
Miscellaneous	5,66,00,000/-	1
Total	6321,89,23,321/-	26

(Source: CCI Annual reports from 2010-2016)
(Fig.1 Penalty imposed under section 3 and 4 from 2011-2016 by CCI)

Sector-wise Analysis of Complaints

A total of 707 cases were filed from 2009-2016, out of which, commission imposed penalty of Rs. 13,980 crore in 92 cases. In 26 landmark judgements by CCI, a penalty of Rs. 6, 321 crore was imposed by the commission (Table 2).

(Source: CCI Annual reports from 2010-2016)

Table 1: Sector wise Penalty Imposed and no. of Cases as Landmark Judgement by CCI from 2010-2016

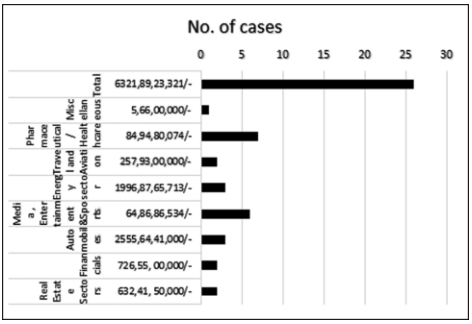
Year	No. of cases where monetary penalty imposed	Penalty Imposed (Cr)	Penalty Realized	Refunded	Net Penalty Realized
2011-12	21	860.38	1.78	0.72	1.06
2012-13	17	7156.18	18.63	13.13	5.5
2013-14	18	1870.40	55.41	1.52	53.89
2014-15	21	2592.39	19.92	0.03	19.89
2015-16	15	1501.64	0.13	0	0.13
Total	92	13,980.99	95.87	15.4	80.47

#No monetary penalty was imposed in 2009- 2011

Above figure excludes the interest of Rs.20, 72,697 realized from opposite parties due to delay in payments of penalty

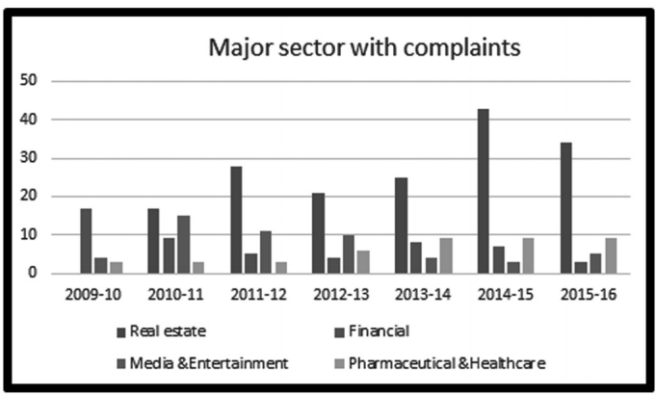
Table 2.: Monetary penalties imposed and realized by the Competition Commission of India (CCI) from 2009-2016

Out of 13,980 crore fine,18 percent of the fine is imposed on companies in automobile sector followed by 14 percent of the fine on companies in Energy sector, 5 percent on companies in financial sector, 4.5 percent on companies in real estate sector, 1.8 percent on companies in aviation sector (Fig. 2).



(Source: CCI Annual reports from 2010-2016)
Fig.2: Sector wise Penalty Imposed in 26 Landmark Judgement by CCI from 2010-2016

23 percent of the complaints were filed against the companies in real estate sector, 7.5 percent complaint against companies in financial services and 7 percent of the complaints against media and entertainment companies and 5.7 percent complaints against pharmaceutical industries. (Fig.3)



(Source: CCI Annual reports from 2010-2016)
Fig.3: Complaints in which penalty imposed from 2010-2016 Cases decided by CCI

In the case involving Hindustan Coca Cola Beverages Private Limited (HCCBPL) and Inox Leisure Limited (ILL)[6], the CCI held that exclusive supply agreement entered into between ILL and HCCBPL did not allow other entrants in the relevant market. The HCCBPL printed two different prices for the same products. The 500 ml water

6 CCI case No.99/ 2009, Consumers Guidance society v/s Hindustan Coca-Coal Beverages Pvt. Ltd and Inox Leisure Pvt. Ltd, May 23rd 2011.

bottle of Rs. 10 was priced at Rs. 20 and orange pulp of 400 ml of Rs. 25 was priced at Rs. 40 in INOX theatres. The CCI opined that the agreement forbids the purchaser (INOX) from buying goods from any other supplier. According to the commission, the theatre did not allow customers to bring inside any product for security reason and then sold them the products at exorbitant price. A penalty of 5 percent of the average turnover of three previous financial years was imposed on them on charges of signing exclusive supply agreement to foreclose the competition.

In the case of Fx Enterprise Solutions India Pvt. Ltd. Vs. Hyundai Motors India Limited[7], the CCI imposed penalty of Rs. 87 crore against Hyundai for anti-competitive agreement by way of re-sale price maintenance. The dealers were not authorized to give a discount on motor vehicles above the range recommended by Hyundai. Those who contravened the clause faced penalty from Hyundai for giving discount to customers over and above the recommended range. As the manufacturer imposed minimum resale price maintenance, the distributors could not give discounts and the customers had to pay higher price, the CCI said.

In the case of **Express Industry Council of India[8],** the CCI came down heavily on practice of increasing "Fuel Surcharge" (FSC) for transporting cargo by domestic airlines in connivance. The airlines were found hiking the surcharge on by same price on same date when fuel prices came down. The CCI imposed fine of Rs. 151.69 crore on Jet Airways, Rs. 63.74 crore on Indigo Airlines and Rs. 42.48 crore on Spice Jet for anti-competitive agreement for directly or indirectly determining sale price that had appreciable adverse effect on competition in India.

In the case against Board for Control of Cricket in India[9] the allegation was about favoring Sony Channel to secure their investment. The BCCI denied access for ten years to other companies to organize IPL. The CCI imposed penalty of 52 crore against the cricket regulator. In the IPL Media Rights agreement, the BCCI had given warranty to Sony Channel that it shall not organize, sanction, recognize, or support during the agreement period another professional domestic Indian T20 competition that is competitive to the league. The Commission held that the warranty benefited Sony Channel and BCCI could not prove how the legitimate interest of cricket and the consumers was served.

---

7 CCI case No. 36 and 82/2014, Fx Enterprise Solutions India Pvt. Ltd v/s Hyundai Motors India Ltd

8 CCI case No. 30/2013, Express Industry Council of India Ltd, Inter Globe Aviation Ltd and Spicejet, CCI Annual Report 2015-16

9 CCI case No. 61/2010, Sh. Surinder Singh Barmi v/s BCCI

In the case of cartelization by M/s Glaxo Smith Kline Pharmaceutical Ltd. and M/s Sanofi[10] through bid rotations and geographical allocations (international) in the tenders floated by the Ministry of Health & Family Welfare for procurement of Quadrivalent Meningococcal Meningitis Vaccines (QMMV) from 2002 to 2012, the Commission imposed penalties of Rs.60.50 crore and Rs.3.04 crore on M/s Glaxo Smith Kline Pharmaceutical Ltd. and M/s Sanofi respectively. The companies had anti-competitive agreement and involved in cartelization.

The CCI ordered a suo-moto investigation against four public sector general insurance companies for cartelization in increasing the premium of Rashtriya Swasthya Bima Yojana (RSBY) of Government of Kerala. The four companies National Insurance Co. Ltd., New India Assurance Co. Ltd., Oriental Insurance Co. Ltd. and United India Insurance Co. Ltd were directed to pay penalty of Rs. 671 crore for manipulating the bidding process.

In the case filed against DLF[11], the CCI found that the developer was engaged in unfair and abusive conduct. It was found that some unfair conditions like additional demands on account of increase in super area, increase in the number of floors, cancellation policy and forfeiture of booking amount were inserted in the agreements. The CCI did not impose any monetary penalty in the case considering the fact that a penalty of Rs.630 crore had already been imposed on DLF in another similar case.

In the complaint involving Honda Siel Cars India Ltd[12]., the CCI imposed penalty of Rs. 2545 crore on 14 Original Equipment Manufacturers (OEMs). The OEMs were imposing unfair conditions upon the authorized dealers and denying market access to lakhs of independent repairers and garages in India. 14 of them became the sole suppliers of the spare parts/components of their respective brands of automobiles and allowed the car companies to influence and determine the prices of the spare parts/components used to repair and maintain the respective brands of automobiles. CCI passed the order making consumers free to choose between an independent repairer and an authorized dealer without facing any adverse financial consequences. CCI ordered OEM's to allow independent repairers to buy spare parts and other technical information from OEM's. The CCI ordered the OEM's to devise appropriate mechanisms of providing adequate

10 CCI case No. 26/2013, Ms Bio-medical Pvt. Ltd and Union of India and Ors, CCI Annual Report 2015-16

11 CCI case No.19/2010, Belaire Owners Association v/s DLF Ltd. Order dated 12/8/2011

12 CCI case No. 03/2011, Shri Shamsher Kataria v/s Honda Siel cars India Ltd and Ors, order dated 27/7/2015

training to the independent repairers and garage personnel and not to cancel their warranties given to the consumer, if they approach an independent repairer. In an important directives, the CCI asked OEM's to provide more information on their websites regarding spare parts, their MRPs, details of matching quality alternatives, arrangements for availability over the counter, maintenance costs, etc.

In the case against Super Cassettes Industries Limited (SCIL)[13], the CCI imposed penalty of Rs. 2.83 crore on it for abuse of dominant position. The SCIL, having copyright over music, imposed clause of minimum commitment charges ('MCC') per month irrespective of actual needle hour on Radio stations. This limited the choice of music for the end consumers to only SCIL's music content and resulted in denial of market access for other music companies with less market share according to the informant HT Media Limited, which runs a radio station. The CCI held that SCIL imposed the unfair condition of MCC in its agreements with private FM radio stations in India.

In the case of Ramakant Kini against Dr. L.H. Hiranandani Hospital[14] it was alleged that the hospital does not allow stem cell banks other than Cryobank to enter into the hospital. The commission found that the agreement between the parties was anti-competitive and directed that the hospital shall not enter into similar agreement with any stem cell bank and, a penalty of Rs.3.81 crore was imposed on the hospital.

In the case filed against Tamil Nadu Film Exhibitors Association[15], the CCI directed it to stop from forcing its member exhibitors against screening the cinema 'Oshti', a remake of 'Dabaang' produced by M/S Reliance Big Entertainment Private Limited (RBEPL). The informant RBEPL alleged that association had a grudge against M/s Sun TV, which was given the satellite rights of the film by it. The Association had banned the film as M/s Sun TV had not paid the dues of some members of the association. The commission imposed penalty on the association of Rs. 41,000 and held that their directions to cinema theatres to boycott the film was anti-competitive in nature which limited supply of services.

In all the above cases, the CCI has directed the companies to cease and desist from enforcing the agreements.

---

13 CCI case No. 40/2011, HT Media Ltd v/s Super cassette Industries Pvt Ltd , CCI Annual Report 2014-15

14 CCI case no. 39/2012, Ramakant Kini v/s Hiranandani Hospital CCI order dated 10/7/2012

15 CCI case No. 78/2011, M/s Reliance Big Entertainment Pvt. Ltd v/s Tamil Nadu Film Exhibitors Association, CCI order dated 5/11/2013

The CCI has in the case against online e-commerce retail trade[16] companies found that there is no appreciable adverse effect on competition when such companies enter into 'exclusive agreements' with buyers to sell the products denying access to other e-portals or showrooms/ shops. The companies like Flipkart, Snapdeal, Amazon and two other e-commerce sites for online trade were the opposite parties in the case. It was alleged that these arrangements destroyed players in physical market and created product specific monopoly leading to manipulation of price, control of production and supply, imposing terms and conditions detrimental to the interests of consumers. The commission held that the e-commerce sites are not dominant players as online retail trade is just 1% of the total market.

In another case filed against Radio taxi service operator OLA[17] for its predatory pricing, the CCI declined to intervene in the matter as the market was in nascent stage. The CCI noted that it is hesitant to pass the order as OLA is not dominant in the market. According to 'Meru' Radio Taxi Service providers, Ola, which had become a dominant player in the Bangalore market, was offering heavy discounts to the passengers and incentives to the cab drivers which amounts to predatory pricing.

It was found by CCI that Meru held highest share during June 2012 till August 2014 while Uber's share increased from 0-1 percent in August 2013 to 36-37 percent in September 2015. OLA's share was 61-62 percent in September 2015. However, during the six month period from April –September 2015, Uber's share increased by 20-22 percent while Ola's share increased by 2-3 percent. Due to this dynamics of the market, the CCI held that OLA was not a dominant player in the market and its pricing strategy did not affect the new entrant like 'Uber' in the market.

Analysis of CCI decisions

In the last 8 years of functioning of CCI, several industries including real estate, automobile, entertainment, pharmaceutical, airline, food and beverages have suffered a jolt. The researchers have analyzed few cases that have a wider impact on several sectors of the economy. The CCI orders has served a death blow and big deterrent to the unfair practices adopted by companies considering the penalties imposed on them.

The orders of the CCI reflect how exclusive supply agreements are creating entry barriers for the other players in the market. By holding that small theatres are also markets when the beverage products are sold

16 CCI case No. 34/2016, Mr. Deepak Verma v/s Clues Network Pvt. Ltd and Ors, CCI order dated 26/7/2016.

17 CCI case No. 6 and 74 /2015, Fast Track Call Cab Pvt Ltd and Meru Travel Solutions Pvt Ltd v/s ANI Technologies Pvt Ltd, CCI order dated 19/7/2017.

under exclusive supply agreements, the CCI has given stern message to the industry big wigs trying to corner share even in small places like Inox theatres by inflating the price of the products. Hyundai motors anti –competitive agreements forcing the distributors not to sell the cars below pre- determined price has also exposed the manipulations prevailing in Automobile industry. Hyundai's arguments that resale price maintenance was suggested by the distributors did not hold water as the CCI held that the consumers were liable to pay higher price for the cars. Cartelization by companies by increasing the surcharges in tandem will also hit the manipulative tendency across the sectors in view of the CCI's order in the case of fuel surcharge case for air transport cargo. The broadcasters signing murky deals with the organizers of the commercial games to recoup their investment also came under the scanner of CCI. This case reflects the shady affair between the BCCI and Sony channel entering into ant-competitive agreement of not allowing any other premier league during the agreement period of ten years. With commercialization of several games in India, the CCI order in this case will not monopolize the broadcasting of the games. CCI has also hammered the monopoly created by the car spare manufacturers that does not allow independent garages to access the spare parts of cars and offer repair services. The regulators order in this case will turn out to be a watershed as it is applicable to every sector where the monopolies rule by supplying spare parts to select few and deny entry to others. Music Cassette Company faced the wrath of the Industry regulator for forcing the purchasers to buy more than what is required. One sided agreements by real estate developers with the buyers, cartelization by Pharmaceutical and public sector insurance companies also exposed new kinds of unfair trade practices to corner the markets. Allowing entry to single stem cell bank and denying market access to other companies revealed the nature of anti-competitive conduct by the hospitals. The CCI has also declared as invalid the directions by associations to its members not to deal with certain parties. However, in two cases, the CCI orders favors the emerging companies due to the size of their market and the dynamic nature of nascent markets. The e-commerce sites, entering into exclusive agreements, passed the test of the regulator as they were dealing in market with less than 1 percent size. The radio taxi operators Ola escaped unhurt, even after adopting predatory pricing, as its dominant position was under threat of Uber, which also adopted predatory pricing.

Conclusion

The competition watchdog is established for redressal of monopolistic issues in the market and dealing with the cases with the firm hand. CCI's decisions have encouraged the businessmen affected due to unfair trade practices to take on the giants. In the last seven years, more than 700 cases have been filed against big-wig industries. They have to pay thousands of crores in the form of imposed penalty. A good beginning is done by the competition commission on India by imposing fine of Rs. 13,000 Crores in around 13 percent of cases filed. The regulator's orders have impacted several sectors and resulted in government intervention to curb malpractices. The industry has witnessed passing of stringent RERA by parliament for real estate sector which accounts for 23 percent of the complaints in CCI . The anti-competitive practices and abuse of domain position by many companies and association are on the decline. The Competition commission has sent a strong message to such companies for indulging in malpractices involving anticompetitive agreements and abuse of dominant position. Now, it depends on others who are affected by the monopolies to take up the cudgels and fight for a competitive environment and strong economic growth.

Media as Progenerator of Knowledge and Information In The Light Of Reasonable Restriction: An Overview

[1]**Shalini Dwivedi**
****Mrs. Vineeta Agrawal**

ABSTRACT:

In a democratic country like India, a vigilant public opinion plays a very vital role in the smooth functioning of the country as well as a strong public opinion prevents the rulers from becoming dictators. In this case, the role of the press becomes paramount. In a democratic set up, the press or media is regarded as the "Fourth Estate". In India the freedom of press is implied in the freedom of speech and expression guaranteed under Article 19(1) (a) of the Indian Constitution. But this freedom is not absolute and is subjected to reasonable restrictions contained in Article 19(2) of the Constitution. This restriction is imposed on the media to prevent it from becoming an unruly horse in the larger interest of the nation. This study focuses on the positive role played by the media in enlightening the citizens by means of emancipation of knowledge and information. It also serves as an eye-opener in highlighting the shackles by which the media is crippled by the rich and powerful under the shadow of reasonable restrictions which comes under the Article 19(2) of our Constitution. It also sprinkles some erudition on a comparative analysis of the status enjoyed by the media and press in India as well as in China.

***Keywords**:* defamation, mass media, right to freedom of speech and expression, Maneka Gandhi case.

Introduction

Article 19 is considered as one of the most incremental provision in so far as the fundamental rights of the citizens are concerned. It lays out the Right to Freedom to Indians which also includes freedom of speech and expression. In the judgement of *Maneka Gandhi v. Union of India*[2]: the status of this provision increased manifold. A 7 judge constitution Bench decided the case in which one of the important issues was whether the right to travel abroad was a fundamental right or not and whether depriving a citizens of this right violates the right to freedom. Justice PN. Bhagwati, in this judgement, said that, Article

1 Assistant Professor, Department of Law, Kalinga University, Raipur.
** Assistant Professor, Department of Law, Kalinga University, Raipur.
2 AIR 1978 SC 597.

19, 14 and 21 are inseparable in a constitutional framework, and must be seen in togetherness. He referred to the three articles as a "Golden Triangle".

1. Reasonable Restriction Under Article 19 Of Indian Constitution

Right to freedom, however, is not limitless. It is subjected to public order, morality and health.. If in exercise of his right to freedom, a citizen disturbs any one of the three mentioned above, his right to freedom can be effectively curtailed. What constitute public order, health and morality, though, is a question of fact.

2. Exploring the Problematic Aspect of Media

Indian democracy is sui generis, meaning thereby, it is unique in its existence. In India, the politicians occupy enormous power and it is very obvious that power shall beget corruption and arbitrariness in state actions. To avoid this, we have the press or media. Media's freedom is therefore imperative and must be preserved at all costs and times. It is the bedrock of the Democracy, and, if the freedom of press is compromised, our country would be like a dark night sans moon to show us the way in the gloomy democracy. An important case wherein freedom of press was fiddled with by the executive is *Sakal Newspapers v. Union of India*[3] wherein a successful newspaper company "Sakal" challenged the constitutional validity of the newspaper (price and page Act, 1956, which empowered the central government to regulate the price of newspaper in relation to their pages and the allocation of space for advertising matter. The publishing company also challenged the daily Newspapers price and page order, 196(Newspaper Order), which was passed by the government under the Newspaper Act to put in place such regulations. The petitions argued that both the Act as well as the order violated the freedom of speech and expression guaranteed under Article 19 of Indian constitution. The petitioner also contended that freedom of press was implicit in the right to freedom of speech and expression. The Supreme Court, while nullifying the Act as well as the order promulgated under it, said that, the right to propagate one's ideas includes the right to publish them, disseminate them and circulate them and is a right under the right to freedom guaranteed by our constitutional scheme.

This was just the beginning of the executive making attempts to stifle free speech. Executive's animosity with uninhibited vocal approach still survives, and is alive and kicking in the guise of defamation. After such affirming judgements of the supreme court, the government and people who occupy authority and power, have got only the weapon of

3 AIR 1962 SC 305.

defamation, to put an end to whatever outrage them and lowers their reputation according to them, regardless of whether it is the truth or not.

3. Defamation

3.1 An Introduction

Defamation cases are filed in two ways- criminal and civil defamation respectively. In civil defamation, the remedy sought by the petitioner is in the form of compensation in monetary terms, to be paid by the respondent to the petitioner, whereas, in criminal defamation, the remedy is incarceration i.e. jail term. Defamation has been an issue of debate because many people feel that it is not a reasonable restriction as laid out in clause one to five of article 19 of constitution. When a defamation suit is filed, the complainant applies for an interim injunction against impugned defamatory material. If the court grants injunction, the respondent cannot report or publish the material or anything related to it till the very same court decides the case. The Court does not take into account the extent of the authenticity of the alleged defamatory piece. In considering such applications, the courts become an accomplice with the petitioner by jeopardising the right to freedom of speech and expression.

Though there is nothing concrete to explain what 'reasonable' of reasonable restriction actually means in a suffice manner, the Supreme Court has come up with test of reasonableness through its judicial decision in the past. The court has observed in *state of Madras v. VG. Row*[4]. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statue impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. In another case of telecasting which involved the state owned Doordarshan, the Apex court said that the concept of reasonableness must change with passage of time and observe the correct socio-economic values. By these preposition, it can be sufficiently construed that in case of declaring a restriction reasonable, individual case has to be examined and, a reasonable restriction should be contemporaneous with the current scenario in so far as the socio-economic condition of the prevailing times is concerned. Keeping in view of the current scenario in so far as the socio-economic condition of the prevailing times is concerned. Keeping in view of the current scenario wherein defamation suits are prima facie filed to shut the other person up, it depicts that the provisions have lost their meaning and are nothing but a crushed handkerchief stuffed in the mouth of journalists who do not concur or toe the line of the cronies.

---

4 AIR 1952 SC 196.

The Supreme Court however has a different opinion. It considers defamation as a reasonable restriction. In the case of *DC Saxena v. Chief Justice of India*[5] the petitioner had made scandalous remarks against the then Chief Justice of India, AM Ahmadi, in one writ petition he has filed. In spite of the court having pointed out that the averment made therein. While dismissing his petition, the Bench observed that it was compelled to initiate contempt proceedings against the petitioner in view of his Scandalous averments. The court observed, "The doctrine of truth in relation to speech does require free exchange of ideas and use of appropriate language." It also said that, "freedom of speech and expression is tolerated so long as it is not malicious or libellous so that all attempts to foster and ensue orderly and peaceful public discussion or public good should result from free speech in the market place. If such speech or expression was untrue and as reckless as to its truth the speaker or the author does not get protection of the constitutional right." The court said that just as a person has a fundamental right to freedom of speech and expression, the person he writes or publishes about also has a right to reputation and dignity, hence, nobody it said, can so use his freedom as to injure another's reputation. The court affirmed therefore, that reasonable restriction provided in the Constitution, and it does not infringe the freedom of speech and expression.

4.2 A weapon against the freedom of press

In the recent past, many online media portals and journalist have been threatened by the so-called defamation lawsuits filed by the rich and powerful. Such defamation suits are also called Strategic Lawsuit Against Public Participation (SLAPP). Be it the Defamation suit filed by jay shah against the news portal." The wire' or by the Adani group against the very same media group, such litigation have one thing in common, that they are used to manage dissenting media groups which show the courage to report matters in public interest.

In such cases, the best alternative for the aggrieved company or person, whose reputation is injured by the alleged defamatory materials, should be to issue clarifications to counter the claims made by the media house. Defamation is neither just nor is it fair. According to the author, defamation is regressive and must go certainly. It puts the complainant in a position of authority and allows him to threaten through the fear of defamation suit. Hugs sums are sought in the suits as compensation from the accused persons in order to manufacture fear.

5 AIR 1996 SC 216.

4. International prospection on Defamation and role of media

In the wake of fake news and Russian-bought ads, that proliferated the 2016 presidential election of the United States of America and the social media campaign in 2014 elections in India, people have started taking a more critical look at the role of social media in society. As social media companies launch new policies in the aftermath, several questions still remain, and among them, a wide-reaching topic for debate: How do social media influence a democratic society?[6] Essentially before we proceed to examine the influence of social media on the democratic processes, we must understand, that unlike print news, which once was considered as an authentic, verified and well researched and reliable source of information, social media has given an opportunity to every person and institution capable of creating data to put their agenda on the plate and on influence maximum number of citizens.

Before the internet, agenda driven and disinformation campaigns suffered from their own limitations as the same were driven by mouth to mouth publicity and /or at the most in public rallies where politicians could throw baseless allegations and spread rumour about the other concerned, as most of the news portals were spearheaded by editors looking to avoid lawsuits and maintain a reputation. Toomas Hendrix Ilves, the former president of Estonia and now a fellow at stand ford University Hoover Institution, in the tweet on the left, suggests that social media creates a news outlet without oversight, allowing anyone to create and shake fake news and misfortune. Information and knowledge was always the pursuit of mankind. Information about the affairs of their kith and kin, information of the worldly things, things which matter for their lives and brotherhood were always a matter of great concerns, sometimes out of curiosity, sometimes out of interest, sometimes as a apart of internal politics. Information is a sum of facts or knowledge provided or learned as a result of research or study. Knowledge was always an inseparable and integral part of human civilization since the era of its advancement, in certain part of the world knowledge was worshiped; it was given a place higher than the wealth and materialistic things. The possessors of knowledge were always given a place higher than the kings and the queens and were dominant over the warlords of their nations; for knowledge was the pivotal point in the advancement of Human Civilization, it was imperative for their advancement, as a society and race. The controllers of knowledge system essentially controlled the society either directly or indirectly.

6 (https://www.digitaltrends.com/social-media/how-does-social-media-influence-democracy/).

As per Plato's formulation of Knowledge, Knowledge is information and skills acquired through experience and or education or perhaps a 'justified' true belief. We use knowledge to determine what a specific situation means. Knowledge is applied to interpret information is applied to interpret formation about the situation and to decide how to handle it. Information is a bundle of true or hypothesized or assumed facts, whereas knowledge is the method used to arrive at a definitive conclusion to these facts. However, in today's world, information plays a more vital role than knowledge, as access to information is easily available due to the development of technology. Media has played a major role in making information available to the world at large. Information is regarded as the oxygen of democracy.[7] It invigorates where it percolates. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of the society. Freedom of expression, free dissemination ideas and access to information, are vital to the functioning of a democratic government. Information is crucial for a vibrant democracy and good governance as it reflects and captures government activities and processes. Access to information not only facilitates active participation of the people on the democratic governance process, but also promotes openness, transparency and accountability in administration. With the development of social media portals like Facebook and Twitter, where almost every second citizen and every third leader operates his account, has now emerged as one of the most powerful tool for the people to voice their opinion.

According to a document published by RTI Cell, Kohima, "Social media can thus be an effective tool for ushering in good governance." Access to information is essential to the health of democracy for at least two reasons. First, it ensures that citizens make responsible, informed choices rather than acting out of ignorance or misinformation. Second, information serves a checking function by ensuing that elected representative uphold their oaths of office and carry out the wishes of those who elected them. With the growth in comparative time spent by the people on the social media, it has become easy for the controllers of 'pages' and 'accounts' on these social media portals to directly connect with the people and feed and information they would love to believe, thereby leaving no distinction between truth and rumours.

5. Media

5.1 A mechanism for democratic nation

Media can be considered as one of the basic constituent element which makes up society. Media act as a mirror and it reflects the

7 http://www.derebus.org.za/access-information-oxygen-democracy-justice-ngcobo/, Last visited on 12.7.2018.

actions done in society. It acts as a medium through which information is transmitted, transferred from one to other. It acts as a unifying force, initiates the flow of an undercurrent feeling of oneness. Its basic function of giving information to the general public sometimes actionable sometimes not makes the people of the country more knowledgeable and more aware about the current affairs. It is the responsibility of the media to showcase such information/news about the lives and opinions of the common public in a responsible way. Media is instrumental in shaping up people's lives, because people i.e. the general masses, are more prone to be drawn away by the whims and the fancies of the media.

Media plays a very important role in democracy because one of the main features of democracy is the right to express such opinion without prejudice to anybody else's right; of course such opinion can be substantial and significant in changing the course of governance when they are voiced. Media acts as an instrument through which opinions, at a large stage, a piece of information, gets publicised. Therefore, the media facilitates in building up a better and fair democracy. It is one of the pillars of the democracy, one of the main wheels of the democratic Engine.

Press/Media should be highlighted and take cognizance of issues which hold a longer national importance rather than trivial issues which are entertaining, specially such issue which are publicised only for commercial benefits.

6.2 Role of Media: An India Prospective

In India today, the media is big business, relying on corporate advertising and the spending of the middle class, and it is hard to claim that it is public good that reaches most citizens.

Democracy has enabled historically marginalized sections of society to become politically powerful through sheer numbers and effective grassroots mobilization; while the elite have tended to retreat from the political sphere. Economic growth has led to greater inequalities, while democratic growth has given a stronger voice to those who are suffering from those inequalities. Social media has helped people connect and express their opinion.

As per "Media: India, Democracy and the press" the media may do a good job of providing news to the estimated 300 million members of the Indian middle class. In fact, coverage of political issues tends to be quite good, but as long as over 700 million Indians are side lined from the media's gaze by their inability to conspicuously consume, the media's role as public service is severely limited." The same now stands covered and almost 500 million Indians are using social media.

6.3 Media in an Undemocratic state China: Communist Regime and Media

Journalist He Qinglian, in her book Media Control in China, Lambastes the communist party for its limit on press freedom. She describes Chinese Journalist as "dancing in shackles."

In china, two organisations within the Communist party, have the status of sacred cows, because, the top leaders depend on them to stay in power. The Organisation Department, responsible for appointing CCP (Chinese Communist Party) and government official, controls patronage. And, the propaganda Department responsible for the political content of the media, textbooks, books and movies, controls public opinion. Together with the internal security bureaucracies and the people's liberation Army these organisations constitute the control cartel, the linchpin of party power.

Corruption by local officials was also a fair game for journalists as long as they went after political figures in provinces other than their own i.e. the CCP (Chinese Communist Party) before 2004 when provincial leaders complained to the politburo and convinced it to ban this investigative reporting in their provinces. Anything related to individual leaders, the communist party, democracy political reform, protests, discussions in government meetings, the 1989 Tiananmen demonstrations, human rights, Falun Gong, religion, corruption at the top, Taiwan, Tibet, and other topics that the propaganda department considers politically sensitive because they could subvert party power, is forbidden. Mass protests such as the anti-Japanese student demonstrations in April 2005 or the winter of 2005 through 2006 demonstration by villagers in a certain province of Guangdong are blacked out. Chinese journalist who report on topics in the closed zone can find themselves fired or imprisoned for years on charges of subversion or revealing state-secrets. Censorship of the market oriented media relies primarily on old fashioned Communists Methods: Administrative oversight, personal appointments and self- censorship by carrier minded journalists.[8] Every publication must obtain a government license, and licenses are limited in number and monopolised by High Ranking, State Owned organisations[9]. Most commercial newspaper and magazines are part of media conglomerates headed by an official publication and supervised by a Government or party entity. The Chief Editors of the newspapers and magazines are appointed from above. The Chief Editor of Global Times, appointed by the editors of communist party of people's daily,

8 Ashley Esarey, "Speak No Evil: Mass Media Control in contemporary China," February 2006, Freedom House Special Report.

9 Hu Shuli "Let a Thousand Newspaper Bloom," project Syndicate, 20th February, 2005.

acknowledged, "if we veer too far away from General Direction of the upper level (party leadership), I will get fired. I know that," Strong Nation Forum, (Qiangguo Luntan), the Fiercely Nationalistic Internet Bulletin Board focusing on international issues is located on People's Web[10], a website owned and managed by People's Daily. Every publication and internet news sites has governed are party entity responsible for the contents of its news. Central Television reports to communist party central authority and television stations in provinces and cities report to local party authorities. The propaganda department has authority over the contents of the print media, television and radio, which also must be licensed by the General Administration of the press and publications and state Administration of Radio, film and television. The State Council Information Office is in charge of the content of internet news sites but as an agency much less powerful than the propaganda department, generally follows its lead. The ministry of Information Industry controls the internet including the blocking and filtering.

(Internet Censorship) Political optimistic had high hopes for the internet in china. As Xiao Qiang notes, because the internet is "an inherently free technology with the decentralised, end-to-end architecture" many people believed it would make Government Censorship impossible.[11] But in fact, the Chinese Censor have showed themselves highly capable of controlling internet content and people's access to information on the internet.

The daunting challenges of extending censorship to the internet have stimulated a burst of Chinese Technologies innovation. According to Harvard University's Brekman Centre, China operates the most extensive and technologically sophisticated system of the internet filtering in the world.[12] Filters installed on the internet backbone and the servers of the internet provider as well as on instant messaging client software reject searches using banned keywords and block out some overseas and local websites entirely. Chinese hackers in 2004 discovered the list of approximately taboo keywords and posted it on internet: 15 percent of the terms were about sex, the rest were about politics (5 percent of the key words were internationally related like, "Defend the Diaoyu Islands" and "sell out the country," in keeping with the party leaders' desire not to let ultra-nationalism get out of the hand).[13] In short, it can thus be very well concluded that in a

10 Renmin Wang at www.people.com.cn/, Last visited on 16.7.2018.

11 Xiao Qiang, "Testimony before the US/China Economy and security Review Commission," 5th June 2003.

12 "Internet filtering in china 2004-05", www.opennetinitiative./net/studies/china, Last visited on 10.7.2018.

13 China Digital Times, 30th August 2004, www.chinadigitaltimes.net/2004/08/, Last visited on 18.7.2018.

Communist Country like China, Media is just a puppet in the hands of the government and freedom of press, especially expressing free thoughts about democracy is strictly prohibited, of course one can possibly say that masses in China does not have access to information of their choice and they are generally drawn by the whims and the fancies of their leaders if not drawn then forced to follow their views and ideas. Citizens of an undemocratic world are more likely to be opinion followers and not opinion criticizes neither to they have the right to do so. Whereas in a democratic world e.g. in India, one has the right to criticise their own government including their policies, and the press and the media can act as pressure group for the government, perhaps force the government to not to indulge in nay activities which might harm the public interest by activating masses and legislation like Right to information Act can empower the media and masses to expose the intricacies of the government to public at large and thereby keep a check on corrupt practices.

6. Conclusion

Information is one of the most important aspects which have been shaping the future of governments throughout the history of mankind. Rulers have always enslaved the masters of "data" to consolidate their rule, either to instil fear and/or faith amongst the masses. However, the role of information or data has never been more important than it is today.

Just as described above, the Chinese government controls the media and decides what information it wants to feed into population. Similarly, bots and information cocoons are new strategic developments, where a targeted audience can be easily trapped in the agenda of agencies to manipulate the public opinion.

The pillars of democracy and democratic processes are not only dependent upon the strength and independence of the media institutions but with the advent of social media they are equally dependent upon the information and data that is available or is shaping the opinions of the subjects. Having an informed opinion, is a virtue of wise but most citizens are full of misinformation, it is east to spread a rumour and then to convince people with truth. Like every coin has two sides, even social media has its own downside and it may not create our bad habits, but it feeds them, and for one reason alone: money. Today is the age of rumours and social media being its hive. Most citizens have little information about politics and equally little avenue to improve their political knowledge. Still democracies do perform reasonably well. Government are often confronted with the opposition, not just it forms of political position, nut many agencies are at work to pull down the government an d/ or further their agendas. Often competing nations use

various agencies to destabilise the governments of their counterparts. These agencies in turn are responsible for opinion formation and creating a dissent. Earlier all such agencies had to work to execute their agendas through various political and social leaders. However, as each democracy does strive toward establishing the egalitarian welfare state; the uniformed collection of data and constant hammering of political agendas of the vested agencies have given a new paradigm to the present state of democratic processes. However, with the advent of social media creating a chaos in democracy which is always in the state of panic on account of healthy opposition parties has become easier. Hence an additional duty is now cast on the citizens i.e. beware of the information you read on the social media.

Indian Constitution and Right to Peaceful Protest

***Dr. Dipti Gala**

Abstract

This research paper is regarding the right to peaceful protest is interpreted along with the freedom of peaceful assembly, the fundamental right guaranteed and enforced in court of law under the part III of Constitution of India. It states the relevant provisions of the Constitution of India. The way in which the right to protest was exercised by people in the olden days and how now it is exercised. Right to protest used as a weapon for solving the grievances. Traditionally used in the non- violent mode and recently exercised by practicing and demonstration of violent activities. The right to protest to be used with certain restrictions. The role of policemen to stop the violent protest. Policemen while taking steps to stop such kind of violent protest sometimes uses excessive force in order to control the situation which leads to violation of human rights and dignity. For the misconduct on the part of policemen the state can be held liable. Remedies available under the various articles of the Constitution of India to the victim along with the justification. Overall the research states about the right to peaceful protect and the relevant articles in the constitution of India.
Key Words: Constitution of India, article, right, policemen, peaceful protest, violent, exercise, Fundamental right and violent.

Introduction

Freedom of peaceful assembly incudes right to assemble peaceful and protest, it is a fundamental right guaranteed in the Constitution of India through exercise of judicial activism by the court. As of now not only legislatures but also the court play role in making the laws by issuing the guidelines. These guidelines issued are treated as law until the proper legislatures are enacted on the subject matter. Earlier only legislature had the power to make the laws. The right of Freedom of peaceful assembly as right to protest can be exercised but is subject to some reasonable restrictions in the interest of the sovereignty and integrity of India, as well as peace and public order. It is rightly stated that peaceful assembly and protest is one of the crucial tool of public participation against any injustice done or any kind of grievances, it could be against the government as well. If the person while exercising this right crosses its limits then the appropriate authority can take reasonable action against the individual for example that can be a

* Assistant Professor , Amity Law School, Amity University, Mumbai, India.

policemen in case of violent protest. Again it is stated that the force applied by the authority to be as much as required excess will result into the violation of rights of the person exercising his right to peaceful protest.

In Indian Constitution gives its citizens freedom to practice any religion and culture upto the extent others rights are not violated. Person can wear whatever they want only point to take care is that basic ethics and social behaviour is retained. Person can support anyone and any ideology but not at the cost of national integrity and security. In the same manner citizen can protest against anyone and for anything, they can even protest against the government, but the protest should be peaceful and non- violent. Hence it is rightly said that India a Democratic country is abided by the rule of law and the Constitution, therefore constitution in its part three guarantees fundamental rights to each and every citizen of India, the freedom of speech and expression as well as freedom to assemble and form associations includes right to peaceful protests. It is ensured no citizen is denied these fundamental rights as it cannot be taken away by one except due process of law with reasonable justification. One should never ever forget, with the enjoyment of rights there comes the responsibilities as well. As it is rightly quoted that every right has a correlative or corresponding duty attached to it. The person is not supposed to enjoy his rights by violating others rights, that is strictly not permitted. The person is not allowed to protest if there is any security reason. In case if the person protests, when he is not allowed due to justifiable reason, then in that case the person can be detained by the respective authority and can be prosecuted according to the due process of law.

Although initially right to protest at the traditional period was not officially permitted, but was still practiced, and now due to judicial activism right to peaceful protest has become one of the fundamental right included under the head of freedom to assemble at a particular place, without arms and without creating any kind of nuisance or disturbing the rights of the other person.

Provisions of Constitution of India:

Fundamental Rights under part III of the Constitution of India:

The below given are the relevant provision:

The fundamental freedom that is guaranteed as under Article 19 (1) (a), 19 (1) (b) and 19 (1) (c) of the Constitution of India.

Article 19 (1) (a) states about the freedom of speech to all the citizens of India and therefore this provision ensures that the people could raise slogan, albeit in an orderly and peaceful manner, without harming anyone or using any kind of language that is offensive in

nature. This article is not only related to right to freedom of speech and expression, which is available to every citizen of India. It states that every citizen has a right to express his views and opinions with regards to any issues and by any mode to name a few through film, movie, mouth, writing and so on. This right cannot be exercised completely, law imposes certain reasonable restrictions to this right.

Article 19 (1) (b) states that every citizen has a right to assemble, but people can exercise this right only for the peaceful assembly and that to without any kind of arms and ammunitions.

Article 19 (1) (c) states that all the citizens have right to form association or unions. Again this right is with reasonable restriction.

Along with the rights there comes the degree of responsibility. Constitution of India clearly recognises these inherent, reasonable restrictions, clearly related to that particular purpose for which there is fundamental right.

One of the traditional way to express grievances is through direct action or we can say by peaceful protest. The history speaks that at the time of struggle for independence, the key weapon used for protest was peaceful assembly of the people, non- violent protest marches in the organised manner. In the olden times the protest was done in a peaceful manner. The practice of Satyagraha was adapted by Mahatma Gandhi. He had stated that democracy is the art and science to manage the physical, economic and spiritual resources of varied sections of the people in the interest of the common interest of all. Therefore in India as the democratic country, protests protest plays the most significant and essential role. The essence of Satyagraha was mode of protest in a non-violence manner. Thus thereafter right to peaceful protest is recognised as one of the fundamental right under the Constitution of India by Supreme Court through one of its judgement announced.

It was stated during those days that right to assemble and demonstrate protest by holding dharnas was the basic feature of a democratic system. The citizen of a democratic country like India has a right to raise their voice against the decisions and policies of the government or can even express their feeling of displeasure over the actions taken by the government on any of the subject matter of social and national importance. The government has to take into consideration such protest and see that any changes are required to be made in their decision and action taken, for the betterment of the nation and its people, it can be stated that government has to respect as well as encourage such kind of the rights, as this will give an opportunity to the people or citizens of the state to take part in decision making and there would be democracy in the true sense, if such kind of rights are

granted to the citizens. Hence right to peaceful protest was regarded as one of the fundamental right of the citizen.

The manner in which this right to peaceful protest is exercised by the people in the recent trend is not the same that was in the olden days. Violent practices are used by young people, who fights or causes damage in public places, actions involving deliberate destruction of or damage to public or private property are demonstrated by people in the name of the protest. And during this kind of practices, when the police tries to control such activities of the protestors to protect the public as well as private property, then the policemen's are also targeted by the protestors. This kind of practice and violent demonstrations by the unruly groups that has become so common, that the people have begun to see them as a supplement or in addition to democracy. To give an example Dalit's in India had demonstrated protest against dilution of schedule Cast/ Schedule Tribes Act, initially it was peaceful protest but later on got converted into a violent protest during which around four people died as well. All these kinds of demonstrations by the people force the police to take an actions in order to stop them by applying certain force. This in turn creates a negative feelings about the police people in the minds of the common people.

If we take a simple example of Kashmir, where there were number instances in which a group of people, who from a larger body on the basis of ethnicity, religion, or gender and provoke violence in the name of protest. In this kind of situations, the task of the police and law enforcing agencies becomes strenuous and exquisite. In the exercise of suppressing suck kind of violence or unlawful assemblies, the police has to manage or achieve its task with utmost caution, skilfully and with exactness.

Thus, on one hand, peace, law and order is required to be restored and simultaneously it is also to be taken care of not applying unnecessary force or force beyond required to stop these violent activities at the time of protest. Policemen are given compulsory training and they have under go for such kind of special training in order to deal with such kind of situations while they are performing their duties. Many a times it has been noticed that the policemen are not in position to handle such kind of situations and which leads to ugly and out of control and they fail to succeed in their task of maintaining peace and order. One of the reason of failure of the policemen is lack of training to the police personnel, to manage such kind of violent situations/environment and challenges to their authority.

In the cases where assembly is peaceful, the use of police force is not at all required. But if the situation is such that the group of people, who have assembled becomes violent, then it becomes a matter of necessity and the police person is justified in using some kind of

reasonable force being applied in order to stop such kind of violence or disturbing activities of destroying public life and property and maintain peace, law and order in the state, which is actually expected from the policemen in performing his duties. The police can apply force in the form of lathi charge.

However in order to bring the situation under control, when the police applies some force and in applying so if the policemen crosses, exceeds or goes beyond the limits by using unreasonable force the condition in such scenario becomes more worst.

Section 144 of the Criminal Procedure Code empowers the magistrate to issue orders of restricting ten or more people from assembling in an area. In case the police starts stopping the people to assemble and form groups in the absence of any kind of orders by the Magistrate then that action would be illegal and state could be held liable for the violations of the persons fundamental right by misuse of the powers vested in the police, as the police can take action only after such kind of the orders are passed by the Magistrate on the situation, which requires to take away the person's right to assemble in the interest of the common public. In one of the case of Madhu Limaye in 1971 the Supreme Court held that the citizens right to peaceful assembly can be taken ways only, if assemble of people is the direct cause of any kind of perceived threat to peace and order in the state.

The history states that there are number of instances where the police has exceeded its authorities and have misused the powers granted to them. In 2012, thousands of protesters marched to Rashtrapati Bhavan to demonstrate their anger at the gang rape incident that took place, the prohibitory orders were passed, to bring down under lock central Delhi water cannons were used followed by lathi charg. If the policemen becomes cruel or does not stop applying force even after the situation is under control and continues to attack by applying force, then this leads to violation of not only human rights but also human dignity. There are many instances where the police has misused their power, for example in Maharashta, there was a case of Ratnagiri administration, whereby taking advantage of Section 144 of Code of Criminal Procedure, the authorities tried to prevent the peaceful protest against the nuclear power there are many more incidence where authorities in order to prevent their corrupt practice as taken advantage of aforesaid legislative provision like it was used to stop the Anna Hazare's anti- corruption campaign and many more.

This is the reason that human rights activists feel that policemen's are frequently abusing and miss using its powers of applying unreasonable force which is at a time not required at all, this in turn becomes a most serious threat to the rule of law. The person who is a

victim of such kind of inhuman treatment, his fundamental rights are violated.

The Remedies available for the violation Fundamental Rights guaranteed by the Constitution of India are as under:

The person whose fundamental rights are violated can file a writ petition against the State and the court can ward compensation to the victim under the below given legislations:

1. Article 32 of Constitution of India to Supreme Court.

This article 32 of Constitution of India gives the right to victim to move to Supreme Court by following appropriate proceedings for the enforcement of the fundamental right guaranteed as per part III of the Constitution of India. The Supreme Court has the authority to issue directions and orders or writs, writs such as habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be applicable to the matter before the Court for enforcement of the Fundamental Rights. Public Interest Litigation can be filled by one of the representative of the group of people, where group of people are affected by such wrong. Without prejudice to the authorities, powers of the apex Court, Parliament also may by law empower any other court to exercise within their local limit of its jurisdiction.

2. Article 226 of Constitution of India to High Court.

Every High Court, throughout their territories shall also have the power to exercise jurisdiction, to the issues of any person, individual or authority in appropriate cases in relation to the violation of the fundamental rights of the person can give directions and orders. Can also issue orders to any Government authority.

The Supreme Court had stated that there was a need to frame and issue guidelines on the issue of rights of citizen to peaceful protest in order to ensure that there is a balance between the rights of people to protest and at the same time maintain law and order in the nation.

The frequent use of prohibitory orders under section 144 of Criminal Procedure Code seems unfair and not rational on the part of the authorities and would unnecessarily restrict the fundamental right of the people to conduct a peaceful protest. There was a case filled by a non-governmental organisation, Mazdoor Kisan Shakti Sanghatan, they had opposed to the repeated use of prohibitory orders by the Delhi Police under the above mentioned provision of law, by stating that it almost wholly declared the whole Central Delhi as a restricted area for organising and conducting any public meeting, dharna or peaceful protest. As given in the sub-section 4 of the Section 144 of Criminal Procedure Code, such kind of prohibitory orders can be issued only

for the maximum period of two months. Hence, the Delhi Police in order to have continuity of the prohibitory orders adopted an idea of getting issued the same orders one after the other repeatedly. This legal provision has become a regular based tool used by police daily in their work. These kind of orders are in fact passed by the local magistrate only if he foresees any kind of danger to life of people or a disturbance of the public peace, or wants to remove any obstruction, nuisance or injury to any person lawfully employed. In this situations, the magistrate may ask the authorities to stop the people demonstrating protest from doing certain acts which may lead to danger. Blocking of road routes at the time of peaceful public protest is allowed, if it done with the permission of the state authorities as this king of blocking routes is not considered as an absolute restriction, in these kind of cases the police authorities can make an alternative routes for the smooth movement of the traffic. In addition to this it is stated that if the police authorities are unable to find the substitute route to divert the traffic in that the permission grated could also get cancelled by the state authorities. As the freedom of assemble and peaceful protest guaranteed by the constitution is with reasonable restriction over here in this matter to maintain public order, which includes maintenance of traffic as well in the area concerned has to be given priority over the individual's right to peaceful protest. The welfare of the state always prevails over the individuals rights. The rights of public in general are given more importance then individual's rights getting affected or violated by it, and the same cannot even be practiced at the cost of causing damage to any person.

In the context of above research, it is justified by stating the below given points, that the court is right in granting or awarding compensation to the victim of violation of human rights and human dignity, where the policemen applying excess force then required in order to stop the protest made by the group of people and maintain law as well as order. By doing so it has to be taken care that neither the injustice is done to the rights of people nor the public as well as property is affected by such protests and demonstrations. It is because of the because of the right to protest, most of the freedoms came into practice by the people and now there exists the liberal democracy.

1. It is clear, when the un-necessary force is applied by the policemen it is a misconduct on his part and violation of the fundamental rights of the victim and this gives rise to a liability not only under criminal or tort law but also under public law.
2. Pecuniary compensation can be awarded for such a violation of fundamental right i.e. right to assemble and right to peaceful protest.

3. It is the state that will be held liable to pay the compensation awarded to the victim and not the police officer found guilty of misconduct by applying the doctrine of vicarious liability, master liable for the acts of the servant in due course of employment.
4. The doctrine of sovereign immunity will not be applicable in the case of violation of the fundamental rights of the person and therefore it cannot be used as one of the defence in public law.

Conclusion:

Through judicial activism it is stated that right to peaceful protest is covered as a part of fundamental right. The right to peaceful protest cannot be taken away from the citizens, but simultaneous the protest and demonstrations should also not be allowed to that extent, where it is going to disturb the others rights and paralyse the life of the civilised society. This right can be exercised by an individual or group of people with certain reasonable restriction. If there is violation of the individual's right to protest, then such a victim can file a petition against another person or government as the case may be and the respective court where the petition is filed has an authority to pass an orders and compensation can be awarded to the victim. The remedies for violation of fundamental rights are available under the provisions of the Constitution of India. To conclude it is truly and rightly said that peaceful and non-violent protest is like a democratic right of the people. The innovative ways of peaceful protest has been successful but not completely. For example the Nirbhaya Movement, 2012, where the people had demonstrated protest against injustice and the incident of gang rape at Delhi, the protest was successful as the government at the centre and states announced many steps to ensure that the women's are safe. On the other hand where the students had gone on strike to demonstrate protest in 2015 at Delhi, against the appointment of the chairman of the film and television institute if India, as he lacked the requisite credentials, there was clashes between the students and the police. After about 150 days of agitation being done finally students gave up and stopped the further protest and there was outcome of the protest.

Suggestions:

Innovative modes to protest peacefully:

The traditional modes used at the time of Gandhi were Anshan's, rallies and dharma's, these protest were slow, and they require lots of patience and time in order to get some fruitful results out of it. These kind of old ways of protest are less effective in today's modern era, where people have become more strong, powerful and corrupt. Hence there was urgent need to think about new ideas and bring creative

modes of peaceful protest, such kind of mode which could easily attract the attention of media, through media large number of people and then finally the concerned authorities.

The below given are some of the new ways of peaceful protest:

1. Through Public Speeches.
2. A group of people filling petition.
3. Wearing of black colour ribbon on hand or black colour clothes.
4. Reciting slogans.
5. Distribution of Leaflets and pamphlets.
6. Displaying portraits.
7. Painting the pictures and demonstrating.
8. Campaigns on social media.
9. Switching of lights.
10. Bike rally with flags and posters
11. Rally with candles lighted and demonstration of banners as well.
12. By not attending functions, weddings, parties and gathering of a corrupt public officials and political leaders.
13. Protest through the means of radio, television or newspaper.
14. Protest by strike.

Though there are few mentioned above and more additional ways of peaceful protest, predicting the effectives of protest by innovative ideas is also difficult. It's not easy to directly link the actions of demonstration taken and based on that the bills are getting passed or changes are made in the laws.

Reference:

1. M.A. Rashid, Right to peaceful protest is a fundamental right.
2. Anita Thakur & ors. Verses Govt. of J & K & Ors, 2016, SCC,814.
3. The Indian Express dated 4th December, 2017, Guidelines needed on right to protest by Supreme Court.
4. The Economic Times by Avinash Celestine, 6th Jan, 2013.
5. Aparna Shekhawat, Democracy and Protest – an interlinked phenomenon, IOSR Journal Of Humanities And Social Science (IOSR-JHSS), Volume 9, Issue 5 (Mar. - Apr. 2013), PP 59-63.

Hamas in Palestine: Role and Future

***Dr. Ali Muhammad Bhat**

Abstract

Political discourse of world is based on cultural and regional alliance for economic corporation particularly in Middle East. Such an alliance or setup gave birth to resistance in Palestine with direct dependence either on Saudi block or resistance axis. When PLO supported by Saudi –US alliance failed to achieve its objective, Hamas emerged as a new hope for Palestinian people. Hamas ideologically looks very conservative obvious from its charter but changed after achieving a landscape victory in 2006 elections and even transformed tune of its leadership at international level. In this paper an attempt has been made to analyze available material, initiated with the Zionist ideology, writers on Palestinian problem with main focus on dramatic advent of Hamas and its role in solving the Palestinian conflict along with its future role. Analytical method is applied to analysis the material available in bulk with different thought and opinions about Hamas. It becomes necessary to analysis almost whole available material by evaluating it and interpret it on logical grounds so that the piece of research may act as bridge between different people of minds sets to research on positive and humanistic conclusions.

Keyword: *Zionism, PLO, Hamas, Foreign Policy, Political Entity***.**

Palestine is a land claimed by all Semitic religions but became a bone of contention between Muslims and Zionists. Palestine, historic region, the extent of which has varied greatly since ancient times, situated on the eastern coast of the Mediterranean Sea, in southwestern Asia. Palestine is now largely divided between Israel and the Israeli-occupied territories, parts of which are self-administered by Palestinians. After the emergence of Islam till decline of Ottoman Empire in mid-20th century, Muslim have hold over Palestine region. But situation changed when through British mandate UNSC passed a resolution to settle the Jews in Palestine along with Muslims and Christians as their home land. Actually this decision paid benefit to Zionist Jews only. They brought Jews from all over the world and settled them by force in the Promised Land. The aboriginal Jews were living with Muslims and Christians peacefully. Zionist, Theodor Herzl (1860-1904) conceptualized the idea of Jewish State in Der *Judenstaat* (The Jewish State, 1896), followed by the formation of the World Zionist Organization. The summoning

* Member/In-Charge, Islamic Research Academy, Brakpora 192101, Anantnag, Srinagar, Jammu and Kashmir, India.

1 Nur Masalha, *Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought, 1882-1948* (Washington, D.C., Institute of Palestine Studies, 1992), 14.

of the First Zionist Congress in 1897 in Switzerland, consequently summarized on the exclusive right on Palestine.

"We cannot allow the Arabs to block so valuable piece of historic reconstruction. … And therefore we must gently persuade them to "trek." After all, they have all Arabia with its million square miles.… There is no particular reason for the Arabs to cling to these few kilometers. "To fold their tents" and "silently steal away" is their proverbial habit: let them exemplify it now".[1]

A perfidy document was sign as Constantinople Agreement in 1915 between the French and Britain (Russia too became its part, to gets its share in Turkey) for the division of Ottoman Empire and thus endanger Palestinian lives.[2] Palestine revolted and pressed hard to Britain to live up with 1915-16 agreement and with covenant Article 22-4 of League of Nations which comes up with the establishment of an independent Palestinian State.[3] In 1934 Palestinian approached to British High commissioner for "…the formation of a Legislative Council as a first step towards Palestinian self-government planned in the mandate."[4]

British decision was throw down the gauntlet by Palestinian people which gave rise to many organizations. Palestinian people searched new options to counter Israel's aggression, target killings, sporadic attacks, obliteration of Palestine houses and colonial constructions paved way for the emergence of Hamas. Andre Nusse that "the main problem for the Muslims to resolve is existence of the Jewish state of Israel in the middle of the Arab-Muslim world. It constitutes a constant reminder of the weakness and deep crisis of the Islamic *Ummah* that does not have the strength to get rid of it……, all Muslims have the duty to fight the Jewish enemy for the independence of Palestine which is their right."[5]

Among the earlier organisation PLO was the leading secular front working for the liberation of Palestine. But the situation worsened when they made deals with Israel and the people last hope with them. Among the earlier organization which took cause into hand was PLO but with time, people of Palestine feel exhausted with its work culture and policies of negotiations.[6] People searched for new options to liberate

2 Harry N. Howard, *The King-Crane Commission: An American Inquiry in the Middle East,* (Beirut: Khayats, 1963), 123, Cathal J. Nolan, ed. *The Greenwood Encyclopedia of International Relations: A-E*, (Greenwood Publishing Group, 2002), 350.

3 Mallison, *"The Balfour Declaration"* in Abu-Lughod (Ed.), *Transformation*, (Evanston: Northwestern. University Press, 1971), 97.

4 Barbara Kalkas, "The Revolt of 1936: A Chronicle of Events," in in Abu-Lughod (Ed.), 237.

5 Andrea Nusse, Muslim Palestine : Ideology of Hamas (London: Taylor & Francis Ltd, 1999), p. 21.

6 Michael C. Hudson, Palestinians and Lebanon: The Common Story, Journal of Refugee Studies Vol. 10. No. 3 (1997), pp. 243-49.

Palestine, so in midst all Islamic groups made a corporation under the leadership of Shaikh Ahmad Yassin entitled as "HAMAS".[7] In Arabic, the word "Hams" means zeal, but in the Palestinian context, it is used for Islamic Resistance Movement as an alternative to the PLO started through first Intifadah, in 1987. Hamas is the real hope for Palestine people to overcome Zionism, who applied every kind of brutal tactics to uproot Muslim inhabitants of the Sacred Land.[8] A sequential wave of events seems to push the issue of Islamic movement on top of social, political and academic agenda. Hamas being ideologically very strong serving all aspects of Palestinian people. According to Dr. Hisham Sharabi that, *"Hamas is the new hope for the liberation of Palestine a true fidai movement since the outbreak of first intifada"*[9]

Hamas consider that, religion (Islam) as base and International law is a tool to serve the cause of liberation which offer them right to fight for their survival and inclined for peace if the enemies wish to decide the matter of dispute peacefully. The Islamic concept of struggle evolved in response to certain historical circumstances reflecting a series of alleged divine interactions between God and the Prophet (pbuh).[10]

Hamas cacophony from all sorts of secular and socialist outlook and considered itself bound to Islamic Teachings. Its evolution through time provides the conceptual framework to understand the ideology and politics of Hamas.[11] From 1978, it stich itself to mosque building in order to bring younger generation into their influence, providing them guidance and strengthening their ideology. They Ideology and religion were preached at clubs, schools and universities and in Mosques. An entire generation was encouraged and mobilized to understand Jewish (Zionist) plots against the Palestinian nation. Sheikh Yassin (influenced by the ideology of Muslim Brotherhood and its work culture) a prolific speaker in the Gaza Strip, draw large gatherings around him. His conviction, and motivational power brought students close to Islamic education and understand the meaning of struggle.[12]

Sheikh Yassin set up an Islamic Society earlier in 1976 in order to preach Islamic beliefs and perform social, charitable, and educational and other religious works in the towns and countryside alike but 1978, realized a need of more organised, well structure with members from

---

7 *Hamas is the acronum of Harkat al Muqawamaat al Islamiayyah*

8 *Hroub, Khalid, Hamas: Political Thought and Practice, (Washington: Institute for Palestine Studies, (2000),* 5

9 *Sharabi, Hisham, That The Palestinian Entity May Be a Democracy, Not A State (Run) by the Security Services", Al Quds al- Arabi (London) 8th December 1993*

10 *Majid Khadduri, War and Peace in the Law of Islam, (London: The Johns Hopkins Press, 1955),*34

11 *Hroub, Khalid, op.cit,* p.12

12 The Charter of Allah: The Platform of the Islamic Resistance Movement (Hamas), 2-5

whole society or organization. It is said that, Israeli government didn't interfere in its matters as a tactics to counter PLO, but it is nothing than a false propaganda against Hamas.[13] Earlier than this, Shaikh Yassin established the Islamic center in 1973 (al-Mujamma al-Islamia) which allowed all the religious organisation to be dominated by the Brotherhood, this in turn permitted for a more united Brotherhood of Gaza Strip.[14] The success of Revolution of 1979 in Iran provided the political and ideological methodology for the movement. Zaid Abu Amr describes it, doing so in two specific ways: Zakat (alms giving) which helped thousands of needy families. "Waqf" the brotherhood had control of this religious endowment which gave it significant access to the population and the use of Mosques and universities for socio-political activities.[15] They also utilized the work culture and methodology of other revolutions happened around the world in order to boost their work and collect and use maximum resources for influencing the world politics.[16]

However its socio-economic design is the best pattern for the recruitment of cadres. These include schools, kindergartens, clinics, educational centres, Qur'anic lessons, mosques and help to needy in various fields were established.[17] According to John Kifner that, "Thus a poor Palestinian family in the West Bank or Gaza can send a child to a Hamas school on a Hamas bus, use a low-cost Hamas medical clinic, play soccer at a Hamas sports club and perhaps rely on a quota of Hamas rice" easily.[18]

In the course of both Intifadas (1988-93 and 2001-2006), Hamas gained momentum, even to West Bank to become the dominant fundamentalist organization in Palestine. Hamas defined its highest priority as offensive struggle for the liberation of Palestine and the establishment of an Islamic Palestine 'from the Mediterranean Sea up to the Jordan.[19]

---

13 Milton-Edwards and Farrell, Hamas: The Islamic Resistance Movement, (Cambridge: Polity Press, 2010).53.

14 Jeffrey Herf, *Nazi Propaganda for the Arab World, (*New Haven: Yale University Press, 2007), 37; David G. Dalin and John F. Rothmann, *Icon of Evil: Hitler's Mufti and the Rise of Radical Islam* (New York: Random House, 2008), 139-41.

15 Zaid, Abu-Amr, Hamas: A Historical and Political Background, Journal of Palestine Studies, Vol:4, (1993) 5-19, Hillel Frisch, "Hamas: The Palestinian Muslim Brotherhood," in The Muslim Brotherhood: The Organization and Policies of a Global Islamist Movement, ed. by Barry Rubin, (Macmillan: New York, 2010), 90-91.

16 Hamas Covenant, Article 22. See: http://www.yale.edu/lawweb/avalon/mideast/hamas.htm.

17 Muhammad Muslih, The foreign Policy of Hamas, (New York: Council on foreign Relations, 1999), 34-36.

18 John Kifner, "How Hamas Rose from Wild Card to Power," *New York Times* (Late Edition (East Coast). 29 January (2006),4.

19 Ze'ev Schiff and Ehud Ya'ari*, Intifada,* (New York: Simon & Schuster,1989), *87.*

Hamas intifada design was highly organised to liberate the people from the oppressors' desecration, filth and evil.[20] It has an appeal and thought to continue through its social network approach inspired by Ikhwan's social-welfare creativities."[21] Whole credit goes to its structure while emphasizing extraordinary implication on consensus and consultation in the decision making process.[22] Hamas' interpretation of human purpose in the society, is to be God's representative on the earth as Shaikh Yasin stated:

"God has created humans being and provided them with a brain, thus increasing His value above that of other creatures…so that he can be vicegerent [Khalīfah] of God on earth. God has made him a waqil [authorized gent] to do his work just as a merchant appoints a trustee to do his business in a different country".[23]

In order to have much influence on the society Hamas in its article 15 of Charter shaped its ideology Islam verses Zionism within the region and justifies its struggle as divine obligation"[24]

Same view with stronger appeal was reinforced in a booklet distributed by Hamas in early 1990 which stated:

"Our struggle with the Jews is a struggle between truth and emptiness-i.e. between Islam and Judaism".[25]

Hamas is committed to the establishment of a religious state based on Palestinian nationalism and is unambiguously Palestinian movement loyal to Allah and its commitment is to Islam as a way of life.[26]

According to Gunning, Hamas elucidates that: "He who has created the universe has also prescribed a Shari'ah for voluntary actions. ……. Revelation was send to preserve humans' freedom and to protect humans against enslavement by secular systems."[27] It played its role to sow seeds of revolution through socialization process and establishment of a religious state which G.W.F. Hegel states as a religious state based

---

20 *The Charter of Allah*, p.3.

21 Christy Flournoy Swiney, "Ideological & Behavioral Metamorphoses: A New Charter for a New Hamas" (Master Thesis, Oxford University, 2007), 22.

22 Khaled Hroub, *Op.cit.* 58-59 .

23 Gunning, *Hamas in Politics*: Democracy, Religion, Violence, (London: Hurst and Company,2007), 63 .

24 *Reuven Firestone, Struggle: The Origin of Holy War in Islam, (Oxford: Oxford University Press, 1999),* 22.

25 *The Charter of Allah: The Platform of the Islamic Resistance Movement (Hamas), Translated and annotated by Raphael Israeli, (Jerusalem: Harry Truman Research Institution, The Hebrew University, April 25, 1998,* 7-8.

26 The Charter of Allah: The Platform of the Islamic Resistance Movement (Hamas), p.6.

27 Ibid, 65.

on divine will in which everyone enjoy its freedom and achieve true universal identity.[28] For Hamas, the Islamization method is suitable freedom, political pluralism and division of power but an antithesis of Western political philosophy.[29]It will be achieved only when children will be nurtured according to values of religion.[30]

Hamas shapes the psychology of its people by the Islamized thought wants to provide dissatisfied masses a sense of belongingness and a sense of strength and freedom from slavery which was caused by continuous raids by Israel in West Bank.[31] Hamas ultimate goal is an ideological state, consider land of Palestine as an Islamic Waqf (endowment) throughout the generations. Hamas describe liberation of Palestine in terms of the Palestinian, the Arabs and the Islamic world.[32] Each of these has a role to play in the struggle against Zionism to liberate an Islamic Waqf (endowment) land. It is a sacred duty of all Muslims to liberate it and cannot be sold to Israel.[33] Hamas believes that it must spread the spirit of struggle among the Ummah, clash with its enemies and join the ranks of the struggle.[34]

Hamas operates at different phases, having organic inter-relationship between nationalism and struggle. The ideology and nationalism of Hamas reflect the level of religious commitment of its adherents or cadres towards the liberation of Palestine. Hamas believe that, "A person is willing to die for his cause if it's a question of his very existence."[35]

The structured and democratic side of the Hamas, educate its members to adhere to principles of Islam and to struggle for Allah in order to liberate their homeland. Since late 1980's viewed the world primarily in terms of a hostile reaction due to the hegemonic policies advanced by U.S. and Zionism as a civilizational struggle which Hamas define it a religious conflict against crusading forces.[36]

Hamas acted more pragmatically in order to attract greater alliance for its cause. Hamas foreign policy now rely on its political Bureau to

28 G.W.F. Hegel, in Gunning, *Hamas in Politics*, 85-86.

29 Hovednak, Hamas in transition: the failure of sanctions". *Democratization.* Vol. 16, No. 1 (2009), 63-65 .

30 G.W.F. Hegel, in Gunning, *Hamas in Politics*, 90.

31 Meir Litvak, *Islam and Democracy in the Arab World* (Tel Aviv: Hakibutz Hameuchad, 1997), 12-15.

32 The Qur'an, (Riyadh: Saheeh International, 1997), 21:18.

33 *The Charter of Allah,* p.7.

34 *Ron Macintyre, Palestine-Israel: Conflict in the Modern Holy Land,* (Auckland: Macmillan, 1997), 4.

35 Joyce M. Davis, *Martyrs: Innocence, Vengeance and Despair in the Middle East,* (New York: Palgrave Macmillan, 2003), 70, *The Charter of Allah,*8.

36 Ibid, 20-21.

maintain good relation with world. Prior to 1987 Palestinian Intifada (uprising), a military agenda was part of the Hamas strategy. After first and second Intifada the organization emerged on more realistic lines divided into three bases, inside and outside occupied territories and different constituencies that allow the movement certain latitude in its discourse.[37] The outside political Bureau (al-Maktab al-Siyasiya) is headed by Khalid Meshal a soft spoken as supreme political leader responsible for daily affairs, fund raising and international relations of the organisation. Appointed by Shura Council they form the committees to regulate the charity organizations, educational Institutions, internal affairs and military.[38] Inside leadership is divided into two regions, Gaza Strip and West Bank (but after clashes with Fatah abandoned its activities in West Bank). Their main function is to control over all local units, daily Dawah work and security. Between these two branches, Gaza leadership has a strong ground in the overall structure of the organisation. Khalid Hroub describes the two branched leadership inside Palestine as;

"They control the muscles of the movement" while the outside leadership "control the financial resources and the external contacts".[39]

Some scholars like Montgomery andPetty John consider Hamas a liberal, democratic organization emerged due to deprivation of rights of generations of Palestinians. The corruption of secular nationalist group fashioned the popularity of Hamas in Palestine.[40] Hamas' organizational structure is fairly complex but democratic.[41] Within Hamas authority depends more on the rational legal religious nationalism than monarchial design.[42] Gunning and Hovdenak states its executive mechanism as;

"Official authority inside Hamas is achieved through elections.[43] Its grading are small 'cells' headed by cell leader followed by members. The provincial shura councils designate representatives to a national Shura Council, which in turn selects the Executive Council or Political

37 *Jereon Gunning Op.cit.* 106.

38 Khalid Hroub, *Op.cit.* 118.

39 Sharabi, Hisham, The Palestinian Entity May Be a Democracy, Not A State (Run) by the Security Services", Al Quds al- Arabi. London, 1993), 162.

40 Milton-Edwards, B. *Islamic Politics in Palestine* (London: IB Tauris. (1996), 35; A Knudsen 'Crescent and Sword: the Hamas Enigma' *Third World Quarterly* 26/8, (2005), 1377-1383.

41 Frankel, R.D. 'Keeping Hamas and Hezbollah Out of a War with Iran' Center for Strategic and International Studies The Washington Quarterly 35/4, (2012), 53-65; Hovdenak, A. 'Hamas in transition: the failure of sanctions' *Democratization* 16/1, (2009), 59-80.

42 Dana Williams, Max Weber: Traditional, Legal-Rational, and Charismatic Authority, (Ohio: The University of Akron, 2003), 1-11.

43 Gunning, Op.cit, 98.

Bureau with equal powers having final authority over policy decisions, regulates the strategy and formalize objectives of the organisation and implement the decisions of the Shura Council."[44]

Gulf war became a bone of contention between PLO and some Arab states which provide chance to HAMAS to get financial support.[45] Among Gulf States Qatar accepted and supported Hamas, allowed its leadership like Shaikh Yassin and later Khalid Masha'al on diplomatic grounds. This all happened to overcome Iranian influence as Emir Hamad Ben Khalifaal Thani said;

"Are you willing to expel them to Iran where it will be very difficult to control their activities, or are you willing to send them to Syria, which is yet to be regarded a friendly country of Iran by US and Israel?"[46]

Hamas' has ability to survive as a state government and admitted the flourishing relations between them. The budget allocated in 1991 by Iran to support the Palestinian Intifada was used to finance political campaigns and the activities of the Martyrs Foundation. The 1990 was a formative period for Hamas and had develop its relation almost all the Gulf States even Saudi Arabia supported financially. Even though, political relation between Iran and Hamas strengthened after PLO signed Oslo Agreement ***"land for peace"***. Opposition to treaty inside West Bank and Gaza Strip raised support for Hamas. Various Arab countries allowed Hamas to establish it offices in their lands like Jorden, Syria and Lebanon. Syria and Qatar willingly supported Hamas and Syria even cut-off all its relation with Israel. One occasion Bashar al Assad of Syria enthralled upon Arab states to list Israel as a "terrorist country" in a Session of the Arab Summit for Economy, development, and Social Affairs held during January 19 to 20, 2009 in Kuwait City and to support the movement.[47]

The Jordanian support for Hamas was remarkable and allowed officers of Hamas to visit of Jordanian General Intelligence Bureau in Amman even endorsed Hamas to establish its intelligence and Political Bureau office in Amman around 1992.[48] Some top members of Hamas like Imad Alami and Musa Abu Marzuq were granted permanent residence[49] but its office was later on closed in 1999.

44 Ibid, p.100.

45 Hovednak, 'Hamas in transition: the failure of sanctions' *Democratization* 16/1, (2009), 69-88.

46 Kumaraswamy, P.R. Israel, Jordan and the Masha 'al Affair. *Israel Affairs.* 9/3, (2003), 121.

47 Ziad, A.A. Hamas: A Historical and Political Background. *Journal of Palestine Studies.* 22/4. (1993: Summer, 16).

48 Ze'ev, S. & Ya'ari. *Intifada: the Palestinian Uprising: Israel's Third Front.* (New York: Touchstom Books, (1989), 234.

49 Kristianasen, W. Challenge and Counterchallenge: Hamas's Response to Oslo. *Journal of Palestine Studies.* 28/3, (1999), 21.

The political leadership of Hamas believes in the justice of its actions and in the obligation to protect the Palestinian people. Hamas leader Ismail Haniyeh, argues, for example, in relation to Yasser Arafat's statement that suicide bombers were harmful to the Palestinian cause[50]. Hamas argued that its response is to Israeli aggression, atrocities and hasty actions, of which the most noticeable attempt by Israeli agents in Amman on 25 September 1997 was, to assassinate Khaled Mish'al. In order to appease King Hussein, Sheikh Ahmed Yassin, the founder of Hamas, was released in exchange for two Mossed agents detained by the Jordanian police.[51]

On military front, Hamas and Hizbullah relationship developed in 1992 when Hizbullah showed willingness to protect Hamas members, when hundreds of Hamas members were exiled by Israel to Lebanon as a vengeance for killing an Israeli policeman.[52] Western scholarship focus on the structure in which Hamas and Hezbollah operate rather than on their ideas and values.[53] Iran supported it financially and provided weapons and training sessions in Iran reroute via Syria, and this grand alliance for Hamas facilitated a quick and safe passage.[54] The bonds between Hamas and Hezbollah, Syria and Iran grew stronger during the second intifada and even after winning the elections in Palestine.[55] Syria served a strong ally for Hamas in the region up to 2012 by providing infrastructure for its politico-military operations and propaganda activities. After two 2012 Hamas moved its Office to Qatar since civil war broke out in Syria and seems apparent cracks in their relation.[56]

---

50 Beverley Milton-Edwards, Islam and Violence in the Modern Era, (New York: Palgrave Macmillan, 2006), 58.

51 Abu Ala Ahmed Qurie, Beyond Oslo, The Struggle For Palestine, (I.B.Tauris & Co Ltd, 2008), 24.

52 Frankel, R.D. 'Keeping Hamas and Hezbollah Out of a War with Iran' Center for Strategic and International Studies The Washington Quarterly 35/4, (2012) 55, El Husseini, R. 'Hezbollah and the Axis of Refusal: Hamas, Iran and Syria' Third World Quarterly 31/5, (2010) 803–815.

53 Bahgat, 'The Gaza War and the Changing Strategic Landscape in the Middle East: An Assessment' Mediterranean Quarterly 20/3, (2009), 63-76, Bar, S. 'Bashar's Syria: The Regime and its Strategic Worldview' Comparative Strategy, 25/5, (2006), 353-445, Salloukh, B.F. 'The Arab Uprisings and the Geopolitics of the Middle East' The International Spectator 48/2, (2013), 32–46.

54 https://www.thepolicycircle.org/brief/foreign-policy-brief-the-middle-east/acessed on 28/4/2016.

55 Thanassis Cambanis, A Privilege to Die: Inside Hezbollah's Legions and Their Endless War against Israel, (New York: Free Press, 2010), 267-272.

56 *Yitzhak Santis,* Hamas: Its Ideology And Record, Jewish Community Relations council, San Francisco 2008, updated July (2014),5.

Hamas has approved the continuation of the 'struggle' against Israel at all fronts militarily as well as at international level by maintaining good relations with Some European countries.[57] Its landslide victory proves it as a legitimate political party.[58] Jeroen Gunning emphasises; 'the international community must find a way of working with Hamas – or give up on the goal of achieving a two-state solution.'[59]

After Hamas victory member states of the Quartet (2002; US, EU, UN, and Russia) debated how to deal with the new and unexpected situation.[60] UK Foreign Secretary Jack Straw said; 'The international community has responsibility to accept the outcome of fair and democratic election, but in this case Hamas has a duty to understand that democracy means of rejection of violence.'[61]

Hamas landslide victory has changed the notion regarding Hamas as terror group. After 2006 election, European countries were divided[62] over Hamas on its legitimacy and some countries started secret communication between influential and dominant Hamas leadership and government officials. These contacts put out of order earlier resolutions for the European Union countries to boycott the movement[63] because of severe pressure from USA and Israel. Therefore huge election victory in 2006 witnessed a growing number of meetings at public and private levels with Hamas officials which were held in places like Doha, Beirut and Damascus.[64]

The British parliamentary committee engrained a call, to end the boycott of Hamas[65] because the policy ruined the human behavior and

57 Ronald R. Macintyre, 'Jordan', In International Security and the United States: An Encyclopedia, (Westport: Praeger Security International, 2008), vol.1, 419-20.

58 Nathan Brown, "Aftermath of the Hamas Tsunmai," Carnegie Endowment for International Peace, (2006), 11, https://carnegieendowment.org/files/BrownHamasWebCommentary.pdf, retrived on January 10, 2018 .

59 Esra Bulut Aymat, European Involvement in the Arab-Israeli Conflict, (Paris: Institute for Security Studies European Union, 2010), 8.

60 Matthew Levitt,'Hamas's Ideological Crisis', Current Trends in Islamist Ideology, vol. 9, (2009), 86-88, Council of the European Union, Council Conclusions (6039/07), February 2007, 15.

61 Mandy Turner, Building Democracy in Palestine: Liberal Peace Theory and the Election of Hamas, (is a Research Fellow in the Department of Peace Studies, University of Bradford) UK. Democratization, 13/5, (2006), 739–755, John Leicester, 'Foreign Leaders Shocked by Hamas Win', (Associated Press, 2006), 201-215.

62 Sheera Frenkel, 'Israeli document: Gaza blockade isn't about security', *McClatchey Newspapers*, 9 June 2010.

63 CRS Report RL33476, Israel: Background and U.S. Relations, by Jim Zanotti and CRS Report RL34074, by Jim Zanotti, The Palestinians: Background and U.S. Relations, Andrew Rettman, "Israel: EU Support for Palestine Is 'Biggest Challenge,'" euobserver.com, January 5, 2015, https://euobserver.com/foreign/127093.

64 Al-Bayan newspaper, UAE, 7/11/11.

65 Sheera Frenkel, 'Israeli document: Gaza blockade isn't about security', *McClatchey Newspapers*, 9 June 2010.

failed to bow the Hamas and Palestinian people. The Elders group, an international body made up of Kofi Annan former General Secretary of UN, Former US President Jimmy Carter, South African Archbishop Desmond Tutu and Former Ireland President Mary Robinson urged Israel to have direct talks with Hamas about its role in Palestine Conflict. Jimmy Carter's visit to region was considered unofficial recognition of Hamas.[66] Swiss policy of direct engagement instead of economic blockade with Hamas will help to build trust. Hamas need to maintain its relation with Swiss and use it as a contact card for maintain good relation with other European countries.[67]

However, from as strategic standpoint Hamas believes it would benefit from strengthening ties with Arab countries, particularly neighboring Jordan, Egypt and Saudi Arabia, which maintain good relations with the West and reinforce its legitimacy. Saudi Arabia and Iran are also vital elements in Hamas' politics on both financial and ideological level. The Gulf States particular Qatar, also provide moral and political support for Hamas.[68]

Hamas emerged as most effect player in the Palestinian Issue and has major voice at ground, active support of some neighboring countries like Qatar, Iran and Turkey. Turkey seems most effect weapon for Hamas after Gulf crises and has a dominant role in the Middle East. Turkey has backed up on Palestinian Problem even took initiative about solutions[69] and is trying to come out with peaceful solutions for Palestine problem.[70] Turkish foreign policy related to Palestine is based on reconciliation and trying to dissuade Israeli aggression against democratically legitimate elected Hamas government.[71]

Although Israel denounced Turkey's role but Turkish president came up with thought to rebuild ruined economy of Gaza"[72] through initiative of the Union of Chambers and Commodity Exchanges of Turkey (TOBB) with respect to managing an industrial zone on the border of Israel and the Gaza Strip.[73] According to Bulent Aras; "……

66 Harriet Sherwood: (http://www.theguardian.com/world/2013/jul/12/europe-hamas-contact-eu-gaza.

67 Esra Bulut Aymat, European Involvement in the Arab-Israeli Conflict, (Paris: Institute for Security Studies European Union, 2010), 28 .

68 Kessler, O. 'The Two Faces of Al Jazeera', in Middle East Quarterly, (Winter 2012), 53.

69 Goksel, O. "Assessing the Turkish Model as a Guide to the Democracies in the Middle East," Ortadoğu Etütleri, 4/1, (2012), 99-120.

70 Mensur Akgün, Gökçe Perçinoğlu,Sabıha Senyücel Gündoğar, (2009), The Perception Of Turkey In The Middle East, TESEV Publications, İstanbul, p.5

71 Turkey Prime Minister's Speech, 28 February 2006, www.basbakanlik.gov.tr.

72 Hisham Abu Taha, Arab News, Erdogan Offers to Mediate for Peace in the Middle East, Published — Monday 2 May 2005, http://www.arabnews.com/node/266288.

73 Bulent Aras, Turkey and the Palestinian Question, Brief No: 27, (January, 2009), 1-5

US Secretary of State Condoleezza Rice also defined the Erez project as "the initiative which would contribute to the regional peace."[74]

Hamas needs to devise its foreign policy on more pragmatic lines and according to needs of geopolitical scenario of modern times so that all the states in Middle East will move towards it. Instead of understanding the world view and current international realities, Khaled Mash'al on January 2006 in Damascus stressed that,

"Hamas will not succumb to international pressures to recognize Israel.: 'We are adhering to the liberation of Palestine and Jerusalem, the right of return, the evacuation of settlements and the option of armed resistance," he send a clear message to Israeli voters ahead of the March 2006 Knesset elections, Mash'al said: "there will be no peace or security amid the Israeli occupation."[75]

He vehemently said, that every agreement that is in favor of the Palestinian people and does not harm its rights will be acceptable to Hamas. In addition 'non-recognition of Israel does not mean that no steps will be taken for the peace process.[76] Mash 'al noted that Hamas will be willing to negotiate with the US and the EU, only on "no precondition" basis. Hamas uttered willingness to signing of a temporary long term peace treaty (Hudna) for solving Palestine problem.[77] This is evident in from his own words: 'We believe in operating in steps, gradually, and realistically. We can achieve our rights step by step and establish our state, on the condition that there will be sovereignty.'[78]

Inclination towards negotiations through EU and US without conditions is considered a good sign, which according to Khalid Amayeh means, "Hamas's original charter adopted in 1988, lost much of its credibility and most of its relevance after participation in elections. This cannot dictate behaviour of the Hamas leadership. It is called anachronistic, outdated and historical.....The acknowledgement of the National Reconciliation Accord is a clear indication of Hamas ideological concession and finally gradual acceptance of Israel."[79]

Hamas politburo Chief Khalid Mash 'al, confirmed somewhat pessimistically at the Arab League headquarters in Cairo in February

74 Bulent Aras, "Deposition of Nihad Awad," ,(Qur'anic Literacy Institute, CA 00C-2905, 2009), 58.

75 Ronald R. Macintyre, (2008), Op.cit., P.21.

76 http://www.telegraph.co.uk/news/worldnews/middleeast palestinianauthority/10974072/Hamas-leader-Khaled-Meshaal-lays-out-terms-of-ceasefire.html.

77 *al-Jazeera, (January 30, 2006); BBC Arabic, (January 31, 2006).*

78 *al-Jazeera, (January 28, 2006).*

79 Khalid Amayreh, Hamas Debates the Future: Palestine's Islamic Resistance Movement Attempts to Reconcile Ideological Purity and Political Realism, (Beirut: Conflicts Forum, 2007), 2-3.

2006 that Hamas "doesn't rule out recognizing Israel if rights of the Palestinian people accepted and if Israel agreed to completely end occupation of the West Bank, Gaza Strip East Jerusalem and departure to 1967 position."[80]

By implementing peace treaty Hamas will overcome difficulties encountered in terms of her commitment to its Charter and obstacles it is facing in pragmatic relations with Fatah, the US and its Arab neighbours.[81] Hamas asserted control over all Institutions of Palestinian Authority and make people dependent over their own authority though faced tough economic sanctions which gave rise to poverty and unemployment.[82] It has managed to survive in the face of unrest (Fatah/PLO boycott), economic pressures enabled it to adopt flexible options and responses, which have the ability to inspire sociopolitical motivation of the confined Islamic community.[83]

It is generally famous that Hamas's negation to recognize Israel is the main difficulty deferring Western recognition of the Hamas. The negativism prevailing about Hamas in the Western world is the false propagation "*Hasbara*" (propaganda) of Israel. The continuing silence over these issues is reflected in the movement's statements and speeches: the movement's election platform of 2006 and all other subsequent pronouncements, have made no mention of "the destruction of Israel"[84] So Hamas came out from the confines of ideological distress to ideological modification which serve for the movement as source of confidence for recognition in the Western world.

Israeli Psychological hostility is a jingoism, a total outcome of unconditional support of European Union and US to Israel at all international fronts at the cost of Palestinians.[85] These nations need to bring Israel by force on the negotiation table by cutting down every kind

80 Hamas's Plan for Governance turns the equation upside down," Muhammed Jamal Arafa, Feb. 14, 2006, www.alwihda.com (Arabic).

81 For instance, during the 1991 Madrid Middle East Peace Conference, the US State Department initiated contact with Hamas political leader – and US resident – Musa Abu Marzuq. For further reading: Shaul Mishal and Avraham Sela (2000), The Palestinian Hamas: Vision, Violence and Coexistence, New York: Columbia University Press.

82 International Crisis Group, 'Ruling Palestine 1: Gaza Under Hamas', Crisis Group Middle East Report No. 73, 19 March (2008), 21.

83 Kent Bob Huzan (2008), Politics of Islamic Jihad, University of Canterbury, 92.

84 Aziz Duweik, Speaker of the Palestinian Legislative Council, told the author, in an interview in early January 2006, that Hamas wouldn't remain hostage to past rhetorical slogans such as "the destruction of Israel." (Arabic).

85 Robert Malley and Hussein Agha, 'How Not to Make Peace in the Middle East', *The New York Review of Book*s, 15 January 2009, 3-4.

of military, economic and financial support. EU and the US will hardly be able to restrain the polarization of Palestinian population with tactic of supporting Israel[86] and isolating the democratically elected Hamas. It role is important internally to overcome corruption and internationally to serve as true representative of Palestinian people. Europe is faced with the difficulty of formulating a sustainable Middle East policy that will not cause long-haul frictions.[87]

Hamas is rooted within Palestinian nationalism but movement has stopped and ignored to openly oppose recognizing the state of Israel, but offered a temporary two-state solution based on the 1967 borders. Although Hamas's acceptance of a two-state solution is uttered as a temporary measure, defended ideologically through the Islamic concept of *hudna* (long-term truce), it implies an acknowledgment of Israel's existence.[88] As for previous agreements between Israel and the Palestinians, Hamas has said little, apart from its unconcealed denunciation of the Oslo accords, declared lifeless with the outburst of the second intifada in 2000.[89] But movement's willingness to join the PLO through PNC, implicitly means that it is ready to adhere to previous agreements too. Finally, the movement has adopted a change of strategy with regard to armed resistance, in fulfilling the Quartet's demand to renounce violence.[90]

Situation in Palestine is troublesome explode any time and engulf large population. Hamas realize such situation but the tranquility of UN and Muslims in particular about Israeli killings and Palestine affair is disturbing. The major voices about Palestine-Israel conflict around the world have faith in two nation theory for long-lasting peace in the region. In such a Situation, Hamas has to overcome its rigidity and discuss possible solution of the Palestine, with powerful Muslim countries in world particularly in the Middle East region. Hamas has to understand that Israel made inroads among fundamental Islamic Organizations and have hold on them. Moreover, Hamas is not in a position to defeat a nuclear state like Israel because Palestinian are themselves divided, on the right to authority over Palestine. For this, Hamas has to approve among the double model standard, one on

86 Sharon Pardo and Joel Peters, *Uneasy Neighbours: Israel and the European Union* (Plymouth: Lexington Books, 2010), 93-109.

87 ETH Zurich, CSS Analyses in Security Policy, CSS, 18/2 July (2007), 2-3.

88 Beverley Milton-Edwards and Alastair Crooke, "Waving, Not Drowning: Strategic Dimensions of Ceasefires and Islamic Movements," *Security Dialogue* 35/3 (September 1, 2004), 295–310.

89 Sara Roy, "Why Peace Failed: An Oslo Autopsy," *Current History* 101/65 (2002), 8–16.

90 Harriet Sherwood, "Arab Spring Uprisings Reveal Rift in Hamas over Conflict Tactics," *Guardian*, January 6, (2012), http://www.guardian.co.uk/ world/2012/jan/06/ arab-spring-hamas-rift-gaza.

Prophetic design in which all the Madinian citizens were give right to live peacefully within the borders of Medina. Second to divide Palestine by two nation theory model adopt in 1947 for the partition of India, for the final solution. Hamas future lies in overcoming the hardships of people within Palestine and in refuge campus across some Middle Eastern countries.

Renewable Energy Sources and Environmentally Sustainable Smart Cities

***Ritu Dhingra**
****Dr. Kanupriya**

Abstract

Sustainable development is the need of the hour. The future smart cities must be made emission free and carbon neutral. The alternative energy sources like solar energy; wind energy, geothermal energy, ocean energy, biomass and tidal energy all can play a very important role in this regard, even for the upcoming smart cities. The National policy on biofuels 2018, National Wind-Solar Hybrid Policy, 2018**,** the 2017 EU-India cooperation on Urban Development, UN 2030 agenda for sustainable development, all intend to progress towards sustainable and energy resilient smart cities. The 2017 BRICS agreement echoes the importance of the role renewable clean energy sources play in economic development. All this in consortium paves a good road for future with clean energy source leading to an ecosystem that is environmentally sustainable. The future belongs to the cities with clean energy.

Keywords: solar energy, wind energy, geothermal energy, tidal energy, ocean energy, biomass, future smart sustainable cities, UN agenda 2030, The National policy on biofuels 2018, National Wind-Solar Hybrid Policy 2018,The 2017 EU-India cooperation on urban development, 2017 BRICS agreement, combatting climate change, Diu smart city, UN Agenda 2030.

1. Introduction

Climate is changing at a very fast pace and the global temperatures are rising every year. The Ice on the poles is melting and the sea levels are rising up every year resulting in loss of islands all over the world. The coastal land is getting submerged in water. The major reasons for this rise in temperature are the green house gasses like "carbon dioxide (CO_2), methane (CH_4), "nitrogen oxide" (NO_2), "Chlorofluorocarbons" (CFCs), "hydro chlorofluorocarbons" (HCFCs), "hydro-fluorocarbons" (HFCs), "per-fluorocarbons" (PFCs), and "sulphur hexafluoride" (SF_6), "Ozone" (O_3) and water vapour (H_2O) these gases play a crucial role in trapping the heat coming from the sun and not allowing it to go back to the space.[1] This phenomenon increases the atmospheric temperature and leads to climate change. These gases are emitted when fossil fuels

* PHD Research Scholar at School of Law (The NorthCap University, Gurugram, Haryana , India).

** Head of the Department, School of Law, The NorthCap University, Gurugram Haryana.

are burnt for energy. Burning of the fossil fuels also causes the air pollution. The need of the hour is to look for alternative energy sources like the solar energy, wind energy, geothermal energy, biomass energy and tidal power and must utilise them in the future smart cities.

Green energy is generated from natural sources like the sunlight, wind, rain, tides, plants, algae, and geothermal heat. Basically all these energy sources are renewable and can be replenished as against the fossil fuels which is a limited resource of energy is bound to be consumed in due course of time and its refurbishing will take millions of years. The fossil fuels are pollution agents as well and their use and combustion emit green house gases as a bye product. The renewable energy sources on the other hand have a very small effect on the environment. The green energy is easy to capture as compared to the fossil fuels that involve mining and deep-sea bed drilling, which is very harmful for the life forms and for the environment as well. The green energy sources are available world over in more magnitudes as compared to the fossil fuels as fossil fuels are extracted from special remote locations, that are usually very sensitive locations like the deep sea bed and its extraction kills many life forms in the oceans and even destroy their habitat. Solar energy, wind energy are easily assessable energy sources and electricity can be easily generated from them by the help of the solar panels and wind turbines. Similarly ocean or tidal energy utilises the energy from the ocean or tidal waves.[2] The geothermal energy is also very environment friendly does not emit any green house or harmful gases, which are detrimental to the environment. Oil, gas and coal have now better alternatives in the form of green energy which is definitely the need of the hour as global temperatures are rising, climate change is a new menace and all this is attributed to the green house gases which are emitted while burning the fossil fuels as a energy source. These renewable energy sources and the green energy sources can easily replace the fossils fuels for good. Power shortages in India can be easily tackled with the help of renewable energy source. Even energy security can be increased leading to a contribution of energy in the regional, rural, and remote sectors. Diverse non-polluting energy sources are beneficial for the global as well as local environments. Policies are underway in the country and a huge investment is required for achieving this aim for an emission free energy source.[3] The future cities must be environmentally sustainable and must use the green energy majorly for combatting global warming by reducing emissions.

1 EPA, United States, Environment Protection Agency, *Overview of Green House Gas Emissions,* Available at: https://www.epa.gov/ghgemissions/overview-greenhouse-gases , Last visited on 28.7.2018.

2 S.A. Rogers, *What is green Energy?* Available at: https://www.mnn.com/earth-matters/energy/stories/what-is-green-energy, Last visited on 17.9.2018.

3 Gevorg Sargsyan et al., *Unleashing the Potential of Renewable Energy in India* ,World Bank Publications, Washington D.C. (2011) p.1-5.

2.Solar energy

The energy from the celestial body, the sun amounts to the solar energy. This energy is free of cost and can be tapped easily by the help of the solar panels. The various uses involves heating directly from the sun, converting it into electricity, it can be used in the cooling process and many other applications which are highly beneficial for day to day life. Below are few methods of tapping the solar energy.

2.1 Generation of electricity with the help of solar panels and its uses thereof

The soar panels can tap solar energy, which consists of particular photovoltaic cells, which have the power to convert energy from the radiations of the sun into electricity. This electricity can then further be utilised in lighting the homes and for virtually all the purposes, which the normal electricity is performing whose source may be hydro or coal. The solar energy leaves no carbon footprints and is good means for reducing the green houses gases and in this manner the global warming can be reduced and also economically this is very effective as it is cheap and solar rechargeable batteries can be installed every where in the city and also in the future smart cities to light up gardens, streets plus each and every nook and corner of the place even in those places where there is no natural illumination. This energy can also be used for passive space heating where a home can be directly heated by the solar energy by tapping the energy with the help of shady screens and canopies. For effective heating solar collectors can be installed, which further can heat liquids like water and this can further warm up the homes or building. This is a very cost effective method of heating the buildings. Smart cities must have this kind of provision for heating. The solar heaters and collector so installed, for capturing the solar energy can heat up the water by 15 degree Celsius in some cases, and this can further be enhanced and customized into an indoor warming structure with the help of a basic heat exchanger. More over many latest technologies are available for this purpose. This is an extremely cost effective source of energy and in a span of only 6 months the cost of installation is reimbursed and after that electricity is free of charge minus the maintenance cost which is also very less. Even solar energy can be tapped for warming up of the food by using the solar collector box, and by keeping food in it. In this type of box solar energy can be easily harnessed and can heat up the food. Even food can be cooked in special solar cookers, in which raw food items can be kept and placed in the sun and then in a span of 3-4 hours the food is cooked with no money spent on fuel. The swimming pools also can be heated by using solar energy panels and by installing solar collectors that consumes the energy accumulated by the radiation of the sun to generate a heating effect that can retain the warmth in the pools.

Even a solar blanket can be installed for this purpose, which covers the pool and does not allow heat to escape from it. Landscaping can be beautified and enhanced by the installation of the solar lights. This is an environment friendly option of lightening the gardens and other landscapes and is cost effective also. Water sprinkles can also be made operational with the help of the solar energy.[4] In order to make future smart cities energy resilient solar energy is a good option.

2.2 India-Korea technology exchange centre

On 10th July 2018 India- Korea exchange centre was inaugurated in New Delhi for promoting reliable alliances in Space, Solar Energy, Nano technologies and some other upcoming technologies. Through this centre both the countries can learn from each other to enhance their comparative advantages and be competitive in the world. Technology in the solar energy field also will be exchanged by the countries.[5] These are very recent advancements by the Government of India that intend to progress towards cleaner energy sources with technology exchange.

3.Wind energy

Wind also is a form of energy which has its existence due to the heat generated from the sunlight. The uneven heating of the atmosphere causes the winds by the sunlight or solar energy and the unevenness and disproportions of the earth's surface also add up to the rotation of wind. The arrays of the wind flow are also changed by the various topographical features of the terrains on the earth like presence of water bodies, vegetative cover like forests, and other factors. The wind energy can be tapped with the help of the wind turbines, which can harvest motion energy and convert this energy into electricity. The wind turbines convert this kinetic energy to mechanical power or electricity. This power can then be utilised for tasks like grain grinding, water pumping or by the help of a generator can be converted to electricity to power homes and other buildings and infrastructures. In simple terms wind turbine is the reverse of the functioning of a fan. Instead of consuming electricity to make wind like a fan, it uses wind to generate electricity. The wind moves the blades of the turbine, which further spins the shaft, that shaft is attached to a generator, which makes electricity further. Wind energy is free and is a renewable green energy source, which does not emit any green house gases, and is a non-polluting energy option. The initial installation cost of the wind turbine

4 Solar Energy.info, *Applications of solar energy in everyday lives*, Available at: http://www.solarenergy.info/what-is-solar-energy-2/applications-of-solar-energy-in-everyday-lives/ ,Last visited on 12.7.2018.

5 Press Information, Bureau ,Government of India, Ministry of Micro, Small & Medium Enterprises, *India-Korea Technology Exchange Centre Inaugurated* , Available at : http://pib.nic.in/newsite/PrintRelease.aspx?relid=180492, Last visited on 28.7.2018.

is quiet high but once it is installed then it has very long life span. The disadvantage is that the blades of the turbine have killed many birds, bats, and our avian friends in many parts of the world. So the position and the location of the turbine is an important factor for avoiding this environmental harm.[6] Wind energy is the most viable option economically. This energy must be tapped for the good of the people at large and for the conservation of environment as well. There had been an upheaval in the countries by policies, which are sometimes on going and sometimes stopped due to various political and other reasons. This energy option is very viable, cost-effectively and from economic point of view, when the wind turbines are installed at favourable places around the world. Due to various reasons the progress in this field is quiet slow.[7] On the whole this is an extremely good source of energy and can be used extensively for future smart cities and lot of environmental problems like the global warming leading to climate change can be solved.

3.1 National wind-solar hybrid policy, 2018

The main objective of the Policy is to provide a framework for promotion of large grid connected wind-solar PV hybrid system for optimal and efficient utilization of transmission infrastructure and land, reducing the variability in renewable power generation and achieving better grid stability. Government will support the technology development projects in the field of wind-solar hybrid systems.[8] This is a great step towards a future with clean energy. Although the notification in this regard was given on 18th May 2018 by the ministry of renewable energy sources and it is very nascent but aims for a better future.

4.Geothermal energy

This is another kind of green energy that utilises the heat from the earth's core. The hot springs are one such example, where the energy escapes from the earth's core in the form of heat. These hot springs are found all over the world. It is a clean and sustainable source of energy emitting from the earth's core. The sources of geothermal energy ranges from the low ground to water that is hot and rocks which are hot and is located at a few miles below the surface of the Earth, and further down even deeper to the exceptionally high temperatures of magma that is the molten rock. Nearly all over the earth surface whether it

6 Wind Energy development Programmatic EIS, *Wind Energy Basics,* Available at: http:// windeis.anl.gov/guide/basics/ , Last visited on 17.7.2018.

7 Bent Sørensen, *Renewable Energy: Its Physics, Engineering, Use, Environmental Impacts, Economy, and Planning Aspects,* Elsevier Science & Technology, New york, (2004), 874.

8 Ministry of New & Renewable Energy, *National Wind-Solar Hybrid Policy*, Available at: https://mnre.gov.in/sites/default/files/webform/notices/National-Wind-Solar-Hybrid-Policy.pdf, Last visited on 28.7.2018.

is the shallow ground or upper 10 feet of the surface, approximately persistent temperature amid 50° and 60°F (10° and 16°C) is maintained always. Heat for the buildings can be directly provided by the hot water from the geothermal resource. This heat can be used for various other industrial processes like horticulture, aquaculture, ice melting on the side walks of the roads and bridges. Even the district heating systems can utilise this energy for the heating up of the buildings.[9] This energy can again be utilised for heating or cooling a building. A geothermal system or apparatus for producing energy comprises of a heat pump, an air delivery arrangement (ductwork) a heat exchanger system of pipes, which are submerged in the shallow ground close to the building where this energy is used. In the winter, the heat pump eliminates heat from the heat exchanger and pumps it into the indoor air delivery system. The process is reversed during the summer, and the heat is moved by the heat pump from indoor air into the heat exchanger. The heat removed from the indoor air during the summer can also be utilised for providing a free source of hot water.[10] This is an extremely good technology and is a source of emission free green energy.

4.1 India and geothermal energy

India is at very primitive stage of tapping this energy because of its preference of coal as an energy source and coal being cheap and easily available in the country. Although the country is working in this direction for the last 2 decades. The first effort was commenced in this direction in the year 1973 and many such sites with a promising geothermal energy were shortlisted by the Government. Various organised efforts to explore the sources of geothermal energy in India started in the year 1973 and many such sites were shortlisted and finalised. Some of these are Puga and Chhumathang in Jammu and Kashmir, Cambay Graben in Gujarat, Manikaran in Himachal Pradesh, Tattapani in Chhattisgarh, Rajgir in Bihar and Ratnagiri in Maharashtra,. The draft policy also lays emphasis on an active involvement by the states and even the provisions for the determination of remuneration and royalty of the utilization of the geothermal resources are there.[11] There is a dire need for putting this in action as the need of the hour is to look for those resources of energy which are climate resilient and do not emit any green house gases. India must move towards this direction. Policies must be construed in this regard and the already existing policies must

9 Charles T. Malloy (ed.) *Geothermal Energy: The Resource Under our Feet*, Nova Science Publishers, United Kingdom, (2010), 7.

10 Renewable Energy World, *Geothermal Energy* Available at http:// wwwrenewableenergyworld.com/geothermal-energy/tech.html, Last visited on 11.3. 2018.

11 Mayank Aggarwal, *India looks to harness 10 GW geothermal power by 2030*, Available at:http://www.livemint.com/Industry/qFWtAToDvYCYqtKjTcfixH/India-looks-to-harness-10-GW-geothermal-power-by-2030.html, Last visited on 12.1.2018.

be implemented, as climate change is a menace, which must be tackled with latest technologies and green energy sources.

5. **Ocean energy**

Various types of ocean energies are found on this planet. They range from two different types that are tidal and wave energy types. Various studies are going on these two types. A new concept is known as ocean thermal energy conversion (OTEC). The concept used in this type of energy source is to produce energy from the temperature differences created in the water. Many justifications can be given for the use of marine or ocean energy. The most prominent are the ones that use the marine energy and tapping this marine energy can reduce the emission of green house gases. This is a good source of renewable energy and before tapping this energy by installing plants at the coastal areas the environmental impacts on the seaside areas must be assessed so that no harm is caused to the environment.[12] Environment impact assessment of the concerned coastal areas is a pre requisite for starting any such project because in an attempt to reduce emissions by installing equipment on the seaside, one cannot harm the very precious biodiversity of the coastal areas.

5.1 Wave energy

Wave energy is a form of kinetic energy, which occurs due to regular disturbances on the surface of the water. Although waves also occur in air, but the concern here is about the waves produced in the sea and oceans. This energy can be used to power a turbine and the energy is captured directly from the surface of waves, which occur in the ocean. The turbine is chosen for a hydroelectric power station but this kind of set up is very expensive but does not emit any green house gases thus is climate resilient.

The magnitude and power of the waves keep changing at different times of a day and even at different locations and coastal areas allover the world. This form of energy is not exploited properly but there is a high scope in the future. Tidal energy is also a form of energy, which is formed from the movements of water currents. The technique used in tapping this energy is very simple. Tidal energy generators are installed in the sea, which face movements that very high due to tides. The generators for the tidal energy then absorb this kinetic motion of the receding tides and also the flow of the tides to produce electricity. As tides are far more predictable than the waves hence this is a far better option than the wave energy type. This is also an emission free source of energy and is climate resilient. Oceans also have thermal

12 Michel Paillard et. al., *Marine Renewable Energies : Prospective Foresight Study for 2030* , France , INIS (Quae 2009) 17.

energy and that can also be used to generate electricity. The concept is of difference in the temperature of the oceanic waters. The concept used in the production of ocean energy is that the difference in the temperatures of the surface and below and is used to generate this type of energy. It is also observed in the sea that sometimes the water gets too cold as one dives into the sea and whereas it is warm at the surface. The more difference in temperature, the bigger will be the efficiency of this method.[13] Although this energy is climate resilient but with this type of energy aquatic life can be adversely affected.

5.2 India and ocean energy

In order to combat climate change, Government of India is also planning to tap this energy in future and has its renewable energy and climate change objectives post 2022. Over 100 different ocean energy technologies are currently under development in more than 30 countries. Most types of technologies are currently at demonstration stage or the initial stage of commercialization.[14]

6.Biomass energy

"Biomass is a renewable energy resource derived from the carbonaceous waste of various human and natural activities. It is derived from numerous sources, including the by-products from the timber industry, agricultural crops, raw material from the forest, major parts of household waste and wood." This type of energy is also climate resilient do not pollute the environment. It can be used even to generate electricity. It is an extremely important source of energy all over the world after coal, oil, and natural gas. Moreover the equipment used in the generation of electricity from the coal and fossil fuels is same for extracting the electricity from the biomass. In countries like Finland, USA, Sweden, China this type of energy is being used. Rural biomass energy policies can promote energy conservation by the use of this renewable energy.[15]It is better to generate electricity from the biomass instead of burning it and increasing the green house gases. Solid fuel is converted by gasifier into a more useful and convenient gaseous form of fuel also known as producer gas. Gobar gas in India is one such example. The bagasse or the left over cane after being crushed and after the extraction of the juice thereof is now being used to generate electricity by the sugar mills in India. One of the major benefit of this energy generation is that first of all the environment is not polluted and also the costs are reduced on the power production and even additional

13 EF Conserve Energy Future, *What is Ocean Energy?* Available at: https://www.conserve-energy-future.com/oceanenergy.php, Last visited on 12.3.2018.

14 Ministry of New and renewable Energy, *Ocean Energy*, Available at: http://mnre.gov.in/schemes/new-technologies/tidal-energy/, last visited on 10.3.2018.

15 Qingfeng Zhang et. al., *Rural Biomass Energy 2020*, Asian Development Bank Institute, Philippines, (2010) 1- 9.

revenue is accrued due to this type of energy production. As per the latest reports it is estimated that around 3500 MW of power can be generated from the bagasse in the prevailing 430 sugar mills in India. Around 270 MW of power has already been commissioned and more is under construction.[16] As per section 10 of the Solid Waste Management Rules of 2016 "The Ministry of New and Renewable Energy Sources through appropriate mechanisms shall facilitate infrastructure creation for waste to energy plants; and provide appropriate subsidy or incentives for such waste to energy plant. Similarly section 15 of the act deals with waste management plans to be made and followed by local authorities and village Panchayats of census towns and urban agglomerations 15v(b) of the act deals with various waste to energy processes to be followed by these authorities.[17] "Many wild plants like Neem, Mahua, Jatropa, Curcas, and few more have been identified by the experts as future potential sources of biodiesel in the country. At present biodiesel has not been commercially exploited by the Indian fuel market but the Government has plans to meet at least 20% of the requirements of the diesel by the country through the year 2020 by using biodiesel. Bio-ethanol is another energy source and the Central government is setting up a policy regarding ethanol blending. For the promotion of bio mass energy The Ministry of New and Renewable Energy (MNRE) is providing Central Financial Assistance (CFA) as capital subsidy and even financial incentives are offered for the biomass energy projects in India.[18] The High Court of Uttrakhand in a case by Judgment dated 16.03.2017 held that:"The Ministry of Power through appropriate mechanisms shall - (a) decide tariff or charges for the power generated from the waste to energy plants based on solid waste. (b) Compulsory purchase power generated from such waste to energy plants by Distribution Company. The Ministry of New and Renewable Energy Sources through appropriate mechanisms shall,- (a) facilitate infrastructure creation for waste to energy plants; and (b) provide appropriate subsidy or incentives for such waste to energy plants." [19] The efforts by the ministry are commendable and need of the hour is to make use of the incentives offered by the Government. These are extremely good sources of energy and are renewable also unlike the fossil fuels which are non renewable.

16 Edu green, *Biomass,* Available at: http://edugreen.teri.res.in/explore/renew/biomass.htm, Last visited on 12.2.2018.

17 Solid Waste Management Rules of 2016.

18 EAI, *India Biomass Energy* Available at: http://www.eai.in/ref/ae/bio/bio.html, Last visited on 20.5.2018.

19 Sai Nath Seva Mandal vs. State of Uttarakhand and Ors. W.P. (PIL) 80 of 2012, UCHC.

6.1 National policy on bio fuels 2018

India's energy security would remain vulnerable until alternative fuels to substitute/supplement petro-based fuels are developed based on indigenously produced renewable feedstocks. In biofuels, the country has a ray of hope in providing energy security. Biofuels are environment friendly fuels and their utilization would address global concerns about containment of carbon emissions. The transportation sector has been identified as a major polluting sector. Use of biofuels have, therefore, become compelling in view of the tightening automotive vehicle emission standards to curb air pollution.[20] This new energy source will be a good source of renewable energy.

7.Future smart cities sustainable and energy resilient

That the number of people living in Indian cities by the year 2050, are estimated at 843 million and that 60% of the world's population will be living in towns and cities in the next 10 years. The Republic of India and the European Union in order to enhance the EU-India cooperation on Urban Development with increasing involvement of Indian States and cities, EU Member States and regions/cities, building on regular dialogue on issues such as infrastructure, energy, sanitation and water management, to promote dialogue and partnership/twinning between local, regional and state entities" entered into a joint declaration on 6th Oct.2017 in New Delhi to promote and strengthen the sustainable urban development and to implement the sustainable development goals of 2015.[21] The future smart cities must be energy resilient and need of the hour is to use green energy sources. The factors like sustainability of energy and the commercial and economic factors also exist side by side. Not only intricate planning is required for the supply of this kind of an energy source but also a great parallel flawless arrangement is required to sustain the flow of that energy for various uses, nonstop for 24 hours and 365 days respectively. Billions of dollars are required for this kind of an investment. This further requires economic stability, huge manpower and various other components to make it a workable

---

20 Government of India Ministry of New & Renewable Energy ,*National Policy on Biofuels*, Available at: https://mnre.gov.in/file-manager/UserFiles/biofuel_policy.pdf, Last visited on 29.7. 2018.

21 Government of India, Joint Declaration Between the European Union and The Republic of India on A Partnership for Smart & Sustainable Urbanisation, Available https://www.google.co.in/search?q=JOINT+DECLARATION+BETWEEN+THE+EROPEAN+UNION+AND+THE+REPUBLIC+OF+INDIA+ON+A+PARTNSHIP+FOR+SMART+%26+SUSTAINABLE+URBANISATION+New+Dehi%2C+6+Oct+2017&oq=JOINT+DECLARATION+BETWEEN+THE+EUROPEAN+UNION+AND+THE+REPUBLIC+OF+INDIA+ON+A+PARTNERSHIP+FOR+SMART+%26+SUSTAINABLE+URBANISATION+New+Delhi%2C+6+Oct+2017&aqs=chrome..69i57.3126j0j4&sourceid=chrome&ie=UTF-8, Last visited on 28.7. 2018.

successful model for the energy generation. This is not an impossible job, if the municipalities and the technology rich companies unite and work together in this direction then, this will become an achievable target. To work at the global level is the need of the hour and treaties and multinational agreements must help and unite together to accomplish this aim. At the global level, every nation and its cities are thriving towards a goal yet to be achieved. This goal is of green environment, cost-effective clean renewable energy and marked reduction in carbon emissions.[22] Metabolism of energy is a problematic thing at all echelons of the society and each and every individual needs to address this problem and contribute to find a solution for the same.[23] Every individual on this earth have to come forward and reduce the carbon footprints by adopting an environmentally sustainable life style. The future smart city must adopt means to consume only green energy generated from non-polluting energy sources and this lead to a sustainable living for all the residents of such a smart city. City has to be smart not only in terms of technology and technical know how, safety, employment, transport etc. but has to have environmentally sustainable energy resources so that no carbon foot prints are left by its consumption. Although a huge investment is required for making such kind of an infrastructure but when one look at the results, they are just over whelming. Since if global warming is controlled, then climate change can be mitigated, then automatically, the loss of biodiversity can be curbed and various other climate change related problems can be solved. A smart city has to be city, which leaves the nature in its pristine state for the future generations. A city, which follows the rules of the sustainable development. A city where air is clean, environment is healthy and the ecosystem is balanced, where all the life forms are living and prospering not only the human beings but also all the life forms.

7.1 Diu smart city becomes first to run on 100% renewable energy during daytime

The Diu Smart city has become the first city in India that runs on 100 per cent renewable energy during the daytime, setting a bench-mark for other cities to follow, an official release said today. Diu had been importing 73 per cent of its power from Gujarat till last year.[24]

22 Smart city press , Renewable Energy in Smart Cities – An insight to the development, Available at:http://www.smartcity.press/renewable-energy-in-smart-cities/, Last Visited on 22.4.2018.

23 Troy, Austin. *The Very Hungry City: Urban Energy Efficiency and the Economic Fate of Cities* Yale University Press, Yale, (2012) 295.

24 Press Information Bureau, Government of India, Ministry of Housing and Urban Poverty Alleviation, *Diu Smart City becomes first to run on 100% Renewable Energy during Daytime,* Available at: http://pib.nic.in/newsite/PrintRelease.aspx?relid=178853, Last Visited on 28.7.2018.

This is an excellent example where a city recently in 2018 has become totally reliant on the renewable energy source during the day time. This kind of energy source is good for the environment and also combats air pollution.

8. Combatting climate change with the help of renewable energy sources

One of the extremely effective tools to fight global warming and climate change is the use of renewable energy sources. Sources of energy like the wind, solar have seen a remarkable growth and major cost cuttings have been observed in the past decade only, and the market is ever increasing by each passing day.[25] If most of the energy required by the society can be obtained from the renewable resources, then of course the problem of burning the fossil fuels and emission of the green house gases, which escalates the global atmospheric temperatures that further lead to global warming and climate change, can be addressed to a very large extent. This will definitely require a massive change the lifestyles of the people at large and also by reducing the energy demands.[26] Climate change has to be addressed at war footing and green energy is a solution for this. One of the options that have been mooted to reduce the growth of fossil fuels as a mitigation action is to increase the energy efficiency of various industries thereby reducing the flow of greenhouse gases into the atmosphere. One of the major contributors to emissions is CO_2 (carbon dioxide). Nearly 50% of emissions in the atmosphere are through inefficient use or coal fired power plants. Encouraging cleaner technologies for reduced emissions of CO_2 along with increasing the efficiency of power plants is one of the measures being implemented by several industries in various countries. Also in the BRICS agreement of 2017 it the strategic importance of energy to economic development was reiterated. The role of sustainable development, energy security, and energy access was recognized. The importance of working in cooperation with the BRICS countries for generating renewable clean energy sources was asserted.[27] Cutting down on production of coal to a more cleaner and alternative form of energy is also a measure being implemented. Reduction in the green house gases by adopting the green energy options can go a long way in mitigation of the climate change.

---

25 Noah Long, Kevin Steinberger, *Renewable Energy Is Key to Fighting Climate Change,* Available at:https://www.nrdc.org/experts/noah-long/renewable-energy-key-fighting-climate-change , Last visited on 12.3.2018.

26 Peter E Hodgson, *Energy, the Environment and Climate Change*, Imperial College Press, London (2014) 71.

27 BRICS, *BRICS Leaders Xiamen Declaration*, Available at: http://theasiadialogue.com/wp-content/uploads/2017/09/28912_XiamenDeclaratoin.pdf , Last visited on 28.7.2018.

9. UN agenda 2030 and role of green energy sources

The global energy mix can be easily decarbonised by the renewable energy sources. The use of renewable energy must be doubled by 2030 in order to cut the fifty percentages of the emissions, which are needed to keep the temperature rise below 2 degree Celsius in order to mitigate the devastating effect of the climate change. The results of this kind of an effort are prodigious. The steps taken today in this direction can lead us to a sustainable; climate resilient, stable environment and can prove to be extremely rewarding. Environment must be conserved for the intergenerational and intergenerational equity. The coming generations must also enjoy the natural resources which are enjoyed by the existing generations By this technique a unique opportunity to limit the global temperatures is foreseen. Due to climate change a huge loss of biodiversity takes place. The natural calamities like floods, drought, cloud burst, storms, tornados are always on the rise. The sea level is rising due to global warming and due to melting of the glaciers leading to over flooding and loos of land and terrestrial biodiversity. These menaces lead to the increase in the number of climate refugees. Renewables energy sources are the key to combat climate change and to mitigate global warming.[28] The key to solve this menace is with the human beings only. It is for them to decide whether to take the path of sustainable development or to burn the fossil fuels as an energy source. The average rise in the global temperatures has to be kept below 2 degrees Celsius.

The contribution of renewable energy in the future is going to be mammoth, as it will totally eradicate the use fossil fuels. Even nuclear power is not needed for such a big transition to an emission free energy source. Solar power as a renewable energy source has immense for providing green, clean and an affordable energy source.[29]

Goal number 7 of the UN 17 sustainable development goals categorically targets to make energy accessible to all. This energy is supposed to be modern and reliable and this target to be met by the year 2030. This goal also laid stress on investing heavily in this field of renewable energy source. The driver of this progress is the continent Asia. Energy production from the renewable sources is the main agenda of this goal as these energy sources are inexhaustible, green and clean.[30] In the UN led global background, the resources, and time needed for

28 Henning Wuester et al., *Rethinking Energy- renewable Energy and climate Change,* Available at :https://www.irena.org/rethinking/IRENA%20_REthinking_Energy_2nd_report_2015.pdf , Last visited on 28.7.2018.

29 M. D. Tiwari and Anurika Vaish (eds.), *Green Energy*, River Publishers, Aalborg, Denmark, (2012), 149.

30 United Nations, *SDG -7 Affordable and Clean Energy*, Available at: http://in.one.un.org/page/sustainable-development-goals/sdg-7/, Last visited on 28.7.2018.

achieving the aim of sustainable energy source for all, needed to be addressed by massive developmental projects to reduce poverty on this planet on the whole. An access to sustainable energy services by majority of the population on this earth leading to a sustainable development by reducing the emission is the need of the hour. The problem of global warming can also be solved leading to a mitigation of climate change. This agenda is of a prime importance as this also addresses reduction of poverty by proving sustainable energy to the poor and is integrated the in post 2015 agenda for development.[31] For achieving this purpose the use of green energy sources is a must. The green energy sources would lead us in a direction of sustainable development and for the conservation of environment for intergenerational equity.

10.Conclusion

As these green energy sources do not produce the harmful green house gases and do increase the atmospheric temperature. When the there is no climate change then a lot of biodiversity can be conserved leading to a healthy ecosystem. An international regime is required to implement this policy of using these energy sources which produce very little or no pollution. Technologies must be developed and shared all over the world for the utilisation of the pollution free energy sources. The equipment for trapping these energies must be made available at a low price to the people at large, all over the world so that a reform can be brought in the world. Ours is a global community of "*homo sapiens"* and we need to work together on this major issue, forgetting the political boundaries. Stringent policies must be construed for using the green energy sources. The future smart cities must be made emission free with zero carbon footprints. Policies play a very important role in the conservation of environment. Policies for constructing and managing the smart cities must be construed by keep the UN 17 sustainable development goals in mind. The principles of sustainable development as enshrined in the Brundtland Report, " Our Common Future" in the year 1987, where in energy is also one of the facet, which is needed to be addressed and what best it could be to use non polluting, emission free energy resources in the future environmentally sustainable smart cities. These types of energy sources are clean and can provide a carbon neutral or emission free energy source leading lowering of the atmospheric temperature as no green house gas is being emitted by these energy sources. This will lead to a sustainable development and the aim to reduce the atmospheric temperatures by 2 degree Celsius can also be achieved. Various environmental problems like global warming, climate change can be solved by this kind of energy source

31 Anilla Cherian, *Energy and Global Climate Change: Bridging the Sustainable Development Divide*, John Wiley & Sons, Sussex, United Kingdom, (2015), 261

and is far better than the fossil fuels, which are a main source of green house emissions. The future smart cities must be made energy efficient by having their own source of wind, solar, ocean, biomass or any other source of green energy, this will have a good impact on the environment and agenda 2030 will also be achieved by this. Proper policies must be drafted and well implemented for the use of these energy sources so as to reduce emissions and global warming thereof. It is a positive sign that India is progressing towards this .

Bollywood: Original or Copied?

***Isha bansal**

Abstract

Bollywood is one of the biggest film industries of the world and one of the biggest contributing sectors in the Indian economy. From past few decades, there have been cases which are brought to court for the violation of the Indian copyright act. Copying movies from other film industries, be it from other Indian film industries or international such as Hollywood is not a recent trend in Bollywood. Earlier this issue was not of the interest of filmmakers but now as the increase of technology, this has raised the issue of violation of copyright law. The scope of the copyright law has been observed by Indian judiciary. The Indian judiciary on the issue of, whether the movie, script, plot or the scene, is copied or not has taken its view in various dimensions. In this article, the debate over copied or original by advocating on the theories such as Indianizing, cross culture, fair use and creativity are dealt with along with the view of Indian judiciary on the subject matter. What is copied and what can be brought under the ambit of copyright act is matter of interpretation of the extent of 'copying', which is discussed in this article.

Introduction

Mohit buys a ticket to watch a Bollywood movie of his favourite actor Rishi Kapoor[1]. He is excited to know the plot of the movie as before the release of the film the songs of the film were super hit. From the trailer, Mohit anticipated the movie to be a full of drama, mystery, romance, music and supernatural thriller. The Movie begins with a courtroom drama, where the judgement is delivered in favour of the Ravi (main lead) in respect to property in a city named Ooty[2]. Ravi decides to go on a honeymoon trip to Ooty where his newly wedded wife kills him next to kali[3] temple. The story then takes the 25-year leap; a famous singer is shown named Monty, who looks exactly the same as Ravi. Monty used to have nightmares and flashbacks where he is killed by some girl. Monty falls in love with a girl Tina with whom he met at a party but the girl disappears. One of the Monty friends discovers

* LL. M. Student, Queen Mary University of London

1 A famous Bollywood actor of 90's

2 A city in the state of Tamil Nadu, India.

3 Kali was also known as Kalika, a Hindu goddess of death, time, power. Barbiani, Erica. 'Kalighat, the Home of Goddess Kali: The Place Where Calcutta is Imagined Twice: A Visual Investigation into the Dark Metropolis',(2005) vol. 10/no. 1 Sociological Research Online.

that Tina is in Ooty. In search of Tina, Monty goes to Ooty where he recollects his memory of that Kali temple and inquiries about his first life[4].

While watching this movie Mohit is actually watching an American motion picture film which was released in 1975 'The Reincarnation of Peter Proud'. Without realizing that the movie with the same plot has been produced on the other side of the world, he enjoyed the movie.

This Bollywood movie 'Karz(1980)' was the biggest hit of its time. While the movie contains many similarities in respect of the plot line of The Reincarnation of Peter Proud, but it also adds elements of a typical Bollywood film such as music, dance, melodrama, Indian culture.

There is a long list of movies which are remade in Bollywood. In the first part of this essay, it will be discussed in detail how Bollywood and Indian cinema is different and the copying of films are done by Bollywood not only of Hollywood films but also of other Indian film industries. We will see some examples of remakes made by Bollywood. In the next section of the essay, the insight of Indian judiciary on the issue of copying films will be discussed. The principles on which the copyright issues are dealt with will be studied in detail with the case laws. The reasons why not any allegation on Bollywood has been proven as copyright infringement in making a remake of Hollywood or any other film industry. The films are remade from the early 20th century but, until 2010 not a single legal action was successful in respect of copyright violation[5].

The taboo of copying films by Bollywood is from decades. But there are movies made by Bollywood which recognized and original and appreciated by other film industries. One of the American director Martin Scorses, after watching a film 'Pather Panchali' by Satyajit Ray, an influential Indian director was moved by the style of the film and was highly impressed by the way that the movie was made. After this, martin convinced the committee of Oscar to award Ray for his work[6].

There have been many arguments on the debate of originality and copying of films. In the Academic Research, the topic of Bollywood has not been taken up by scholars that much but on the issue of copying movies in different industries, many scholars have considered the importance of cultural differences and diversity which create the

4 Synopsis of a Bollywood movie 'Karz(1980)'.

5 Hariqbal basi "Indianizing Hollywood: The Debate Over Copyright Infringement by Bollywood", 18/no. 1 UCLA Entertainment Law Review 33.

6 Madhavi sundar, *From Goods to a Good Life : Intellectual Property and Global Justice*, Yale University Press, (2012) available at ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/gmul-trial/detail.action?docID=3420860.

imitation of movie unique and one of its own kind[7]. In Bollywood, classic movies like 'Satte Pe Satta (1982)[8]' which was inspired from a Hollywood musical movie 'Seven Brides for Seven Brothers (1954)' was a big hit[9]. Behind this success of the movie, the transformation of a western cultural movie to Indian culture plays a vital role. Indian Filmmakers Indianize[10] the movies for the targeted audience.

Bollywood has a wide range of audience, a country with the population of 3 billion people[11] and a majority of the population speaks Hindi[12]. Even the remakes earn as much as an original movie earns. Remakes like the 'Knockout(2010)[13]' copied from 'phone booth(2003)[14]' which are not successful at the box office is not because they are copied but because they are modified enough for the Indian audience. Herman Melville, an American novelist said: 'It is better to fail in originality than to succeed in imitation.'[15]

The era of globalization and internet has made it easier to detect the plagiarism in movies. But even then all the film industries are keen to make remakes of the movie. In this essay, we will look into these issues in detail.

History of copying

Indian cinema is one of the biggest film industries[16]. One of the reasons for this is the diversity of the country. When one talks about Indian cinema first thing that comes to mind is "Bollywood" but Indian cinema is not all about Bollywood only. Indian cinema consists of various linguistic and regional film industries. In 2015-2016, films were made in 41 regional languages by Indian cinema according to Central board of film certificate (the equivalent of BBFC).[17] Bollywood

7 Kiran, Ravi, and Apurva Bakshi. "Copyright Violations in Indian Cinema: Why Barfi! Denotes all that's Wrong with Bollywood", vol. 4/no. 4 Queen Mary Journal of Intellectual Property (2014).

8 Ibid.

9 Ibid.

10 The process of adding Indian and Bollywood elements to a movie is called Indiainzing. It is discussed in detail in later part of the essay.

11 Cassen, Robert et.al. , *Twenty-First Century India: Population, Economy, Human Development, and the Environment*, Oxford, Oxford University Press, 2005.

12 Hindi is the official language of the union of India. The Constitution of India, article 343(1). Bollywood movies are in hindi language.

13 Supra note 7.

14 Ibid.

15 Melville, Herman. , 'Hawthorne and His Mosses [in, the Literary World]', Anonymous Translator(, S.l., E. A. & G. L. Duyckinck, 1999).

16 Priti H. Doshi, Copyright Problems in India Affecting Hollywood and "Bollywood,"(2003) 26 SUFFOLK TRANSNAT L L. REV. 295, 314.

17 Ministry Of Information & Broadcasting Government Of India, Annual Report (April 2015 - March 2016).

consists of films which are made in 'hindi'[18] language.[19] The Allegation of making remakes of Hollywood films are not new for Bollywood but remakes of movies of other Indian film industries by Bollywood should not be ignored. In order to track copying in Bollywood first, we should look into the Indian film industry.

From 1931 filmmakers in India has taken the benefit of the vast culture of the country and made remakes of the films. In 1967 a movie was made in Bollywood named "Milan" which was a remake of the super hit Telugu[20] film Mooga Manasulu (1963)[21]. Milan was not a successful release but some of the blockbusters of Bollywood are the remakes of Tollywood[22] (Telugu film industry).One of them is "Wanted(2009)" which is a remake of Tollywood action film "Pokiri(2006)"[23]. Likewise, remakes from Tamil,[24] Malayalam,[25] Kannada[26] film industry are made in Bollywood which were a huge success at the box office. Some of the examples are "Singham(2011)" copy of "Singam(2010)[27]","Gajini(2008)" starring Amir Khan is a copy of "Gajini (2005)"[28].These movies where remade scene by scene.

The evidence of copying is not only from one industry to another but is also visible within the same industry. Within Bollywood, there are movies which are said to be inspired by the old version of the films. The best example for this is a famous movie "Devdas" a screen adaptation of a novel by Saratchandra Chattopadhyay[29]. This movie was remade three times in Bollywood [Bimal Roy's Devdas (1955), Bhansali's Devdas (2002) and Anurag kashyup's Dev d (2009][30]. Filmmakers also have attempted of making remakes of successful Hindi films such as the super hit movie of 1975 "Sholey" was remade as "Ram Gopal Varma

18 Hindi is the official language of the union of India. The Constitution of India, article 343(1).

19 Tejaswini Ganti, *Bollywood: A Guidebook To Popular Hindi Cinema* (2004).

20 Regional language of Andhra Pradesh one the state of India.

21 C.S.H.N. Murthy, "Film remakes as cross-cultural connections between North and South: A case study of the Telugu film industry's contribution to Indian filmmaking" 19:1 ,The Journal of International Communication, 19-42 (2013).

22 Elias, Arun Abraham, and M. Rohit. "Decreasing number of box office hits per year in Telugu film industry (Tollywood)-analysis and recommendations."

23 Supra note 6.

24 Language of Indian state 'Tamil Nadu'.

25 Language of Indian state 'Kerala'

26 Language of Indian state 'karnataka'

27 IMDb 'Copied Bollywood Films from Tamil, Telugu, Malayalam, Kannada etc Cinema', available at http://www.imdb.com/list/ls006449353/.

28 Ibid.

29 C.S.H.N.Murthy And Oinam Bedajit, "The Nuances In The Intertextuality Of Film Remakes Of Devdas: Situating Romanticism In Devdas From The Perspectives Of Indian Aesthetics" 36 (1) Journal Of South Asian Research.(Sage) 24-40 (2015).

30 Ibid.

Ki Aag" in 2007[31]. "Don" starring Amitabh Bacchan(1978) was remade with the same name starring Shah Rukh Khan(2006).[32] This trend of copying movies within industries is from the starting and still being followed.

One of the Old Hollywood movies Frank Capra's "It Happened One Night (1943)[33]" was remade by the name "Chori Chori" (1956) and again in 1991 "Dil Hai Ke Manta Nahin[34]" starring Amir Khan one of the biggest actors of Bollywood. "Hum Tum (2004)"[35] was a modified version for the Indian audience of "When Harry Met Sally (1989)" .The Storyline and most of the action scenes of "Knight and day(2010)" were taken into Bollywood film "Bang Bang(2014)"[36]. After numerous remakes, only a few films were dragged into court for the violation of copyright law by Hollywood one of them were namely "Banda Yeh Bindass Hai"(2009) which was a clever copy of Oscar- winning comedy film "my cousin Vinny" (1992).[37] After so many decades of copying the movies, the Hollywood studio got its first success in the case of copyright issue in 2010 where movie produced by 20th century fox "Phone booth" (2002)[38] was massively copied by "Knockout" (2010).[39] There is an endless list of such "inspired" movies in Bollywood but the most interesting fact is when it comes to taking a legal action only a few have been successful.

Indian Judiciary Perspective

A reputed film industry which is the one of the largest in the world in terms of movies produced in a year (more than 1000 per year) and tremendously contributes in the country's gross domestic product (GDP).[40] In order to protect rights of filmmakers and the production

31 Gallagher, Mark, and Julian Stringer. "Cultural Borrowings: Appropriation, Reworking, Transformation [Special Issue]", vol.15 Scope: An Online Journal of Film Studies(2009).

32 Ibid.

33 Ibid.

34 'Thorny issue', (May 24-30, 2003), Economic and Political Weekly, Vol. 38, No. 21 p. 2001 <http://www.jstor.org/stable/4413584> accessed 7 December 2017.

35 Supra note 18.

36 Shubhra Gupta, "Movie review bang bang: Hrithik roshan, katrina kaif better looking than cruise and diaz, but duller". (2014, Oct 03). Financial Express Retrieved from https://search-proquest-com.ezproxy.library.qmul.ac.uk/docview/1566981056?accountid=13375.

37 Rachana Desai, "Copyright Infringement in the Indian Film Industry", 7 VAND. J. ENT.L. & PRAC. 259, 265(2005).

38 Twentieth Century Fox Film Corporation v. Sohail Maklai Entertainment Pvt. Ltd. and Anr., 2010 (112) BOMLR 4216.

39 Supra note 18.

40 METAXAS, T.BOUKA, E., & Maria - Marina MERKOURI "Bollywood, india and economic growth: A hundred years history" 3(2) Journal of Economic and Social Thought 285-301(2016). doi:http://dx.doi.org.ezproxy.library.qmul.ac.uk/10.1453/jest.v3i2.746.

studios which affects not only artistic perspective but also an economic aspect of the society, the issue of copying movies is important to look upon. The Copyright act of 1957 protects 'original literally, dramatic, musical, artistic works, cinematograph films and sound recordings from unauthorized uses'[41].India is a member of World trade Organization (WTO) so is bound by Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement of 1994[42]. The Indian copyright act protects expressions and not the idea as it is a reflection of TRIPS.[43]

On the issue of copying films there have not been many precedents in the Indian judiciary. Indian courts had developed tests to determine if the film infringes the copyright law or not in term of originality. It is clear that there cannot be any copyright in an idea and the violation is only confined to the expression of the idea. Any person can choose the idea and give its own expression to it and can present differently.[44] One of the tests which Indian courts laid down is the 'lay observer test[45]' which is similar to the 'ordinary observer test' originated by U.S supreme court in Daly v. Palmer[46]. This test states that when two works are so much similar to an ordinary or layperson of reasonable minds that it can be concluded as an unlawful use of the protected expression.

One of the remarkable judgment in reference to violation of copyright law in relation to films and the originality is R G Anand vs Delux Films.[47] R G Anand was a play writer who wrote and produced a play called 'Hum hindustani' in 1953. In September 1956, a film was released by the name of "New Delhi" after seeing the movie the plaintiff filed a case claiming it is the infringement of his copyright. The supreme court of India said that it is not a copyright violation because of difference in story, theme and climax and went on saying that copyright cannot be on the idea itself. The surest and the safest test were laid down, in this case, to determine whether or not the film is a copy of another film. According to this test if the reader, viewer or the spectator of the film after seeing the work is of the clear opinion and doesn't have any mistakable impression that the work appears to be a copy of some other work or say original work than it is said to be a violation of copyright. Movie with the same theme but presented differently and not treated as in the original work than it cannot be said

41 The Indian copyright act 1957.

42 Endeshaw, Assafa., 'Intellectual Property in Asian Emerging Economies: Law and Policy in the Post-TRIPS Era'(2010).

43 Ibid.

44 RG Anand vs Delux Films, A.I.R. 1978 S.C. 1613.

45 Ibid.

46 Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868).

47 Supra 31.

copied[48]. The principle of Scène à faire has been seen in cases. One of such case is NRI Film Production Associates Pvt. Ltd. v. Twentieth Century Fox Film Corporation & Anr[49] where Karnataka high court[50] applied this principle of Scène à faire where some scenes are sometimes could not be modified or avoided in order to express the intent of the film and are 'must' to be done as they are already showed by other work. The question, in this case, was the movie 'independence day' is copied from film 'extra-terrestrial mission'. It was held that the scenes such as blasting of nuclear missiles, traffic jam, and movement of the spaceship are all Scène à faire commonly found in these types of movies.

The court in R G Anand went on saying that if any substantial work is copied of the original work than it amounts to violation of copyright law.[51]

In the case of Twentieth Century Fox Film Corporation v. Zee Telefilms Ltd. & Ors[52] there was an interesting question that what the substantial copy is? The Delhi high court said that in order to answer this question the similarity between both the works should be considered individually and after that the part which is said to be copied should be looked into[53]. If that copied part represents the substantial part of the original work then it can be said as the substantial copy of the work[54]. The other test which was seen in deciding the matter of copying was that if the parts which are copied in the film is removed from it and the remainder becomes meaningless than it is said that it is a substantial copy.[55]

After so many remakes for a long time not many of them were legally alleged or proved to be an unlawful copies but in 2009, 20th century fox one of the most famous Hollywood studios moved to Bombay High Court against a Hindi remake of Oscar-winning movie 'My Cousin Vinny' 'Banda Yeh Bindass Hai' and claim INR 70 million as damages and injunction against release of the Bollywood movie but before court could issue a decision the parties agreed to reach a settlement.[56] Due

48 Supra note 33.

49 NRI Film Production Associates Pvt. Ltd. v. Twentieth Century Fox Film Corporation & Anr., 2005 (1) KCCR 126.

50 One of the high courts of India out of 24 high courts.

51 Supra note 33.

52 Twentieth Century Fox Film Corporation v. Zee Telefilms Ltd. & Ors. 2012 (51) PTC 465 (Del).

53 Ibid.

54 Ibid.

55 Supra note 27.

56 Nishith desai associate,'indian film industry- tackling litigation' (2017) available at http://www.nishithdesai.com/information/research-and-articles/research-papers.html.

to this settlement, the question on the status of remakes of Hollywood movies by Bollywood was left unanswered[57]. In 2010 20th century fox once again tried to allege a Bollywood movie and drag it into court. It was alleged that the script and screenplay of Hindi film 'knockout' is a copy of 'Phone Booth'.[58] Finally after decades the Bombay high court after watching both the films granted an interim injunction by applying test of Anand's case[59] that an average viewer will 'unmistakably' conclude that it is a copy of the original film.

Majorly, a film is recognized by the title. Movie title has been disputed matter in terms of protection. According to Indian courts title alone cannot be protected under copyright law but can be protected by trademark law under the trademark act 1999. Bollywood has always modified the films according to Indian audience and made the remake of films but one side of the issue which is not noticed is Bollywood has also tried to copy the title of the films and moulded for the Indian cinema one of the best examples of this is the case of Warner Bros. Entertainment Inc. and Ors. v. Harinder Kohli and Ors.[60] The Warner Bros studio sued Mirchi movies production house due to the similarity of the movie title 'Harry Potter' and 'Hari Puttar'. Plaintiff argued that Hari Puttar is confusingly similar to harry potter and dilutes the original title. The court dismissed the argument and said that if an illiterate or semi- literate viewer saw Hari Puttar he will never be able to relate that movie to Harry Potter and a literate viewer however even for once has looked into the book or the movie of harry potter he will not be misled by the title because the storyline is different[61]. There is nothing similar in the content of both the movies. Even if there is similarity the test to determine the deceptiveness is through the target audience weather they are able to distinguish between the two or not.

It is clear that the copyright law and its implications are weak on the remakes of films. With all these tests, principles and doctrines by Indian judiciary, it is next to impossible to make a filmmaker or production house liable for copying.

Originality vs Remake

There has been a lot of talks over copying and how much Bollywood does that but it is important to not neglect the arguments which are

57 Ibid.

58 Twentieth Century fox Film Corp. v. Sohail Maklai Entm't Pvt. Ltd., 2010 (112) BOMLR 4216.

59 Supra note 33.

60 Warner Bros. Entertainment Inc. and Ors. v. Harinder Kohli and Ors., 155 (2008) DLT 56.

61 Madhavi,sundar *From Goods to a Good Life : Intellectual Property and Global Justice*,Yale University Press (2012).

in favor of remakes and if it is wrong to make a remake. The taboo of copying by Bollywood has forced to think if there is any originality in Bollywood left?

Indianizing:

Indian filmmaker claims that when they remake a Hollywood movie or any other industry movie they make the movie for Indian audience. They explain a process of making and transforming a film which is according to Indian culture which is termed as 'indianizing'.[62] One of the famous directors of Bollywood Mahesh Bhatt said 'when you take an idea and route it through the Indian heart, it changes entirely'.[63] Abbas Mustan another most influential director of Indian cinema supports this idea of changing the film completely in order to be a perfect fit for Indian audience and says that "whenever we've adapted a film we've completely Indianized the story".[64]

Bollywood is known for long movies, lots of dancing numbers, loud music, colourful sets, family drama, ethnicity, songs, melodrama, intense emotions, romantic angle and the unique style of action scenes. All these elements have to be added to make a Hollywood movie a Bollywood one. There are narrative difference in Indian movies and the other industry movies. Sometimes due to these elements which are added for making it a Bollywood movie people who have watched the original version of the remake they also can not recognize that it is a remake. Indianzing gives a uniqueness and novelty to the movie.

Sutanu gupta, 1980's screenwriter says that Hollywood movies are pretty straightforward they have one story line and they go for that in the entire movie but movie making in Bollywood is much difficult[65]. The kind of entertainment Bollywood gives is according to the culture and audience expectation which involves not the straightforward rule but a mixture of different elements in one story. There must be action, drama, music all in one.

The transformation of movies is to be done with caution and according to targeted audience. Filmmakers have to keep in mind about what to be shown in a film will be approve or not by the India's Central Board of Film Certification[66]. There are levels of scrutiny which

62 Supra note 5.

63 Rachana Desai, 'Copyright Infringement in the Indian Film Industry', 7 VAND. J. ENT. L. & PRAC. 259, 259-271 (2005) .

64 Subhash K. Jha, Abbas Mlustan to Remake Italian Job!, Bollywood Hungama News Network, http://www.bollywood.com/abbas-mustanremake-italian-job.

65 Tejaswini Ganti, Bollywood : A Guidebook to Popular Hindi Cinema (Taylor and Francis, Florence). Available from: ProQuest Ebook Central.

66 Supra note 67.

they have to pass. In order to get a certificate by the board so that the film can be watched by the entire audience Indian movies cannot go beyond their cultural limits and cannot show nudity or sex scenes.[67] so while making remakes all the scenes which are restricted by the board has to be removed and replaced by other scenes so that it completely fits the storyline.

Fair use

Filmmakers have argued that in the subsequent work if there are adequate variation and modification it is considered as fair use. In Harper & Row, Publishers Inc. v. Nation Enterprises[68] the US Supreme Court had ruled the fair use rule. The fair use rule has to be applied depending on the amount of transformation and the process of indianizing and it may vary from case to case. Although, in commercial matters, the defence of fair use is not enough as US Supreme court said. Bollywood movies are commercial in nature.[69]

Copying also needs creativity:

Let's take an example of Bollywood remake of 'Knight and Day' 'Bang Bang' starring Hrithik Roshan and Katrina Kaif. Many scenes are copied from 'Knight and Day' starring tom cruise and Cameroon Diaz one of them is when Cameroon shoots the expensive cars behind tom cruise sitting across on the motorbike in the middle of the city. The same scene is taken in the Hindi adaptation but in order to remake that scene, many factors have been considered such as budget of the film, location, audience perspective, adapting according to the story, camera angle, background music, direction for the scene, actors adjustment etc. These all factors when taken into consideration it require creativity. In the Hindi version of that scene, the action of actors was same but the whole background was different the scene was shot in the middle of the desert because it matched to the storyline. There were normal cars, not the expensive ones because of the budget of the movie. The direction and the camera angle were different. The scene may be similar but the effect of both was different. Vikaram Bhatt a filmmaker of Bollywood said 'a story is nothing but a tool to generate a kind of emotions through a narrative[70]' and this narration requires creativity. Giving different visual to a story or a scene is an art in itself. The process of indianizing a film requires creativity.[71]

67 Ibid.

68 Harper & Row, Publishers Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

69 Supra note 5.

70 Supra note 67.

71 Supra note 67.

Cross-cultural:

The purpose of a film is to entertain the audience. Who is the audience? Every film industry focuses on the targeted audiences which commonly are of their own nation. The fact of cultural differences of every nation gives the filmmakers a chance to experiment with the films of other industry. Filmmakers believe that if a successful movie from other film industry is moulded according to the culture of the targeted audience than it will be successful in their industry also[72]. This cross cultural effect can also be seen in one nation like India. The culture in north India and south India is different this is one of the reasons Hindi Bollywood movies are making remakes of south Indian movies or other language movies. There is a difference in target audience people who don't speak Tamil, Kannada, Telugu, Bengali (regional languages of India) for them Hindi remakes are made by Bollywood in Hindi.

Religion also plays an important role in this. While making a remake of the movie the major cultural clash comes when the whole theme is changed according to a particular religion. While transforming a western movie where churches and Christianity are depicted in a Bollywood movie where temples and Hinduism are shown creates cultural differences. The Best example of that is a horror movie. Bollywood movie '1920' a remake of 'the exorcist' showed the main lead to chant 'Hanuman Chalisa'[73] in place of the chants of the priest in the Hollywood version of the film.

The legal or political issues based on moral and cultural differences such as the issue of gays or minorities shown in different film industries are different.[74] This argument of cross culture arises from the process of Indianizing. But this concept applies to every film industry not only Bollywood. Due to this globalization and several cultures in the world films are borrowed and remade which in the end get success in the box office. These cultural differences give a sense of originality to the movie even if it is a remake. The impact of different culture and diversity in the world adds spices in any remake and makes the film of one of its own kind.

Future of copying in Bollywood

The fact that Bollywood contributes a significant percentage of the Indian economy has increased the need to implement the copyright law strictly. Bollywood industry is now recognized by Hollywood and Hollywood studios have realized that the Indian market is most favorable

72 Arjun shah, "Is Bollywood Unlawfully Copying Hollywood? Why? What has Been Done About It? And How Can It Be Stopped?" vol 26 issue 1 Emory International Law Review (2012).

73 Hindu devotional hymn.

74 Supra note 50.

for them in terms of expenditure and income. In 2006, Hollywood movies which were released in India earned 44 million dollars.[75] With the rise of social media now Hollywood is aware of remakes in Bollywood and after knowing the Indian market and the amount of profit which they can get out of this market they are now trying to drag the matter in court. From the remake of' My Cousin Vinny' to 'Phonebooth' Hollywood studios are now trying to take legal action and this is increasing trouble for Bollywood producers. The reputation of Bollywood industry is also at stake. In future Bollywood has to be more careful in regards to the remakes as now the issue of copyright will not be cornered. This will affect the economy of the country and also Bollywood's reputation, profit and expense.

Conclusion

The borrowing of scripts, copying of plots, recreating a film from one film industry to another is not new. In India, Bollywood has been a constant target of film critics in relation to copying film of Hollywood or of Indian film industries. This debate of originality and copied is prolonged and unsettled. Some argue that Bollywood has created more original and classic movies then copied ones. Some argue that remakes make the film more accessible to a wide audience all over the world of different language and culture. To be fair, one should give credit to the original author of the work. Even if a film is copied and it is recreated for the respective targeted audience of totally different culture, the original authors should be acknowledged for his work.

Recently, remakes of films were noticed by Hollywood in Bollywood due to overlapping audiences and few legal actions were taken by Hollywood alleging Bollywood of the illegal copy of the film but were not successful due to the cultural shift in the process of remaking the movie. The copyright act in India is not implemented as strictly as it should be.

The purpose of copyright laws is to protect the original author of the work and to give recognition so that encourages more creative work and invention which are unique and original. But it is clear by the fact that in the context of film remakes this purpose is not fulfilled. The clear evidence of this fact is until 2010 no legal action was successful against Bollywood which was discussed above and Indian judiciary favoured Bollywood. Not only India but also other countries and film industries those are copying the scenes, script or the plot of a film should give recognition to the original author.

Recreating a film and considering it as original work because it has been reproduced with the additional elements for the targeted

75 Ayan Roy Chowdhury; "The future of copyright in India", Volume 3, Issue 2 Journal of Intellectual Property Law & Practice Pages 102–114(2008)

audience doesn't make the film original. Bollywood by indiainizing the movie cannot claim it as original work. It is agreed that this process of transforming the film requires creativity but still it is taken from someone's work.

One way to check this issue of illegal copying at an international level is to have a contractual agreement between major film industries on the unauthorized remake. This will reduce the cost of litigation and will give a sense of security to the original author of the work.

Internationally, Bollywood is now recognized and appreciated. But the issue of making so many remakes can harm the reputation of film industry even if there are lots of original movies produced by Bollywood. For Bollywood, it is high time to bring back more original content as the audience of Bollywood films is increasing not only in India but internationally.

References:

Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868).

Harper & Row, Publishers Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

NRI Film Production Associates Pvt. Ltd. v. Twentieth Century Fox Film Corporation & Anr., 2005 (1) KCCR 126.

RG Anand vs Delux Films, A.I.R. 1978 S.C. 1613.

Twentieth Century Fox Film Corporation v. Sohail Maklai Entertainment Pvt. Ltd. and Anr 2010 (112) BOMLR 4216.

Twentieth Century Fox Film Corporation v. Zee Telefilms Ltd. & Ors. 2012 (51) PTC 465 (Del).

Warner Bros. Entertainment Inc. and Ors. v. Harinder Kohli and Ors., 155 (2008) DLT 56.

The constitution of India.

The Indian copyright act, 1957.

Assafa E, *Intellectual Property in Asian Emerging Economies: Law and Policy in the Post-TRIPS Era* (2010).

Cassen R, Dyson T, and Visaria L , *Twenty-First Century India: Population, Economy, Human Development, and the Environment', Anonymous Translator*(Oxford University Press, 2005).

Ganti T*, Bollywood: A Guidebook To Popular Hindi Cinema* (2004).

Horton A and McDougal S, *Play It Again, Sam: Retakes on Remakes* (University of California Press c1998 1998).

Sundar M, *From Goods to a Good Life : Intellectual Property and Global Justice* (Yale University Press 2012).

Verevis, Constantine, and Inc ebrary., *Film Remakes* (1st edn, Edinburgh, Edinburgh University Press, 2006;2005).

Aslam S 'Bollywood Movies: A Contributing Factor towards Juvenile Delinquency'(2015) vol 2 issue 3 International Journal of Research 503 Available at http://internationaljournalofresearch.org .

Barbiani E, 'Kalighat, the Home of Goddess Kali: The Place Where Calcutta is Imagined Twice: A Visual Investigation into the Dark Metropolis'(2005) vol. 10/no. 1 Sociological Research Online.

Basi H, 'Indianizing Hollywood: The Debate Over Copyright Infringement by Bollywood' (2010) vol. 18/no. 1 UCLA Entertainment Law Review pp. 33.

Chowdhury A, 'The future of copyright in India' (2008) vol 3 issue 2 Journal of Intellectual Property Law & Practice 102.

Desai R, 'Copyright Infringement in the Indian Film Industry'(2005) 7 VAND. J. ENT.L. & PRAC. 259.

Doshi P,'Copyright Problems in India Affecting Hollywood and "Bollywood"'(2003) 26 SUFFOLK TRANSNAT L L. REV. 295, 314.

Elias, Abraham A, and M. Rohit 'Decreasing number of box office hits per year in Telugu film industry (Tollywood)-analysis and recommendations.'(2014) business research methods.

Gallagher M, and Stringer J. 'Cultural Borrowings: Appropriation, Reworking, Transformation [Special Issue]' (2009) Vol 15 Scope: An Online Journal of Film Studies

Kiran R and Bakshi A, 'Copyright Violations in Indian Cinema: Why Barfi! Denotes all that's Wrong with Bollywood' (2014) vol. 4/no. 4 Queen Mary Journal of Intellectual Property.

Metaxas , T.Bouka, E., & Merkouri M 'Bollywood, India and economic growth: A hundred years history.(2016) 3(2) Journal of Economic and Social Thought 285.

Murthy C.S.H.N And Bedajit O, 'The Nuances In The Intertextuality Of Film Remakes Of Devdas: Situating Romanticism In Devdas From The Perspectives Of Indian Aesthetics'(2015) 36(1) Journal Of South Asian Research.(Sage) 24.

Murthy C.S.H.N, 'Film remakes as cross-cultural connections between North and South: A case study of the Telugu film industry's contribution to Indian filmmaking'(2013) vol 19 The Journal of International Communication 19.

Natarajan A, 'The intersection of hollywood and the indian film industry: impact and implications' (2014) Vol.2, Issue.6 International Journal of Business and Administration Research Review 126.

Nayar S, 'The Values of Fantasy: Indian Popular Cinema through Western Scripts' (1997) 31 Journal of Popular Culture 73.

Nishith desai associate, 'Indian film industry- tackling litigation' (2017) available at <http://www.nishithdesai.com/information/research-and-articles/research-papers.html>.

Shah A, 'Is Bollywood Unlawfully Copying Hollywood? Why? What has Been Done About It? And How Can It Be Stopped?'(2012) vol 26 issue 1 Emory International Law Review.

Thorny issue, (May 24-30, 2003) Vol. 38, No. 21 Economic and Political Weekly 2001 <http://www.jstor.org/stable/4413584> accessed 7 December 2017.

Vasudevan R, 'Addressing the spectator of a 'third world' national cinema: the Bombay 'social' film of the 1940s and 1950s'(1995) Screen, Volume 36, Issue 4 available <https://doi.org/10.1093/screen/36.4.305>.

Access and Benefit Sharing: A Welfare Measure Lacking Implementation

***Ebee Antony**

ABSTRACT

Access and Benefit Sharing is a scheme that came into picture with full thrust act the Convention of Biological Diversity, the purpose of such a measure was to compensate the traditional knowledge holders of the loss that they would face, as a result of scientific and technological advancement. Science and Technology has created an atmosphere which is not conducive for the life of the persons who lag behind or those who prefer to stay without indulging into it. The ABS scheme was given further shape through the Nagoya Protocol, which mandated that every party to the convention should formulate domestic legislations to effectuate the ends of the protocol. A pertinent issue facing all the authorities under the act is the determination of the value of the biological resource. Right now there is a confusion regarding whether local industries should pay the ABS fees as the wording of the legislation are ambiguous about this. The difference between the marginal benefit of the user and the marginal benefit of the stakeholders should be decreased to attain the actual purpose of the scheme. The establishment of several administrative authorities under the act which are empowered to impose fines for the purpose of enforcing the provisions of the act, the need for the involvement of various stakeholders and empowering the Biodiversity Management Committee is also necessary as it is the institution that has first-hand knowledge about the realities of the locality.

Introduction

In pursuance of the Convention of Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and Equitable Sharing of Benefits Arising from their Utilization, the signatories to it have drafted and passed local legislations and other administrative policies for the purpose. India became a signatory to this convention on the 19th May 1994.

Mostly resource rich countries are developing and poor when it comes to the technical know-how required to tap into these resources. As a result the developed countries tend to barge into the biological resources of the developing countries and illegal means extract these resources and claim a patent protection over them. Instead of a plant patent they go for a utility patent which covers the entire niche of the

* Student, 4th Year B.A.LL.B.(Honours), School of Law, Christ (Deemed to be University), Bangalore-560029.

DNA and other genetic material, thus depriving the local community of their right to access the livelihood security systems. It is the fear of this IP ambush that has triggered the International Community to present such a convention and other protocols under it.[1]

The IPR system provides uninterrupted rights over the commodity on which such rights prevail, this will give the holder the incentive to commercially exploit the same. The holder will not consider keeping enough for the indigenous/local community for sustainable growth. Our present understanding of the genetic knowledge owes a good deal towards the traditional knowledge of indigenous communities, hence it is our duty to consider their rights as well.

The ABS regime comes into picture at this juncture, it brings in the idea of sharing out of the benefits accrued from the utilization of resources. This is done through a contract which involves the Mutually Agreed Terms (MAT) which highlights the commitments from the side of the biological resource supplier (State) and the user (Individuals/ Corporations). The goal of ABS is to make an environment suitable for sustainable development. ABS is also helpful in the achievement of two Sustainable Development Goals (SDGs):

SDG 2: Zero Hunger.

SDG 15: Protect, restore and promote sustainable use of terrestrial resources.[2]

According to the Bonn Guidelines on Access and Benefit Sharing, ABS can be carried out either in monetary as well as in non-monetary terms. The examples of these are provided in Appendix II to the Bonn Guidelines, some of which will be discussed here for the benefit of the reader:

Monetary forms of ABS:[3]

- Access Fee.
- Fee for the collection of samples.
- Joint ownership of IPRs.

1 Neeti Wilson, Guidelines for Access and Benefit Sharing for Utilization of Biological Resources based on the Nagoya Protocol, 20 J Intellec Prop Rights, pp. 67-70.

2 http://www.fao.org/sustainable-development-goals/news/detail-news/en/c/1045012/.

3 ABS Guidelines, 2014.

Non-Monetary forms of ABS:[4]

- Sharing R&D results with the state.
- Locating production and R&D facility in the region for the purpose of improving the living standard.
- Research directed to the priority needs of the supplier state.

I. Convention on Biological Diversity, 1992

The convention took shape as one which was for the purpose of protecting the biological resources of the planet, but it has got relevance to the topic of this paper as one of the three objectives of the act is, "… ensuring fair and equitable sharing of benefits arising out of utilization of genetic resources." States have been roped in to play a major role in drafting domestic legislations in pursuance of Article 15(7) of the Convention which states that it is mandatory for every contracting to state to frame domestic laws and rules for attaining the objectives of the convention. There has been a departure from the earlier belief that biological resources are part of the common heritage of mankind, the convention through Article 3 has reaffirmed the position of the state as the custodian of the natural resources found within its territory.[5]

India had ratified this convention on 19th May 1994 and hence have the liability to carry out the obligations laid down under the Act. The deadline for the countries that have ratified this convention to effectuate the aspirations of the convention is mentioned in the Aichi Biodiversity Targets, Target 16 states that the Nagoya Protocol should be inforce and operational by the year 2010.

II. Nagoya Protocol

It is an additional agreement to the Convention on Biological Diversity, 1992. The purpose of this Protocol is to convey to the signatories their obligations under the third objective of the CBD. Article 5 of the Nagoya Protocol mandates the sharing of the benefits accrued out of the utilization of genetic resources, it further goes on to state that this sharing should be based on a formal agreement which will be known as the Mutually Agreed Terms (MAT).[6] The Nagoya protocol has a wide scope as compared to the earlier ABS regime under the International Treaty on Plant Genetic Resources for Food and Agriculture (IT PGRFA) which covered only seeds. The Nagoya Protocol on the other hand covers in its ambit all kinds of genetic material and the benefit arising out of its utilisation, also it covers under it wide net the Traditional Knowledge of the indigenous communities.

4 *Ibid.*

5 171st Law Commission Report on Biodiversity Bill, 2000.

6 Bavikatte Kabir, Robinson, Daniel.F, Towards a people history of the law: Bioculture Juisprudence & the Nagoya protocol on Access and Benefit Sharing, pp.37-49.

III. Mutually Agreed Terms

The two parties (State-Individual) will come into a contract on how to carry out the terms of the ABS. It is a bilateral agreement, to provide access to genetic resources by the supplier state and on the part of the user to reciprocate by granting both monetary and non-monetary benefits. Negotiating the MAT is the most crucial part in arriving at a equitable contract as provided under the Convention. As the state is the sovereign it has to exercise his power to restrict the way in which collection is done, all natural resources of a country are within the sovereign powers of the state and it is their duty to protect it. The state can prescribe regulations, the only qualification being that it should not be restrictive in nature.[7]

IV. Bonn Guidelines on Access and Benefit Sharing

The main purpose of these guidelines is to serve as a pole star for different states to help them in drafting local legislations, rules, regulations and policies.

It also tries to enhance the compliance with the Mutually Agreed Terms (MATs) by including in it the names of the indigenous tribe as well as the user of the resource. Further in the absence of MAT, i.e., when they are under negotiation other IP clauses have to be developed to fix the vacuum. They have also mandated the setting up of a Competent National Authority which look into the matters relating to Biodiversity conservation and protection of the indigenous and tribal community. The have been given the authority to decide on whether to admit a certain user and to decide on the quantum of compensation to be paid to the local community via the fund created by it.[8]

In India the Competent National Authority is the National Biodiversity Board, established under the provisions of the National Biodiversity Act, 2002.

V. National Biological Diversity Act, 2002

The objective of the Act as provided in the objects and reasons,'... fair and equitable sharing of benefits arising out of the utilization of biological resources, knowledge and of matters connected with or incidental thereto." Section 2(g) defines Fair and Equitable benefit sharing as those acts of ABS as provided under Section 21(2) which is nothing more than the non-exhaustive list of monetary and non-monetary modes of benefit sharing. The Act goes onto to mention that the NBA is duty bound to ensure the existence of a contract for benefit sharing before grant of access and at the same time should ensure that there was prior informed consent.

7 *Ibid.*

8 *Supra,* n.3.

The money deposited with the National Biodiversity Fund should be utilized only for those purposes purpose as specified by the Act under Section 27(2):

- For the benefits of the stakeholder.
- Development of the areas from where the biological resources have been sourced.
- Socio-Economic development of the community.

VI. Biodiversity Rules, 2004

These rules prescribe the duty of the Biodiversity Authority and the State Biodiversity Board, both these bodies in consultation with the Biological Management Committee and the local community will have to negotiate with the user about the terms of the Mutually Agreed Terms, the clauses should guarantee that there will exist equal bargaining power. Neither access nor the benefit should be disproportionate. Rule 14(6) lists the information that should be included in the application for the receipt of the informed consent. Rule 14 (10) is a hallmark rule which should be implemented with and carried out can reduce the asymmetry between access to the genetic resource and the benefit that has to be paid to the local community on each level of commercialization of the bio resource. A look at Rule 20 of the Rules says that there is no blanket formula for determining the value of the benefit sharing and this should be done in a case to case basis. In most cases this valuation is below the actual value this can be countered by the introduction of an ABS Cess/ABS Tax, which is a percentage calculated upon the difference of the ex-factory cost of the commodity and the taxes.

VII. ABS Guidelines, 2014

The guidelines have been issued by the Ministry of Environment, Forest and Climate Change after the action taken by the Madhya Pradesh and Maharashtra State Biodiversity Board's action against the domestic users of biological resources.

The guidelines include within it the matters that need to be taken into consideration before evaluation the monetary consideration. They also present ration in which the National Biodiversity Authority and the State Biodiversity Board should devolve the money to the locals, which is to be done through the Biological Management Committee (BMC) which is the grass root level institution to secure the rights of the inhabitants. The money to be paid to the authority is 1%-3% or 3%-5% as the case maybe, which is worked on the net of the ex-factory price and the applicable government taxes.[9]

9 *Supra,* n.1.

VIII. Benefit sharing under Protection of Plant Varieties & Farmer's Rights Act, 2001

The Act has nuances of benefit sharing but the scope of the Act is limited to plant varieties and not as wide as the Biodiversity Act, 2002. Special reference should be laid on Section 26 of the Act which provides for determination of the worth of benefit that has to be transferred to the indigenous community. The authority under the Act is empowered for the purpose which listens the matter from the side of the user and the claimants of the benefit, it has to dispose the matter in an expedient manner and this order shall also contain the value of the monetary benefit that has to be paid if any, this has to be accompanied by reasons for the same. Some grounds on which the amount has to be determined:[10]

- Commercial utility and demand in the market of the variety relating to which the benefit sharing is claimed.
- The extent and the nature of the use of genetic material of the claimant in the development of the variety relating to which the benefit sharing has been claimed.

IX. Conclusion- Keeping pace with the changing landscape for the effective implementation of ABS regime

Valuation of the potential of the Biotechnology resource is a tricky business, no one is able to readily tell the monetary value of the resource that is being extracted from a particular area. There have been certain suggestions regarding what elements should be taken into consideration while making this decision, these can the found in the Nagoya Protocol itself and in the Indian domestic framework, in the ABS Guidelines, 2014 published by the Ministry of Environment, Forest & Climate Change along with the National Biodiversity Authority which is the competent authority in India to determine whether the access should be granted. These are the matters to be considered while determining the value of the compensation that is to be made to the National Biodiversity Fund for distribution among the benefit claimers:

- Market Potential.
- Investment in Research and Development.
- Likelihood of commercial success of research or product.
- Intention to secure IPR on the outcome.
- Annual Turnover of the applicant from the previous years.[11]

---

10 Section 26, The Protection of Plant Varieties and Farmer's Rights Act, 2001.

11 Biodiversity Rules, 2004.

These will be considered only as a guiding light, the competent national authority has to construe other factors for determination with the help of an expert research group. Drawing inspiration from the Brazilian ABS framework, they have a concept of Ad hoc compensation to be paid to the Biodiversity Fund, which is in line with the environmental law concept of 'Polluter Pays'[12], i.e., a percentage as set by the authority calculated on the amount of genetic resource taken. The authorities in that country have realized that collection of a sum at different stages of commercialization will increase the cost of monitoring and actually eat up the finances which have to be made available to the domestic community.

Another suggestion is to widen the powers and the function of the Biological Management Committee, to increased participation of the affected stakeholders for better understanding of the situation, it should be invested with greater powers of advising the National Biodiversity Authority on which areas should be allowing to be subject to bio surveying/bioprospecting and which areas should be left out so as to maintain sustainability in the area. Furthermore, the Intellectual Property Office of the country should be allowed to participate in the decision making process to advice the Authority in framing the MAT.

The convention while mandating that access should be granted in all cases, upholds the spirit of sovereignty over the natural resources under its territorial jurisdiction, this gives unfettered rights to the state to put in place restrictions of its choice which it finds appropriate in consultation with the local community. The only requirement for the parties to the convention is that they should lift the blanket ban on access to technology. Moreover, the convention does not provide for a definition to the term 'Prior Informed Consent', this leaves space for the individual nation to frame case to case PIC requirement. The PIC may specify the territorial limit of bioprospecting.[13]

The local legislation should also be made applicable to domestic land grabbers and other individuals who make use of the biological resources, this is because if they are left unattended by any law, they will become brazen. If order to tackle this a very novel method is to conduct frequent and timely audit of the user of the genetic resources, this can be done without hassles by the inclusion of a 'licensor audit' clause in the Mutual Agreed Terms.

The aspirations of ABS cannot be achieved all of a sudden, this can be done only through constant research and analysis of the results

12 Juliana Santilli, Genetic Resources common pools in Brazil, Common Pools and Genetic Resources: Equity and Innovation in International Biodiversity law (Evanson Chege Kamau & Gerd Winter).

13 *Ibid.*

of such research findings needs to be incorporated, the Authority in every country ought to work without vested interest and work towards attaining the best interest of its people especially the persons living in the geographical area being subject to bioprospecting activity. In situations where the access is truly for academic or research purpose the authority should place an obligation to the researcher to publish the work and conduct workshops for the local community to understand the results of the work, this should be done in non-technical language to facilitate better understanding of and to make useful application of the research finding. The competent authority can direct the user to make their research and development directed to certain particular end that might be useful for the country of origin to tackle some of their domestic problems.[14]

The National Green Tribunal (Central Zone) has made certain observation regarding the tardy implementation of the Biodiversity Act and the Rules under it that the State Biodiversity Boards in many of the Indian states have not yet been given guidelines pertaining to the demarcation of certain geographical locations as Biological Heritage Zones. The following was noted by the National Biodiversity Authority and the guidelines for the demarcation of Biological Heritage Zones were issued by the Authority in its 19th meeting and now it is open to the state governments to notify the rules for enforcing the guidelines.[15] The National Biodiversity Authority has in its 19th meeting passed guidelines regarding designation of ecologically fragile zones and those with other peculiar characteristic as Biological Heritage Zones, this is a step towards sustainable growth and protection from commercial exploitation.

I am of the personal opinion that the provision of the national legislation in India is not far behind the international standards, in fact the Biodiversity Act, 2002 from it conception had all the provisions other nations like Brazil, Costa Rica & Brazil are coming up with, the issue here lies with the implementation of the provisions. The illiteracy that prevails with regard to the provisions of the Act and the lack of awareness of such mechanisms in the part of the local community who are finally the victims of exploitation as they are deprived of human food, livelihood security systems and human health in the name of technological development. The government and the people of the region should realize that sustained use of biological resources is important for growth and development, economic growth without development in other sectors will result in nothing less than perpetual

14 Srividhya Raghavan, India's attempt to reconcile diversity, Indian Journal for Intellectual Property, NALSAR.

15 Bio Diversity Management Committee, Keonti Gram Panchayat v. Union of India, O.A 06/2014 (CZ).

poverty and over dependence on external sources for basic needs. In order to satisfy the concern of the holder of the patent holder that disclosure in the PIC be prejudicial to their interest, such a disclosure maybe made in a separate form with a confidentiality clause attached to it, which will enable the applicant to hold the Competent National Authority liable for any breach in a court with relevant jurisdiction. And another key suggestion would be the introduction a digital library in line with the Traditional Knowledge Digital Library so that the search cost of the potential users can the reduced to a minimal and the job of maintaining of the PBR can be stopped, hence providing a single point of contact to derive all the necessary information.

That perfect balance between access and equitable benefit sharing is a farfetched goal, this can be arrived at only by constant research in this regard, development of various parameters for the calculation has to be seen, till then the local communities will have to settle with the valuation that prevails, the technology transfers and the capacity building initiatives.[16] Access and Benefit sharing is a novel idea that has blossomed in the hindsight of the international community which has duly found that the IPR system is acting in a manner which is inconsistent to the interest of the local communities and those who depend on it for their livelihood. The objective of implementing newer mechanisms to make sharing efficient is pertinent as now the ABS system is only in its nascent stage and even though in theory they have to balance economic growth and welfare, the reality is antithetical to that objective. New valuation mechanisms, distribution mechanisms and check point systems which ensure that prompt implementation of the scheme should be in place. The gulf between the marginal benefit of the user and the marginal benefit of the stakeholders are widening, the ABS system should attempt to bring this closer and finally achieve a level playing field, where no one gets an upper hand.

16 International Treaty on Plant Genetic Resources for Food and Agriculture.

On The Run, But Not Lost; an Enquiry into the Fugitive Economic Offenders Ordinance, 2018

***Padmesh Mishra**
****Arkaj Kumar**

This paper examines the Fugitive Economic Offenders Ordinance, 2018, promulgated by the President of India on 21st April, 2018. The Ordinance is an almost identical image of the Fugitive Economic Offenders Bill, introduced by the Finance Minister on 12th March 2018. Through clearly signposted sections, this paper will first examine the background and the need for an Ordinance to clamp down on White Collar Criminals who are defrauding the Government, the public and the banking sector at large and fleeing to legal jurisdictions with lax extradition laws. The second section of this paper will lay out the salient features of the Ordinance and briefly analyse their paradigm of operation. The third section of the paper will examine the underlying nature of the Ordinance as a Non Conviction Based Asset Forfeiture Legislation and explore the efficacy of the same at tackling the problem identified in the previous section. The last section of this paper will juxtapose certain constitutional guarantees over the operative provisions of the Ordinance and weigh in on whether the Ordinance is likely to pass muster before the Courts of India, if it is to be passed by the Parliament as an Act..

Introduction[1]

Over the last decade, India has witnessed a spate of high order white collar offences, which involve sub-par lending to large business houses, and eventually culminate with the individuals involved in the fraud, fleeing the territorial jurisdiction of India. In a series of revelations by India's leading Public Sector Banks it has come to light that the Indian Exchequer suffered a loss of approximately Rs. 160000 Crores as a result of individuals fraudulently obtaining extraordinarily large

* 3rd year LL.B. student at Campus Law Centre, Faculty of Law, University of Delhi.

** 3rd year LL.B. student at Campus Law Centre, Faculty of Law, University of Delhi.

1 The provisions of the Ordinance discussed in this paper are in accordance with the draft Ordinance uploaded to the Lok Sabha Website at the time of writing the paper. However, considering the statement and objects and reasons of this Ordinance, and the fact that the analysis in this paper is limited to the principle premises of the Ordinance, updates and changes are unlikely to affect the analysis made in this paper.

unsecured loans or loans granted upon fraudulently issued of Letters of Undertakings.[2] Recognising that these offences affect the health and stability of the entire economy,[3] the government acknowledges that the perpetrators of these offences must be treated with a heavy hand; more so when the country has embarked upon the herculean task of bringing economic and social prosperity to every household in the country. To this end, the Fugitive Economic Offenders (FEO) Ordinance seeks to bring back such fugitive White Collar offenders and to deter future economic offenders from evading the process of law by fleeing away to territorial jurisdictions beyond the reach of the Indian State.[4] The conventional criminal process has often been regarded as being inadequate to target certain forms of criminality, such as organised criminal groups where those at the upper echelons are seen as being beyond the reach of the criminal law[5]. The high standard of proof along with the complicated procedure relating to attachment and confiscation under the existing has created a major lacuna in dealing effectively with economic offenders. In a bid to address the problem of NPAs and wilful defaulters; the Government, through the FEO Ordinance seeks to introduce a Non-Conviction Based Asset Forfeiture[6] regime which would proceed independently of the prosecution that the fugitive evades, by confiscating the proceeds of crime and other assets owned by them. Furthermore, as elucidated by the Statement of Objects and Reasons of the Ordinance, the Government is attempting both to stabilize the financial health of the banking sector of the country and to lay down measures to deter economic offenders in the future from evading the due process of Indian law by fleeing the country[7].

Through the course of this paper, we will evaluate the operative portions of this Ordinance, the vacuum it attempts to fill and its efficacy at the same. In order for the examination to be extensive, we will also be considering the genus of Non-Conviction Based Asset Forfeiture Legislations, to which this Ordinance belongs, and the reasons behind

2 A Letter of Undertaking is a guarantee given by one bank to another bank to repay a loan on behalf of a client. A widely used tool of payment for facilitating trade in the international transactions. https://scroll.in/article/870336/rs-160000000000-for-indian-banks-thats-what-the-february-nightmare-added-up-to.

3 *Y.S. Jagan Mohan Reddy v. CBI,* (2013) 7 SCC 439, 449.

4 Statement of Objects and reasons appended to the Ordinance provides economic offenders flee the country anticipating criminal prosecution.

5 Martin Collins, & Colin King, *The disruption of crime in Scotland through non-conviction based asset forfeiture"*,Vol. 16 Iss 4.379, Journal of Money Laundering Control, 388 (2013).

6 A tool used to allow for criminal assets to be forfeited to the State even in the absence of criminal conviction, the stated objective being to undermine the profit incentive of criminal activity. *See* Hendry, J. and King, C. . *How far is too far? Theorising non-conviction-based asset forfeiture.*11(04) International Journal of Law in Context,.398-411(2015).

7 Ibid.

their success. In the interest of a wholesome consideration of the issue, we will also be analysing the validity of the procedure provided in the Ordinance, and the Constitutionality of the same in light of the incorporation of the Fugitive Disentitlement Doctrine as a statutory measure to disallow future claims.

Salient Features of The Ordinance

One of the primary objectives of the FEO Ordinance is to define a 'Fugitive Economic Offender', which it accordingly delineates to mean any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India; and who has left India in order to avoid criminal prosecution and being abroad, refuses to return to India to face criminal prosecution[8]. The Schedule appended to the Ordinance provides a list offences under various statutes under which a warrant of arrest has been issued by any Court in India. Right at the outset, it is integral to note that the Ordinance in itself, is not criminal or punitive in nature. Unlike the Prevention of Money Laundering Act, with which the FEO Ordinance shares an enforcing and administering agency, the Ordinance does not prescribe an offence but merely lays down the procedure for the pursuance of asset confiscation proceedings against individuals who are already being prosecuted for one of the scheduled offences.

The Special Court may declare a person to be a FEO, on an application made by the concerned authority,[9] and the Special Court may declare so, after affording an opportunity to the person sought to be declared a FEO to appear before it within a stipulated time[10]. The authority under the Ordinance may attach any property which it believes to have been obtained as a result of any scheduled offence i.e 'Proceeds of Crime' or any other property owned by such person whether in India or abroad or any property of equivalent value, to a property which it believes would be unavailable for confiscation.[11] If the accused appears before such Court, the Court may terminate

8 Section 2,Fugitive Economic Offenders Ordinance, 2018, 79 of 2018 Ordinance introduced in Lok Sabha, 2018. Section 2 of the Ordinance defines a Fugitive Economic Offender as:any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who—(*i*) has left India so as to avoid criminal prosecution; or (*ii*) being abroad, refuses to return to India to face criminal prosecution.

9 Section 10, Fugitive Economic Offenders Ordinance, 2018, 79 of 2018 Ordinance introduced in Lok Sabha, 2018.

10 Section 12 Fugitive Economic Offenders Ordinance, 2018, 79 of 2018 Ordinance introduced in Lok Sabha, 2018.

11 Section 5 Fugitive Economic Offenders Ordinance, 2018, 79 of 2018 Ordinance introduced in Lok Sabha, 2018.

proceedings against him,[12] however, in the event of failure to appear on such notice, the Court may on hearing the ED declare such person as a FEO by a reasoned order,and further approve the confiscation of any property attached by the Directorate. On confiscation, all the rights and title in the property would vest in the Central Government, free from all encumbrances.[13] An administrator has to be appointed by the Central government to receive, manage and dispose of the property so confiscated.

On the declaration of a person as a FEO any court or tribunal in India may disallow such person from contesting or filing any civil claims in any court in the country. Furthermore, any court may disallow a company or limited liability partnership from putting forward or defending any civil claim, if an individual filing the claim on behalf of the company or the limited liability partnership, or any promoter or key managerial personnel or majority shareholder of the company or an individual having a controlling interest in the limited liability partnership has been declared as a FEO.[14]

Non-Conviction Based Asset Forfeiture Legislations; Introduction And Efficacy Analysis

The FEO Ordinance is India's attempt to join the international trend of using a combination of civil and criminal law proceedings to get fugitive white-collar offenders back to the country, and appropriate the gains they had wrongfully made through criminal actions. In order to examine the FEO Ordinance in light of other Non Conviction based asset Forfeiture or Civil Forfeiture legislations, it is essential to understand the objectives of the Ordinance. As clarified by the Statement of Objects and Reasons accompanying the Ordinance, the objective of the Ordinance is not to create another punitive framework but to supplement the extant framework in achieving its ends, through asset attachment and civil disfavor. The Second and incidental objective of the Ordinance is to serve as a deterrent to other white-collar criminals in the future from absconding Indian Territorial Jurisdiction. Civil forfeiture does not seek to impose criminal punishment, rather it serves preventive, reparative and deterrent functions in that it removes the capital for future criminal activity, it denies a person the benefit of criminal proceeds, it raises the costs of committing crime, and it increases the likelihood of detection/ conviction.[15]

12 Section 11(1) Fugitive Economic Offenders Ordinance, 2018, 79 of 2018 Ordinance introduced in Lok Sabha, 2018.

13 Section 12(8), Fugitive Economic Offenders Ordinance, 2018, 79 of 2018 Ordinance introduced in Lok Sabha, 2018.

14 Section 14, Fugitive Economic Offenders Ordinance, 2018, 79 of 2018 Ordinance introduced in Lok Sabha, 2018.

15 Anthony Kennedy, *Justifying the civil recovery of criminal proceeds*, Vol. 12 Iss 1, Journal of Financial Crime, pp. 8 - 23(2005),

In order to understand the scope and extent of this Ordinance, it is imperative to keep in consideration that most jurisdictions in the world apply a higher standard of judicial safeguards to criminal proceedings than they do to civil remedies. Because of the stigma that accompanies a criminal conviction and the potential punishment which may be imposed by a criminal court, legal systems provide procedural protections above those available to a defendant in a civil case. Most fundamentally, the standard of proof to prove guilt in criminal proceedings is 'guilt beyond reasonable doubt' in most legal jurisdictions, whereas a 'preponderance of probabilities' is a sufficient standard of truth in civil proceedings. Safeguards like the presumption of innocence, the burden of proof resting upon the prosecution, and the heightened standard of proof beyond reasonable doubt which are rationalised by reference to, *inter alia*, the relationship between the State and the individual, the potential consequences of an unjustified verdict, the avoidance of wrongful convictions, and respect for individual dignity and autonomy[16] have been a major cause for the failure of the extant legislations in resolving the problems sought to be solved by the FEO Ordinance.

The premise of pursuing retrieval of criminal proceeds is a two pronged approach to justice. On the first front, the State and the judicial system, taking cognizance of the crime committed against society at large, pursue a criminal action against the accused to reprimand them and employ punitive measures against the wrongdoers. However, unlike crimes like murder, large scale economic frauds do not impact a single victim and his family, but shakes the very foundation of the nation and society. As noted by the 47th Law Commission in their report[17] Socio-economic offences, in light of their magnitude of their impact must be dealt with severely, and consequently they should be situated at a level separate from ordinary offences in so far as legislative competence for dealing with them is concerned.

In consonance with the same, the perpetrators of the crime in addition to being pursued criminally and punished punitively; must also be held liable for reparations of the financial wrong that they have committed against society, this is the second front of pursuit. However,

16 Ibid.

17 Law Commission of India. February 1972, 47th Report on Trial and Punishment of Socio-Economic offences pp. 11- "*These offences affecting as they do the health and wealth of the entire community, require to be put down with a heavy hand at a time when the country has embarked upon a gigantic process of social and economic planning... The legislative armoury for fighting offences of such a nature must be furnished with weapons which may not be needed for fighting ordinary crimes. The damage caused by socio-economic offences to a developing society could be treated on a level different from ordinary crimes. In a sense anti-social activity in the nature of deliberate and persistent violations of economic laws could be described as extra hazardous activities and it is in this light that we approach the problem.*"

jurisprudentially, most legal systems of the world including India do not recognise non punitive reparations[18] as absolvence to a major crime.[19] NCBA Forfeiture Legislations find themselves grounded on this moral imperative.

As discussed above, the primary purpose of non-conviction based asset forfeiture legislations is to compel attendance of the fugitive accused in the ongoing criminal proceedings; in a sense then, jurisprudentially Non-Conviction Based Forfeiture in this sense is a lot like the recognised principle of Bail. The efficacy of the Anglo-Saxon tradition of using financial security to compel attendance is undeniable throughout the world,[20] and extending this logic to fugitives is a natural recognition of this efficacy. In its 268th report, the Law Commission of India while suggesting amendments to provisions relating to bail, under the CrPC has opined that the threat of forfeiture of one's goods serves as an effective deterrent to break the conditions of one's release[21]. Similarly the FEO Ordinance seeks to confiscate properties of the fugitive in order to put the pending criminal law proceedings into motion.

Quite evidently, most individuals who engage in economic frauds at the scale at which India has witnessed recently, do not do so out of emotion or hate, but out of a rapacious desire to exploit the system. Acknowledging the genus of crimes of this nature and their motivations, the United States of America initiated the civil forfeiture paradigm, something which has now been adopted by states like the United Kingdom, Ireland, South Africa and Canada. A peaceful enjoyment of the proceeds of crime damages public confidence in the rule of law and provides harmful role models to other members of the society.[22]

Non-Conviction based legislation has gained so much traction owing to the recognition that most modern day white collar criminals operate through careful and considered organizational set-ups, and possess enough wherewithal to avoid prosecution in their home state. Since this is a monetarily motivated crime, attaching the property of the criminal works in reducing the criminal's access to safe havens and from further perpetuating crime. As a fugitive on the run from the

18 Non-punitive reparations refer to monetary compensations not amounting to fines and compensation for accidental wrongs.

19 The Indian Legal System acknowledges the compounding of certain offences which are in the sphere of 'personal wrongs' and not public wrongs-proper.

20 T, Schnake, et al . *The history of bail and pretrial release.* Washington, DC: Pretrial Justice Institute (2010).

21 Law Commission of India. May 2017, 268th Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail

22 Home Office,` *Proceeds of Crime: Consultation on Draft Legislation*', UK Proceeds of Crimes Act. p. 226, (2001).

law, the number of options such criminals have for income generation in foreign states are limited, and clamping down on their assets is an easy way to squeeze them out of hiding and make them face the legal consequences of their actions.

It is a trite of law that a criminal prosecution in an adversarial system cannot take place in the absence of the accused. Under the existing legal provisions under criminal law, an order of attachment can be made after declaring a person to be a Proclaimed Offender under Section 82 of the IPC, however this provision serves only a small purpose and becomes toothless in the case FEOs. Their escape brings the criminal prosecution to a grinding halt. Even with respect to the recovery of the proceeds of crime, the proceedings are painfully choked to a slow demise, as the government attempts to get a fugitive offender outside the territory of India through diplomatic channels with the hosting state and in some cases these states may not be contracting parties within the existing legal framework that can extradite fugitives. All this while, the public perception of the judicial system being an accomplice to the crime becomes gradually entrenched and the respect for the law amongst the ordinary citizenry steadily declines. The provisions that provide for Criminal Forfeiture within the IPC and the CrPC, become ineffective in light of the accused becoming the fugitive.

Besides domestic interests, the FEO Ordinance also caters to India's international obligations. Under Article 54(1)(c) of United Nations Convention Against Corruption (UNCAC), which requires all States Parties to consider forfeiting the proceeds of crime without a conviction, proposing NCB asset forfeiture as a tool for all jurisdictions to consider in the fight against corruption, a tool that transcends the differences between systems. Having ratified the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against transnational Organised Crime (UNTOC), India is honouring its International Commitment of impounding assets of fugitives under a NCB Asset Forfeiture Regime.[23]

In the context of the FEO Ordinance, Section 16 places the burden of proving that an accused is a FEO or that property is the proceeds of crime upon the prosecution, where the standard of proof adopted within sub-section (3) is that of preponderance of probabilities. The confiscation of property within the Ordinance does not affect the the trial of the scheduled offence. In its criminal dimension, the charging of a person with a criminal offence for the purpose of securing a conviction with a view to exposing that person to criminal sanction remains intact and distinct from proceedings under the FEO Ordinance. The

23 India ratified both of these conventions in May 2011

proceedings under the FEO are obviously and significantly different from the standard of proof adopted in the trial of the Scheduled Offence. The purpose of proceedings under the FEO are two-fold, First, to ensure that the property acquired by the FEO remains within the reach of the government and second, to compel the attendance of such accused in the ongoing proceedings before the court.

The departure from the traditional NCB Asset forfeiture regime is that the proceedings under the FEO Ordinance would not only target properties in rem but they will obviously have an impact on the fugitive, these are predominantly proceedings *in personam*, as under section 12 of the Ordinance, the special court has been granted the mandate to confiscate not only the proceeds of crime but also any other property that have been identified to be owned by the fugitive[24]. They are designed to recover the proceeds of crime as well as to compel the attendance of the fugitive, rather than to establish, in the context of criminal proceedings, guilt of specific offences and therefore the standard of proof envisaged under the Ordinance is civil in nature that is of preponderance of probabilities.

In view of the above, it cannot be denied that a combination of *in rem* as well as *in personam* proceedings would be a shot in the arm for enforcement agencies in their endeavour to improve the financial health of the country as well as to ensure that the rule oflaw is not undermined by offenders harbouring in safe havens to avoid prosecution. This in our opinion is and ideal adaptation of the NCB Forfeiture doctrine, allowing the government to deny access to the fugitive to the proceeds of crime, while simultaneously ensuring his attendance of the criminal proceedings. This breaks away from the tradition of using NCB Forfeiture as a last resort, and moulds it into pro-active affirmative action, which does not rely on the diplomatic goodwill of other states.

Criminal Procedure And Constitutional Protections

Virtually all legal systems recognise the need for separate codes of procedure and evidentiary standards for criminal and civil law owing to two fundamental reasons; firstly because criminal proceedings must proceed with a presumption of innocence and not of wrongdoing, and secondly because criminal proceedings have the potential for denying an individual access to their civil liberties. Criminal procedure, therefore is designed with an inviolable 'due process' which must be ascribed to, in order to ensure that no individual is wrongly denied his civil liberties.

24 Ibid s. 12

The FEO Ordinance dissolves this chasm between civil and criminal procedure in the interest of swift and efficacious proceedings, however it is essential to consider whether this dissolution is line with the Constitutional Rights of citizens of this country.

Access To Justice

The edification of India's jurisprudence on fundamental rights and access to justice arose as observations and riposte to the Emergency. A fundamental distinction was derived between the *rule of law* versus the *rule by law*. It was recognized that courts in the country cannot be used as a means to impose the unconstitutional will of the legislature, because the courts foremost serve the constitution, and as the *Volksgeist* of the democratic populus of the country, the Constitution must ascribe by the will of the people; a will which manifests as the rule of law. A pre-requisite for the adherence to the rule of law is the rule of access to the law; equality in the eyes of the law is meaningless if the law is required to be equal to only those who are allowed to approach it.

Section 14 of the FEO Ordinance empowers every Civil Court and tribunal in the country the prerogative to deny deemed 'Fugitive Economic Offenders' access to the Courts to bring a claim against a person or the State, and furthermore the right to contest a civil claim brought against them. Shockingly, this preclusion from access to restorative civil justice is not just limited to the FEOs themselves, but also to legal persons associated with them, including companies where such individuals held key managerial positions, and Limited Liability Partnerships wherein they were partners. In *Anita Kushwaha vs. Pushap Sudan,*[25] A constitution bench of the Supreme Court of India recognised and iterated the right to access to justice as an inalienable Fundamental Right. Consequently then, it is essential to question whether a Legislative action such as the FEO Ordinance can be considered to be constitutionally valid if it does not espouse the standard of rule of law set by the constitution.

The Courts in this country are free to determine whether an individual approaching the Court has just-cause to pursue his action, however no court in this country can be empowered to determine whether an individual has the right to approach the court for justice or not. After all the purpose of having courts of law is to advance justice and not shut its doors,[26] when a person has been declared a fugitive it cannot extend to denying him resort to any other form of justice. The Rule of Law precludes courts from determining questions of law based on issues of personality, such that Courts may only concern themselves

25 *Anita Kushwaha v. Pushap Sudan* (2016) 8 SCC 509, 527-528.

26 *Narendra v. State of U.P.*, (2017) 9 SCC 426, 435-437.

with persona only insofar as locus standi is concerned. Section 14 of the Ordinance grants Courts the arbitrary discretion to look beyond the cause of action and the locus standi of the individual bringing the cause, and make a determination on the maintainability of the action on the grounds of the personality of the individual. Justice must remain blindfolded to the social or legal status, primarily for the advancing the cause of substantial justice by ensuring impartiality[27]. This is violative of the ordinary protections guaranteed by the Constitution to every individual and is likely to be construed as an infringement of the Fundamental Right of access to justice, as construed by the Court in *Anita Kushwaha.*[28] In addition to the above, the FEO Ordinance is a formalization of the Doctrine of Fugitive Disentitlement in India. In order to examine the basis of this bar to access to justice, and its scope and extent, we will be considering the origins and applicability and the implications of the doctrine in the Indian context in the following sub-section.

The Doctrine of Fugitive Disentitlement

As a measure to address the problem of fugitives fleeing away to territories with lax extradition laws, the Fugitive Disentitlement Doctrine is increasingly becoming a common tool of deterrence to compel the attendance of fugitives. To trace the evolution of the doctrine, reference must be made to judicial decisions in the United State of America. Originally a creation of the United States Supreme Court first laid down in 1876 in *Smith v. United States,*[29] the doctrine took birth in a criminal context and has evolved through subsequent judicial pronouncements and has subsequently been imported and incorporated into multifarious legal systems across the globe.In *Allen v. Georgia,*[30] the US SC remarked that it was not inclined to hear and determine moot cases and that by escaping during the pendency of the appeal the criminal defendant had caused the case to become moot. The rationale given by the court was that escape of the accused was a separate criminal offence and to hear the case further would be a indignity upon the court, a ratio which as aptly titled the *mootness* rationale.

In *Molinaro v. New Jersey,*[31] the US Supreme Court rejected the *mootness* rationale and held that while escape does not trim the essential character of the case pending before it but disentitles the

27 Gregory C. Sisk , *Lifting the Blindfold from Lady Justice: Allowing Judges to See the Structure in the Judicial Code* (February 23, 2009). Florida Law Review, Vol. 62, 2010; U of St. Thomas Legal Studies Research Paper No. 08-21.

28 *Ibid.*

29 *Smith v. United States*, 94 U.S. 97 (1876).

30 *Allen v. Georgia*, 166 U.S. 138, 140 (1897).

31 *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970).

defendant to contest a case for determination of claims. A close nexus test was laid down in *Ortega-Rodriguez v. United States,*[32] wherein it was held that in absence of some connection between a defendant's fugitive status and his appeal, the courts were not to justify any dismissal of fugitive's pending appeal.

A unanimous decision of the Supreme Court in *Degen v. United States,*[33] however, looked down upon an arbitrary and blanket application of the doctrine. It recognised, for the first time, the applicability of the doctrine in a civil case but at the same time held that it does not permit the district court to automatically enter summary judgement in favour of the government in a civil forfeiture action based on a claimant's criminal fugitive status. The Supreme Court of New Jersey in *Matsumoto v. Matsumoto*[34] while analysing the Degen case held that, although the doctrine served the purpose of upholding the rule of law, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights.

The FEO Ordinance as tabled in the Lok Sabha, if passed, would give this doctrine a statutory force in India. Section 14 of the Ordinance gives a wide discretion to any court in the country to disallow a person declared a FEO to put forward or contest a civil claim. Section 14(b), further disallows a company or a LLP where the FEO is a key managerial person to put forward or contest a claim. In a country where it is settled law that access to justice is an inalienable constitutional guarantee within Article 21, by granting such wide sweeping discretion to civil courts to forbid access to the doors of justice, the FEO Ordinance stands in contravention to the Indian Constitution as well as a painstakingly curated ideal of access to justice explicated by a catena of judgements of the Supreme Court[35] [36]. A statutory rule striking a fugitive's claim and entering summary judgment against him as a sanction, would not only vitiate the due process of law but also violate his inalienable fundamental right of redress to court within Article 21 of the Indian Constitution. Viewed from this perspective the severity of the doctrine's application is overly draconian to those who have not been convicted of

32 *Ortega-Rodriguez v. United States*, 507 U.S. 234.

33 *Degen v. United States*, 517 US 820 (1996).

34 335 N.J. Super. 174 (N.J. Super. App. Div. 2000).

35 *Brij Mohan Lal v. Union of India,* (2012) 6 SCC 502*;* the Supreme Court had enshrined that it is the constitutional duty of the state to ensure that every citizen has access to the judicial system.

36 In *State of A.P v. Challa Ramakrishna Reddy,*(2000) 5 SCC 712,,723*;* the Supreme Court declared that Right to Life is a basic human rights and not even the state has the authority to violate that right. This right cannot be taken away even from a convict or a prisoner. Even on a conviction a person can be denied of personal liberties in accordance with procedure established by law, but they still retain the residue of constitutional rights.

any crime and are merely seeking protection against persecution.[37] For this reason alone, the FDD and the provisions of the FEO Ordinance formalizing the doctrine are unlikely to sustain a scrutiny before Courts of the country.

Protection of Third Party Interests

Every confiscation and non conviction based forfeiture regime must consider the variable of third party interests when positing a regime which disentitles a class of individuals from their property. This is rooted in recognition of a fundamental principle of natural justice that no individual acting bonafidely and in good faith shall suffer on account of his associations, or the actions of third parties. The FEO Ordinance also seems to have considered this question at length, with due consideration being given to third party interests throughout the Ordinance. What remains to be considered whether these protections are enough to secure the constitutional rights of these individuals. To begin with, the Ordinance through Section 4(2) prescribes that an application to initiate proceedings to declare an individual a FEO shall necessarily contain the details of persons interested in the properties which are sought to be confiscated[38]. Recognising the rights of the individual of enjoyment of immovable property, section 5 of the Ordinance posits that attachment shall not preclude an individual interested in the property from enjoying the immovable property. The individual in consideration includes all persons claiming or entitled to claim interest in the property. The Ordinance provides for affording an opportunity to persons interested in the property sought to be confiscated by issuing notice to such third persons and granting a period of week to reply to the court.[39] While Section 12 (7) empowers the Special court to exempt the confiscation of any property which is a proceed of crime, in which a person who is not the FEO, has acquired a bona fide interest, in accordance to section 16(2)[40]. A consideration of the aforementioned provisions implies that the Ordinance provides an opportunity to third parties to participate in the confiscation in the confiscation proceedings.

37 See Peter Acker, *A Critique Of The Fugitive Disentitlement Doctrine And Why It Should Not Apply In Certain Immigration Proceedings(March 18th 2018, 10:00 AM)* http://www.acker-immigration.com/articles/A_Critique_of_the_Fugitive_Disentitlement_Doctrine_in_Immigration_Proceedings.pdf.

38 Section 4(2), Fugitive Economic Offenders Ordinance, 2018, 79 of 2018 Ordinance introduced in Lok Sabha, 2018.

39 Section 10(2), and Section 11(4), Fugitive Economic Offenders Ordinance, 2018, 79 of 2018 Ordinance introduced in Lok Sabha, 2018.

40 Section 16(2) places the burden of proof for proving a bona-fide interest in property which is proceeds of crime, and no knowledge of the criminal nature of the property upon the individual claiming such interest in the property.

However, Section 14(b) of the Ordinance gives the mandate to any other court in India to disallow access to legal persons other than a FEO bring and contest civil claims, if the FEO held a key managerial role or a controlling share in the Company or LLP.

Confiscation: Penalty or Not

In order to determine whether the forfeiture of assets under this Ordinance would amount to proportionate punishment within the scope of Article 20 of the Constitution, it is imperative to determine, whether this Ordinance is punitive in its essence as well as its prescriptions. A perusal of the statement of objects and reasons of the Ordinance draws a blank with respect to its punitive nature; which at best can be derived from its objective to serve as a *deterrent* to future white collar offenders.

Jurisprudentially, help in determining the nature of the confiscation, can be found in analysis of the judgement in *State of West Bengal vs. SK Ghosh*[41] wherein the court considered the nature of confiscation under the Criminal Law Amendment ordinance of 1944. In essence, the Court laid down twin tests that need to be satisfied while determining whether forfeiture within a particular act amounts to punishment within the scope of Section 53 of the Indian Penal Code(IPC). The first test laid down by the Constitution Bench was to determine whether the order of forfeiture was passed by the Court trying the offence, and second was whether confiscation of such assets had been prescribed as a punishment within the ordinance. The purpose and intent behind the first test is that in jurisprudence, the court deciding the fate of the accused must be the Court granting him an opportunity for representation. The second test is predicated on the understanding that although empowered to determine the extent of punishment, no court is empowered to punish beyond or besides the empowerment granted to it by the legislature. In the case of the FEO Ordinance, the confiscation of property fails to satisfy both these tests.

At this point, it is integral to reiterate that the Ordinance prescribes no offence, but merely annexes certain existent offences to which it applies. The Special Court empowered under this act, is neither the trying authority nor the court of justice granting an opportunity to hear the defence of the individual against whom proceedings under the scheduled offence have been initiated, therefore rendering this confiscation assistive in compelling his attendance, but not punitive.

Referring to the above Constitution Bench judgement in *Ghosh*, the Supreme Court in *Yogendra Kumar Jaiswal v. State of Bihar,*[42] while

41 *State of W.B.* v. *S.K. Ghosh*, AIR 1963 SC 255.

42 *Yogendra Kumar Jaiswal v. State of Bihar, (2016) 3 SCC 183, 286.*

dealing with constitutional validity of the Orissa and the Bihar Special Courts Act, added a twin rigour in the determination of whether asset forfeiture amounts to penalty within Section 53 of the IPC. The court laid down that a forfeiture amounts to a penalty if it is the result of a judicial order passed by a competent court trying the offence. Furthermore, such a forfeiture must be final and not interim in nature, that is to say there must not be scope for restoration of property so forfeited. In the context of the FEO Ordinance, the court of competence will be the court empowered to try the scheduled offence, for the same reasons as considered above while considering the test in *Ghosh*[43]. As for the test to determine the permanence of the confiscation, attention must be drawn to Section 12(9) of the Ordinance. A perusal of the components of this section yield the understanding that the confiscation is not permanent, but merely an interim abeyance of the individual's title to the property until he either comes forward and partakes in the proceedings of the special court, or alternatively, till the criminal warrants against him are quashed or recalled. This is perhaps the most definitive evidence of the fact that the confiscation under the scheme and letter of this Ordinance is not punitive as envisaged under Section 53 of the IPC.

However, looking beyond the interpretation of punishment by the Indian legislature and judiciary, we find that perhaps the Court in *Ghosh* has fallen into the trap of strict interpretation caused myopia. Given the ambit of authority of a Constitutional Bench, the judgement is surprisingly limited in its scope of discussion of the issue. In order to garner a more holistic view of the issue, it is integral to take a step backwards and consider both the jurisprudence of punishment and its foundations in the law. Although a large part of academic literature has been devoted to determining a concise definition of punishment, most attempts have been in vain. H.L.A Hart, perhaps the foremost jurist of our times sidestepped this roadblock and laid down a fivefold criterion for determining whether an act is punitive in a state-structure paradigm, as mentioned hereunder:[44]

(i) It must involve pain or other consequences normally considered unpleasant;

(ii) It must be for an offense against legal rules;

(iii) It must be of an actual or supposed offender for his offense;

(iv) It must be intentionally administered by human beings other than the offender;

---

43 Ibid at n.41.

44 ANDREI MARMOR, THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW, *The Justification of punishment* (2015).

(v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

Traditionally, the monopoly of the State is the first marker which determines whether an action is punitive in its nature. The powers of confiscation as envisaged in the FEO Ordinance are quite obviously powers which belong exclusively to the State in any modern democratic society, and in this case the State has set up an elaborate administrative procedure for punishing those who transgress its legal authority. In fact, confiscation per se is regarded as punishment within the IPC as discussed before in this section. This begs for a consideration of other elements which deem an action punitive. The second such characteristic is the deprivation of an individual's liberty or freedom. The FEO Ordinance on this account does not deprive an individual of his physical liberty, but it does indeed deprive an individual of the right to enjoy his wealth. It is integral to reiterate here that the wealth in consideration is not a reference to alleged proceeds of crime, but extends to other properties to which the FEO possesses title, and are liable to be confiscated under these proceedings. To illustrate the transgression of this fine line of distinction, an individual accused of defrauding investors in his company to the tune of hundreds of crores of rupees may lose access to all funds that he has acquired as proceeds of crime from the thousands of investors; however the moment the authorities confiscate properties which are in no way related to the proceeds of crime but are legally acquired properties like his ancestral properties, to which the FEO possesses title, they tread into the territory of punishment.

Working through our problem with the 5 criterion as listed by H.L.A Hart, we find ourselves painting a picture quite contrary to the view laid down in *Ghosh*. Although the precise contours of criminal punishment are debated, it indisputably involves the intentional infliction of hard treatment or the deprivation of substantial liberties.[45] Undeniably, the regime of confiscation is administered by the State, it is for an offence against legal rules and the Legislature has made an amply sufficient designation of an authority to undertake its administration. What remains to be considered then is whether this would amount to an unpleasant or painful consequence and whether it is for an actual or supposed offender for his offence.

Beyond theoretical consideration, it is trite to question whether confiscation is painful or unpleasant, evidenced by the fact that if it wasn't unpleasant, it would defeat the purpose of bringing fugitives back to the country and deterring further acts of economic offenders becoming fugitives from law. As discussed in the section addressing

---

45 Ibid at n.44.

the FEO Ordinance as an NCB Asset Forfeiture Regime, we have noted that the confiscation under the Ordinance is not exclusively *in rem*, but extends to proceedings seeking to affix consequences *in personam*. A reference at this point should be made to *Collector of Customs v. D. Bhoormal*[46], wherein confiscation proceedings under the Sea Customs Act was recognised to be a penalty in *rem* as well as *in personam*, and was delineated as punitive both in their intention, as well as their implementation. Furthermore, as mentioned above, the *Statement of Objects and Reasons* of the Ordinance signifies that it intends to serve as a deterrent to future white collar criminals; this is an enlightening insight into the nature of the Ordinance. To argue that that there can be deterrence without punishment turns the idea of deterrence on its head and defeats any logical view of the concept. If such a view were to be admitted, it would put in abeyance Rousseau[47] and Hobbes'[48] lofty ideals with respect to the social contract and the state's tools to enforce transgressions of the same; lofty ideals which deeply influenced our constitution makers.[49] Furthermore, this stands either as a silent and possible begrudging admission of the punitive nature of the Ordinance or a testament to its lack of effectivity.

Despite the binding judgements of the Supreme Court characterising confiscation proceedings to be non-punitive unless specifically provided to be so in the statute; we are compelled to point out the glaring oversight of both jurisprudential theory and sociological facts that incarceration in any form, whether in the sweet will of the legislature deemed civil or criminal in its very *quiddity* is punitive. This whim of the legislature, manifest as it may, does not change the fact that the confiscation regime under the FEO Ordinance must be taken to be punitive in its pith and substance, and once implemented, in its manifestation.

Proportionality of The Punishment

Notwithstanding the extant corpus of law created by Indian courts on the subject matter, in this section we attempt to further our alternate examination of the punitive nature of the confiscation under the FEO Ordinance; and consider its proportionality in light of the Constitutional ethos, which guarantees proportionality as a right to every individual who suffers the fate of his actions through the due process of law.

46 *Collector of Customs v. D. Bhoormal,* (1974) 2 SCC 544.

47 JEAN JACQUES ROUSSEAU, THE ESSENTIAL ROUSSEAU: THE SOCIAL CONTRACT, DISCOURSE ON THE ORIGIN ON INEQUALITY. New American library (1974).

48 THOMAS HOBBES. LEVIATHAN, Cambridge: Cambridge University Press., (R. Tuck, ed.1991/1651).

49 Markandey Katju, *Constitutional jurisprudence*, Amicus Curiae Issue 87 Autumn 2011.

The constitutional guarantee under Article 300-A, mandates that no person shall be deprived of his property save by authority of law;[50] however this limitation on the right to property cannot be read to mean that an individual can be denied access to his property which has been acquired through legitimate sources of income. Furthermore, it is imperative to recognise that the authority of law is not infinite, but must function within the contours of the constitutional scheme and natural justice. Therefore every law which creates a punitive regime and has the propensity to erode a constitutional right guaranteed to citizens must satisfy a dual test in order to withstand a challenge to its constitutionality. The first standard is that the law must qualify as *reasonable* as envisaged under the constitutional scheme and secondly it must ensure that the sanction sought to be imposed has a *nexus* to the objective sought to be achieved.[51]

The confiscation proceedings provided in the Ordinance allows the Special Court to confiscate properties legitimately owned by the fugitive in favour of the government. Despite *right to property* having being deleted from Part III of the Constitution, any law depriving a person of his right to property cannot be immune from challenge before the court of law[52]. The denial of legitimately owned property to an individual is violative of Article 14 of the Constitution and must satisfy that there is a rational and sufficient nexus between the infringement of such right with the end sought to be achieved by the Ordinance. Evaluating the quantum of *punishment* prescribed in the Ordinance, it is evident that it is well beyond the bounds of reasonableness, for it is the dictate of the legislature to punish an individual not only for his wrongdoing, but also for any innocent acquisitions of property he may have made in the past.

Nor does the Ordinance satisfy the test of providing a rational and sufficient nexus, on account of the fact that the Special Court need not even arrive at a *prima facie* opinion that the property to be confiscated is proceeds of crime, let alone justify the same through a consideration of materials on record. Even if the provisions for recording reasons for confiscation are to be taken as an indication of consideration of the nature of the property, in its very essence the Ordinance does not provide for differential treatment of properties which are not proceeds of crime.

---

50 The Constitution of india, Article 300-A.

51 W.P. No. 16313 of 2001 V.P. Ranganathan vs. Appellate Tribunal for Forfeited Properties.

52 44th Constitutional Amendment Act removed Right to Property as fundamental right under Article 31 of the Constitution. It remains a constitutional right under Article 300A.

The prerequisite to denial of right over property is that the act of the executive or the legislature must be to advance a just public cause. It is not our case that the Ordinance does not achieve a public purpose, but rather merely because it is the urgent public need to address an issue, it cannot erode the due process guaranteed to every individual. Under no democratic framework does an individual who wishes to avoid harassment at the hands of enforcement agencies can be denied his constitutional and fundamental rights. Despite providing punitive measures the act does not even contemplate attributing criminality to the Fugitive Offender.[53]

The disproportionality of the punitive measure prescribed herein stems fundamentally on two counts, first because the FEO Ordinance in itself does not posit any offence, yet manages to impose penalty upon individuals; and second because the scope of penalty limits itself not only to the proceeds that an individual may have garnered through engaging in illegal activity, but also to property that may have been legitimately acquired well within the definitions of the legal system. The state would be perfectly justified in its right to deny a person, the proceeds of crime or any property that might be tainted.[54]

As considered at various instances above, the FEO Ordinance only appends a schedule of offences to which its provisions apply, whereas if a person is acquitted by the court in respect of the scheduled offence, his property being confiscated would not only cause irreparable harm to the individual, but also would be a blatant denial of his constitutional right. The regime of confiscation of properties other than proceeds of crime fails to satisfy the afore discussed criterion and thereby leads us to the logical determination of disproportionality. This renders the scheme of the Ordinance manifestly arbitrary, unreasonable and being contrary to the rule of law and hence it would violate Article 14, but given the current interpretation of the nature of confiscation being non-punitive, the Ordinance is likely to pass muster before the constitutional courts of this country; although it ought not to unless the metric for consideration considers all of the above.

53 See *Aslam Mohammad Merchant v. Competent Authority*, (2008) 14 SCC 186. Also See *Union of India v. Rajnikant Raghunath Belekar*, W.P No. 837 OF 2007, Bombay HC decided on 22.07.2008.

54 ibid at n. 42

Conclusion

Having evaluated the genus of non-conviction based asset forfeiture, the fugitive disentitlement doctrine and their evolution through time, it is safe to conclude that the FEO Ordinance falls within the genus in spirit, but seems to have been lost in translation. However, this is not to undermine the eventual efficacy of the legislation in light of the objectives it has been created to achieve, albeit at the cost of certain guarantees. Through an extensive analysis we have concluded that as the Judicial position stands as of date, the confiscation scheme of the Ordinance is not likely to be deemed punitive. However, we have also extensively analysed how this position must be revised to keep pace with the changing nature of jurisprudence and the blurring line between civil and criminal legislations. Consequently, having bought into an established judicial design, transposed its core value, and added more firepower through confiscation *in personam* as opposed to pursuance *in rem*, the FEO Ordinance seems fit to take on a rather herculean task, in the interest of public justice, at the cost of public ideals.

We believe that the infirmities of the Ordinance are not entirely incurable, and can be amended to ensure constitutional guarantees are not overridden. The first such amendment must necessarily concern itself with limiting the scope of the disentitlement doctrine, such that FEOs are precluded from bringing or civil claims against the government, and not a blanket disentitlement *in rem*. Secondly, the Ordinance must narrow the scope of confiscation proceedings to properties which can reasonably said to have rational nexus with the scheduled offence the individual is being prosecuted for. Lastly, the hallmark of a legal system governed by natural justice is that it must not make individuals pay for association; a trite which is glaringly overlooked in this Ordinance.

Rape: A Threat to Mankind

***Shirley Mody**
****Poorva Sharma**

Abstract

Rape is grave wrong and heinous crime which could lead to death and often leave the victim in a critical condition for lifelong. It is *malum in se*[1] and can have severe consequences on the victims. Rape is the fastest growing crime in India. It is considered as a gender biased sexual violence. However, that is merely a contemporary notion. This study highlights the sexual crimes committed on the female gender as well as male gender.

Rape is not a rarity, which occurs only in the rural areas. Its' vices are spreading rapidly in urban or metropolitan cities of India. The purpose of this research is to study the complexity of rape as it has been ignored and mischaracterized. It is complex phenomenon with many dimensions which needs an in-depth study. It being one of the most controversial issues and is perhaps the most under-reported crime due to social stigma attached to the victim. It is on the increase, despite changes in the legislation, practice and procedure in the investigation, high profile coverage in the media, and support available to the victims. However, only a small number of perpetrators are brought to justice. This research focuses on recommendations to mitigate rape. Dealing with rape is much more complex and sensitive issue than dealing with most other crimes. This paper seeks to explore the negative impacts faced by the rape victims.

Introduction and background

Rape is a "*malum in se*". Besides being created by the statute, *malum in se* is an inherent wrong. These wrongs are not only traditional, but illegal, violating public principles and morality of civilised society. Rape is as old as the existence of mankind, not a modern phenomenon in the society. It has been observed that in the earlier texts of the western world, rape has been given a description as well. The Greek Mythological God Zeus had raped women including Hera, Io, and Phoenician princess Europa. In ancient Rome, the Rape of the Sabine women had been reported.

* Student, Symbiosis Law School (SLS) Pune.

** Student, ILS Law College Pune.

1 VK Madan, RK Sinha, The Dynamics of Rape in Modern Indian Society, ISSN 1843-570X, E-ISSN 2067-7677, No.4 (2013), pp 81-87.

In many countries, rape is considered as a taboo for the victimand her family members. The concept is highly misused and misinterpreted by many such as rape of a non-virgin woman was considered a lesser crime than raping a virgin. Virginity should not be considered as some criteria to ascertain the intensity or severity of the crime. However, the society fails to understand that whether a woman is a virgin or not, rape has the same consequences and ill-effects on the victim. It is a threat to the integrity of the victim whether being a woman or a man.

Under the Indian constitution, gender equality is enshrined with the provision of positive discrimination in favour of women. Also, in the modern India women occupy position in the leadership roles in most fields. Women are also given the position of a deity or Goddesses but that does not reflect in our today's society due to the increased number of crimes against women in India.

In India, this horrendous crime has escalated immensely, and presently has emerged as a national problem. It is a challenge to the contemporary thinking. In historic times, rape existed in Europe while women in India have always had a divine personification as *"Shakti"* (strength) and worshipped as *"Devi"* (Goddess). Rape is a dynamic phenomenon emerging and the evils are spreading to a large extent.

Incidents of Rape in India

Rape violates the victim's fundamental rights construed under Article 21 of the Indian Constitution. Thus, these social issues should be dealt with firmness as well as sensitivity. Sexual violence or harassment, apart from being a dehumanizing act, is an unlawful intrusion on the sanctity of a woman/child and right of privacy. It is a serious blow to the supreme honour and offends the victim's dignity lowering herself-esteem too.

The quote given by Dr. Martin Luther King. Jr. urges one to reflect on what matters the most to us, individually as well as collectively.

"On some positions, cowardice asks the question "Is it safe?"

Expediency asks the question "Is it polite?"

And vanity comes along and asks the question "Is it popular?"

But conscience asks the question "Is it right?"

And there comes a time when one must take a position

That is neither safe, nor politic, nor popular,

But he must do it because conscience tells him it is right".

Rape became so rampant in the Indian society that the United Nations Secretary General appealed to the government of India to take measures

to protect women, furthermore the United Nations High Commissioner for Human Rights called rape in India a national problem. The Indian Government acted swiftly by modifying the laws and set up number of fast-track courts to deal with this crime. It is ironical and disappointing that in spite of such caution, sexual violence continues to increase every day.

In India, rape is a horrific fact of life, a common occurrence that makes everyday news, and in the recent times these incidents have been on a rise sharply. In December 2012, in South Delhi, a high-profile gang rape case occurred where a student was gang raped with horrific acts of cruelty. It shook the entire nation with striking protests against the Central and state government for failing to provide appropriate security for woman and children. Again, in August 2013, a similar brutal case took in Mumbai stirred memories similar to the December 2012 case. These disgustful incidents drew the world's attention towards India.

1. Thangjam Manorama Devi 2004 Case – In Manipur, majority of the population belonged to tribal and ethnic groups. Thangjam Manorama Devi was raped and brutally tortured by personnel of the paramilitary force of about 17 Assam Rifles. (Human Rights Watch Report, September 15, 2008).[2] The protests displayed anger over the brutal killing which succeeded in pressurizing the authorities to some extent. On the other hand, the case still lacks a positive legitimate action to provide justice to the victim without being effected by influential and powerful positions of the perpetrator.

2. Soni Sori 2011 Case- A 35-year-old Adivasi woman belonging to the ethnic tribal group named Soni Sori from a village in Chhattisgarh was attacked by unknown assailants who stripped her naked and gave her shocks. The evidence of gross sexual torture was exposed following a Supreme Court directive for medical examination. In the examination doctors found and removed stones that had been inserted into her genital tract and rectum during the torture (The Indian Express, 30 Apr 2013).[3]

3. Nirbhaya (Jyoti Singh) 2012 Case- In Delhi, on 16th December, 2012, Nirbhaya (Jyoti), a medical student and her friend were returning from a movie theatre waiting for a bus. One of the culprits convinced both of them to get onto an empty bus which had tinted windows. They were assaulted by 6 males, one of whom was a minor, aged 17. Her friend tried to protect himself as well as Nirbhaya but was beaten up with an iron rod by the

2 Arun Ignatius, Sexual Violence in India, Department of Global Political Studies, 26.05.2013 page 18 and 19.

3 Ibid.

6 perpetrators as a result of which he became unconscious. Nirbhaya was not just raped in a moving bus, her body was mutilated beyond imagination as her intestines were pulled out and her private parts mutilated. This unfortunate incident sparked protests across India and captured international media attention. Consequently, on 29th December, she succumbed to multiple organ failure, internal bleeding and cardiac arrest.

In September 2013, after a nine-month long trial in the court, the verdict for the Delhi Rape case was announced.The Court handed down death penalty to the four surviving assailants involved in the gang rape. This case is categorized to fall under the category of 'rarest of rare' case by the apex court in our country. Finally, on July 2018, the Supreme Court of India upheld the death sentences for 3 men involved in this case. Later, amendments were made to various sections of the Indian Penal Code, 1860 by the government to include death penalty in selective rape cases. The amendments also included the offences of acid attacks, sexual harassment, stalking and voyeurism, which were not part of any provision under the Indian Penal Code, 1860 ("IPC") or any other relevant act for the same.

4. Vishakha Landmark Supreme Court Judgement- Bhanwari Devi was a social worker at rural level in a development programme initiated by the State of Rajasthan which aimed in curbing the evil of child marriages throughout villages. She tried to stop an infant's marriage but that was not successful. However, her efforts for all this were not forgotten. She was subjected to social boycott and in September 1992, was gang raped by 5 men infront of her husband. After this case the Hon'ble Supreme Court by setting up a committee headed by Justice J.S Verma had laid guidelines and norms to be observed to prevent sexual harassment at workplace and accordingly after recommendations a Criminal Law Amendment Act, 2013 was passed. Since February 2013, in India, the word 'rape'has been substituted by the word "sexual assault" and it includes assault without penetration and new offences. Additionally, we now have a legislative Act in place called 'The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013'.

   Later, in *Ak Chopra Case*[4] the Vishakha case guidelines were implemented and thereof the idea justice was met.

The legal definition varies from country to country and from time to

4 (1999) S.C 625.

time. In mathematical parlance, rape may be described as a function of time and space.

The IPC describes an exhaustive list of a number case of crime and punishment. The IPC takes into account "*actus reus", "mens rea",* and the fundamental maxim "*actus non facitreum, nisi mens sit rea"* which means "the act is not culpable unless the mind is guilty."

There are two sections in IPC pertaining to rape viz. Section 375 and Section 376. In Section 375 IPC, *a man is said to commit "rape" to a woman in a circumstance like against her will, without her consent under false promise, consent by coercion, with her consent when she has unsound mind or intoxication and is unable to understand the nature and consequences of that to which she gives consent, or with or without her consent when she was under 16 years of age.* Section 376 of IPC defines a minimum punishment of seven years for the perpetrator. The punishment covers a list of rape situations and punishment for a public servant, police, and gang rapists.

Impact of rape on victims

Rape and psychosis: There are high chances that children who have been sexually abused get diagnosed of psychosis and bipolar affective disorder. Psychosis greatly depends due to the severability of the trauma suffered by the raped victims.[5]

Rape and employment: Many women report problems such as ability to work and job satisfaction at a work place. Their self-confidence reduces considerably that leads to underperformance at work or the place ofemployment. The victims become apprehensive to approach their colleagues after experiences such horrendous crimes.

Post-Traumatic stress disorder ("PTSD"): The symptoms can be seen as soon as the incident took place or even many years down the line. Feeling helpless, intense fear, lack of trust even around family members and dear friends, insomnia, feeling of impurity and disgust towards one's own self, loss of appetite and the symptoms faced by victims. There are no precise medicines to cure PTSD but a few drugs could help hyper arousal or sleeplessness. Complex problems do not have a clear remedy or medicine and each person heals at their own pace as there are not hard and fast rules for the same.

Rape and mental/emotional/psychological effects health: The incident of rape has immense effects on the emotions or the mental health of the victims. She tends to get flashbacks about the same incident over and over again making it difficult for her to lead a life of a normal human and do the daily routine work whether in her house or even at the

5 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3196946/ Retrieved on 28th July, 2018.

workplace. The victim can become a patient of a borderline personality disorder. One of the worst effects is that even a good touch on her body reminds her of that particular incident and the victims feel that there is still certain amount of control over their body.

Rape and physical health: The physical effects of rape can arise from both forced sexual assault and those not involving forcible submission. Forced sexual assault causes visible bruising or bleeding in and around the vaginal or anal area and the other parts of the body as well. Forced and other types of rape can highly impact the victim's physical health and she can face consequences such as urinary infections, pregnancy, sexually transmitted diseases (STDs), uterine fibroids, painful intercourse etc.

Factors

There are a number factors such as:

The ***Institutional factors*** include the educational system and the legislation of the country.

Social factors include the patriarchal society, gender inequality and considering sexual intercourse as a taboo in the Indian Society.

The ***Cultural related factors*** such as masculinity and power.

Individual factors include the motivational and psychological aspects.

Environmental factors including westernisation and people migrating within our country and even inter country.

Apart from the abovementioned reasons for rape, it includes sexual pleasure, power, anger, socio-economic factors, evolutionary factors, etc. For example, influential and powerful people can coerce mating with very little fear of punishment.

Causes of Rape in India

1. Acceptance of domestic violence: Domestic violence is seen almost in every house whether rich or poor. A number of women blame themselves for getting beaten up by their spouses and do not stand up for themselves. Generally, the husbands are intoxicated and demand for sexual intercourse, going against her will and if when the woman refuses for the same then she is assaulted and raped. Adolescents and children living in such families observe such behaviour and get influenced to continue the same.
2. A slow court system: The Indian courts are relatively slow and sluggish. There are plenty backlog cases pending over the years. This is as there are relatively less number judges and due to the over the population of India. Sadly, there is also a

lot of corruption which creates a huge hurdle in administering justice.

3. Encourage rape victims to settle for a compromise: Elders of the family or head of the village persuade the victims to compromise or to settle the dispute in a quiet manner with the rapist. This poor guidance encourages the rapist and do not held them responsible as much needed. In many scenarios girls are asked to marry the attacker as marriage is given more priority and importance than bringing the culprit to justice.

4. Low status of a woman: The biggest issue of Indian society is lower status of women. Practice of dowry is deep-rooted in India. It is expected that the girl's parents are obliged and hence need to pay a handsome amount of dowry to the boy's side family, just to ensure that the daughter is treated with respect at her in-law's home. Paying huge dowry makes it difficult for poor sections of the society and the consequence is that girl child is considered a burden to the family. Many people resort to abortion of a girl child and it can be observed that India has the lowest female-to-male ratio. Throughout, the sons of the family are given better education, fed better and more affection than their sisters. Young children observe this kind of trend which is followed in their respective families and thisforms the basic foundation of their morals.

5. Blaming victim or the victim's clothes: More often than not, there is a greater tendency by people to blame and shame the victims of rape. It has been observed culprits consider provocative clothes as an invitation to rape, molestation and sexual harassment. Rajasthan suggested banning skirts as a uniform for girls in private schools, citing it as the reason for increased cases of sexual harassment.[6] Such do not deter the criminals and rapist from committing sexual offences but shifts the entire blame on innocent victims. Rape victims feel a sense of guilt and disgrace for themselves.

6. False notion about masculinity: Since the old era men are always given a higher status and authority compared to women. A man is also considered as the head of the family and the decisions regarding the family members are taken solely by the "man of the house." Women did not have much to say and were often suppressed and considered incapable for taking decisions. This perception continued in the Indian Society for many years together as a result of which women fall prey to many crimes.

6 Hindustan times December 29th 2012, 13.29 IST, retrived on 26th July 2018

However, they had to keep mum to protect the integrity of the family and themselves. No one dared to raise a voice against the man or do anything which was against his wishes. Therefore, gender-balance was a rare sight to see.

Theories regarding Rape

Erik Erikson's psychosocial theory provides us with the insights about the accused especially the juvenile in a rape case. Erikson was the first to develop an eight stage human developmental model. Each stage represents a person with some conflicts, termed as crisis that a person needs to successfully deal with before moving to the next stage.

Social Disorganization Theory (SDT) developed by Shaw and McKay (1942) offers yet another perspective to analyse rape. Thistheory argues that "crime and deviance reflect conditions that disrupt the integrity of local communities and weaken the regulatory power of social norms" (Baron and Straus, 1987). Migration, separation from the family, marital issues may be some of the reasons to indulge in criminal activities (Blau and Blau, 1982).

Analysis based on News Reports

Rape on Females

1. NCRB Report:

The 2015 National Crime Record Bureau (NCRB) data on the proximity of offenders to victims (the most recent data available) shows that in 95% of all the rape cases, the offender knew the victim. It was observed that 27% of rapes are committed by neighbours, 22% involves the promise of marriage and 9% are committed by immediate family members and relatives. The data further stated that at least 2% of all rape cases involves live- in partners or husbands (former partners or separated husbands — rape within marriage is not recorded), 1.6% are committed by employers or co-workers and 33% are committed by other known associates.

According to the data collated by the NCRB, Madhya Pradesh with 4,391 cases, Maharashtra with 4,144, Rajasthan with 3,644, Uttar Pradesh with 3,025, Odisha with 2,251 and Delhi with 2,199 recorded the highest number of reported rape cases. Here, it must be noted that a lower rape count could mean a lower 'reported' rape count. States that do better on other gender parity metrics (literacy rate, sex ratio, workforce participation etc) are likely to see a higher count of reported rapes because more victims try to access the justice system. For instance, Kerala reported 1,256 rapes while Bihar reported 1,041

rapes, despite the fact that the population of Bihar is three times the population of Kerala.

2. Livewire report on 8th May 2018:

India's average rate of reported rape cases is about 6.3 per 100,000 of the population. However, this marks vast geographical differences with places like Sikkim and Delhi having rates of 30.3 and 22.5, respectively, while Tamil Nadu has a rate of less than one.

India's average rate of 6.3 suffers from under- reporting. According to a recent report by the Livemint, about 99% of cases of sexual violence go unreported.

Reported cases jumped by a massive 26% in 2013, the highest in the last 15 years, mainly driven by an increase of reports in the states of Northern India, like Rajasthan, Delhi, and Uttar Pradesh.

While the conviction rate for all crimes against women stands at a measly 19% across India. The Northeastern states, quite notably, have relatively high conviction rates ranging from 25% to 70% (with the exception of Assam). On the other hand, states like West Bengal, Gujarat, and Karnataka have rates of less than 5%. Data on conviction rates for rapes with an all India rate of about 25% in 2016.

At the beginning of 2016, over 118,537 cases of rape were pending at the courts. At the end of the year, the pending cases went up to 133,813, an increase

The pending cases went up to 133,813, an increase of 12.5%. For crimes against women overall, pending cases increased from 1,081,756 to 1,204,786. This is merely a consequence of the larger inefficiency in the judicial system which had pending cases increase from 9,012,476 to 9,703,482, truly a staggering number.

Over 16,500 cases, or just under a third of reported rape cases in 2016 were pending investigation by the police at the end of that year. The highest number of cases pending police investigation as a percentage of all cases was the highest in Manipur at 84% and Delhi at 62%, and lowest in Rajasthan at seven and Haryana at 15%.

Rape on Males

India Today on 12th January 2018

In a recent study, it was found that out of 222 Indian men surveyed, 16.1% had been coerced into having sex. Despite rape of men not researched as widely as rape of female, there are several statistics to suggest that men are raped and the prevalence of men rape is wider than is generally presumed.

A Public Interest Litigation ("PIL") filed before the Supreme Court for provision to punish women too for rape. The petition asks that the word "any man" used rape. The petition asks that the word "any man" used under the offences under Section 354C (voyeurism), Section 354D (stalking), Section 354A (sexual harassment) and Section 375 (rape) be declared ultravires, or in violation, of the Indian Constitution.

It is argued that Article 15 of the Indian Constitution, 1950 prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them. Crimes such as rape and murder do not see age, caste or even gender or sexual orientation.

Recommendations/ suggestions

Institutional

Policing:

- In India, there has been see a gradual growth in the conviction rate of rape cases recently but most of the rape cases go unreported. Thus, it is highly recommended that these cases are registered as soon as the cases as reported.
- There is a need to educate and train the police officials in the required investigation and interrogation techniques or methods.
- The values of integrity and honour shall be promoted among the police personnel. Even our society shall make an effort to promote these values within itself and even outside India. We must try to promote the values of integrity and honour not only among the police personnel but also extend it to the society.

Legal sanctions and deterrents:

- It is high time that the rape laws re-energized and re-strengthened with respect to the international standards for our country. It is highly recommended that the rape laws are modernized and re-vitalized according to international standards and requirements in our country.
- There is a need to consider the psychology of the victim and with respect to that the quality of investigation, methods and procedures shall be improved. Improving the quality of investigation, methods and procedures for investigation, especially taking into account the psychology of the victim is essentially important.
- Revamping of the punishments for the offenders would be another significant deterrent in order to reduce the number of rape cases in India. Another deterrent could be overhauling of the punishments for the offenders.

- It can be seen that the existing rape laws are not proper or effective enough as needed.
- Therefore, we must have watchdogs over the same and additional support to such victims as well. Moreover, it is a must for proper and effective enforcement of the existing laws by introducing watchdogs and additional support to the victims.
- We must ensure a time bound infliction of punishment on the offender so as justice is not only sought or asked for but also done in any case. Ensuring that justice is done to the victim and a time bound punishment is inflicted upon the offender.
- Further, re-examination of the victim compensation provisions shall be taken into consideration as these rape victims need to be compensated well though the physical and the mental trauma that these victims undergo can never be compensated in monetary terms. Lastly, re-examination of thevictim compensation provisions is necessary as well.

Social & Cultural

- At the macro level, certain campaigns firmly addressing the patriarchal values and cultural bias in India favouring the males shall be conducted for the public in order to create awareness for the same. We must conduct campaigns at a macro level to firmly address the patriarchal values and cultural bias in India favouring the males.
- There are a number of causes and catalysts regarding the issue of gender imbalance in India. This needs to be addressed by the society as a whole so that some positive changes can be seen in our society in the near future. The society as a whole should address the causes and catalysts for the gender imbalance in India.

Victim Support

- A team of dedicated and professionally trained doctors and social workers must provide the victims with both legal and psychological assistance such as personal therapy, attention, and representation services that bring back the lost confidence within the victims. The victims must be provided with both legal and psychological assistance such as personal therapy, attention, and representation services to be made available to the victim from dedicated and professionally trained social workers.
- One of the most important measures is the protection of the victim and her family from the baseless taunts by the neighbours

or the society for that matter in general. Such baseless taunts have huge impacts on the minds of the victim and her family members hampering their mental health and living. Certain measures must be adopted that wouldensure that the victim and her family are not taunted in/by our society.

- In different localities, victim support centres and any other support groups that aim at comforting the victims must be established. Establishment of victim support centres and other support groups where the victims can seek comfort.
- The Medical Staff shall be given special training and they shall be well equipped in order to deal with the rape cases. Moreover, regular updates for the same shall be done to maintain records of these cases or any significant improvements in a particular case thereto. A Medical staff must be given the specific training related to the rape cases and have regular updates for the same.
- The conduction of medical seminar or conferences to address, guide and fulfil the short term and long term requirements of the victims and their families is necessary. Also, conducting medical seminars or conferences to not only address but also to guide and fulfil the needs of such victims and their families in a short term and a long term as well.
- The medical examinations which are to be carried on the victims must be done in a sensitive manner such that it has no further negative effects on the mental and physical conditions of the rape victims. Further, sensitive medical examinations must be carried on as much as possible keeping in view the mental and physical conditions of these victims.
- In the Indian Penal Code, 1860, as amended by the Criminal Law (Amendment) Act, 2013 34th Edition by Ratanlal and Dhirajlal it is mentioned in *Delhi Domestic Working Women's Forum v Union of India and amp; Ors,*[7] Supreme Court found that in the cases of rape, the investigating agency as well as the subordinate courts sometimes adopt a totally different attitude towards the prosecutrix and therefore, the apex court issued directions in order to render assistance to the victims of rape.

Education and Awareness building

The schools and the colleges should havesex education courses or sex education as a subjectwithout politicizing this very issue being the need of the hour to create awareness from the teenage years of age itself.

- Schools and universities must be involved in running awareness campaigns, victim help projects, sensitization campaigns,

7 (1995) SCC (1) 14.

workshops etc. in villages and local areas wherever required at the grass-root level.

- Organization of a few workshops on sex education for both the teachers and the parents in the schools.
- Organization of training workshops by the local women leaders on human rights and legal rights would help the locals to know about this particular issue and the related issues in the society.
- There should be a proper subject of self-defence and the instructors should teach the related techniques especially to the girl students in the schools and colleges.
- We must also do a reasonable amount of investment in the area of proper education forall the experts and professionals dealing with such incidents, victims or the perpetrator. This can account to: -

  (a) Responding to the disclosures of sexual violence.

  (b) Approach towards providing prevention instruction to youth.

  (c) Necessity to record the history behind each case.

  The trauma involved in a particular case and the required training regarding the same must be dealt with. Thus, training in recording the history of sexual abuse and the trauma involved in the case and responding to disclosures would be helpful.

  (d) In the modern society, a need is felt to burst the myths about sexual violence and correct the factually incorrect beliefs on this issue. Challenge the widely held but factually incorrect beliefs expose commonly held myths about sexual violence.

Environmental factors

In India, Media plays an extremely significant role in influencing the views of the entire nation.

- Campaigns focussing on re-defining or re-interpretation of masculinity by the way of mass media can serve the purpose of bringing about even the slightest change in our society. Initiate massive media campaigns that focus on the re-defining/ re-interpreting of masculinity.
- Telecasting government sponsored short films before the

commercial films on the issue of rape in our country to reach larger audiences across the country.

- Moreover, high rated TV daily programmes on different channels must be used as a platformto bring across embedded or separately shown social messages related to gender issues in Indian society.
- Awareness campaigns involving a celebrity or a known face by way of using his/her voiceto talk about curbing rape in India.
- Media coverage of rape cases to raise awareness about the legal process and the sanctions faced the victims.
- It must be noted that in today's times, social media has developed and become a major platform of expression for the youth in India. It is needless to say how powerful this social media is not merely within a country but beyond the geographical boundaries to reach out to the public in large numbers. This signifies that the help social media must be taken to spread or talk about this issue.
- Again, the mobile is a huge and progressive platform to broadcast campaigns and support prevention activities.

Community Action

- The community policing initiatives could be a great idea in the area of community action to be adopted by and for the community to problems of rape and sexual harassment.
- A 'beat officer' initiative i.e. designated policemen can be appointed in every neighbourhood to assist the kick-start community policing. He/She can become part of the local networks and be instrumental in redeveloping community bonds. He/She can also contribute incontrolling the social issues.
- There is a need to start specific training programmes for the community, community leaders and also the law enforcers in the Indian society.
- In order to support community action, it is pertinent that the social and physical infrastructure is a developed one.
- Active andenergetic participation of women in the community patrolling can serve as a valuable tool which in turn will have an increased impact of these community actions.
- At community level, establishment of clinically trained counselling and support centres to lower the threshold of this

crime would considerably help large number of rape victims in the years to come.

- Pilot projects should be started in vulnerable communities with the help and participation of diverse stakeholders most likely the NGOs, local schools, law colleges and universities, youth groups, teachers, politicians and healthcare organizations as well as professionals from other fields.

Conclusion

On the basis of our analysis in this research paper, it is concluded that a prominent fact that rape is regarded as heinous and criminal in nature. It is not hidden that the number and the level of inhumanity of this crime against the women has been on a rise in the recent years in all the societies whether educated or uneducated or the open or closed ones. Therefore, this research paper aims to stress upon the problem of rape from the social, cultural, institutional, environmental and individual perspectives. We intend to make not only a theoretical but a practical contribution to this topic as well which is the least talked about as considered a taboo in India. This multi-dimensional analysis of the rape cases can help in many ways in the future. A better understanding of this issue and the reasons behind the same would hopefully result in taking effective measures to curb the problem. The law enforcing agencies would be helped by such theoretical analysis in each case to punish the offenders rightly, to investigate and prosecute the offender and to also rehabilitate any such offender if the court thinks fit as per the facts of each case. In India, the legislation is required to have an enlightened framework of mind rather than an emotional one. It is the duty of the society to assist the rape victims in coping up with the social and psychological stress due to a particular incident in her life rather than ridiculing or taunting her.

To summarize, we put forth that the present study is dispersed in the nature and need of a holistic integration to delve deeper into the cause and consequences of rape inspite of the existence of various other views over this issue. This study majorly focuses to integrate diverse perspectives so as to envisage a new lens of inquiry and line of multidimensional explanation for rape in our country.

Here, it can be said that rape is under reported in India largely because of social stigma, victim-blaming, poor response by the criminal justice system, and lack of any national victim and witness protection law. All this makes them a highly vulnerable group of people in society receiving unnecessary pressure and distress from the accused, the police force, their own families and the very inquisitive society.

However, researchers conclude that that the framed laws in India

are the necessary ones but definitely not sufficient enough to cater to all the incidents of rape in our country. It is hereby suggested that this challenge be addressed and tackled with new effective ideas while considering the multidisciplinary perspective as well besides the law and its ineffective enforcement.

Lastly, on the basis of this research paper, it is stated that the analysis put forth in this paper strive to provide an insightful and sound approach to find the most suitable solutions for the ungovernable social problem of rape as a crime against women in India.

References:

V. K. Madan & R. K. Sinha, *The Dynamics Of Rape In Modern Indian Society*, AGORA International Journal of Juridical Sciences, ISSN 1843-570X, No. 4, 2013 at 81-87.

Dr. Sushma Suri & Sanjeeda, *An Analytical Study of Rape in Delhi*, International Journal of Education and Psychological Research (IJEPR), ISSN: 2279-0179, Vol. 2, Issue 3, Aug 2013, at 60-68.

Arun Ignatius, *Sexual Violence In India*, Department of Global Political Studies, May. 2013 at 6-7.

Memchoubi Ph. & Kh. Pradipkumar Singh & Supriya Keisam & H. Nabachandra, *Rape or Pseudo Rape: A Five Year Study of the Medico-legal Cases in Imphal*, J Indian Acad Forensic Med. Vol. 35, No. 3, July-Sept. 2013 at 242-244.

Dr Nina Burrowes, *A review of the literature on rape and sexual assault,* NB Research pro-bono report, 2011, at 11-20.

Elisabeth Wise, *Rape Culture in Society and the Media*, WomenNC CSW 2013 Fellowship, Feb 2012.

Livewire news Report on 8th May, 2018.

India Today news Report on 12th January, 2018.

The 2015 National Crime Record Bureau (NCRB) Report.

The Indian Penal Code, 1860, as amended by the Criminal Law (Amendment) Act, 2013, 34th Edition by Ratanlal and Dhirajlal.

The People No Country Wants: National Register of Citizens - Assam's Citizenship Crisis

***Bedpriya Lahiri**
****Dr Ayan Hazra**

I. Introduction

The Northeastern region is a true frontier of India. It has over 2000 kilometers of border with Bhutan, China, Myanmar and Bangladesh and is connected to the rest of India by a narrow, 20-kilometer wide corridor of land in West Bengal. Ecologically this region is unique with its high mountains, snow bound regions, deep forests, undulated terrains, networks of rivers and rivulets and plain land with high rainfall and moist weather. It is also one of the most ethnically and linguistically diverse regions in India, with each state consisting of its distinct cultures and traditions. One such state is Assam, famous world over for its tea, jaded mountains, singing waterfalls, the majestic river Brahmaputra and its ever-smiling people.[1] Assam is one of the most beautiful states of Northeast India, which is as rich in natural resources as it is in its diversity of population.[2] However, in recent years it has stood volatile and rife with controversies when deciding upon certain matters such as the question of the citizenship of its residents. The main source of strife is the alleged illegal immigration and the consequent changing demography of the state. This gave rise to the issue of NRC, which shall be discussed in this paper.

To put simply, the National Register of Citizens (NRC) is a register that maintains the name of Assamese citizens, its updation being a periodical process. The objective of updation of NRC at regular intervals is to document the existence of legal citizens and prevent illegal migration. It was originally prepared based on data collected in

* LL.M. Student, National Law University, Delhi

** Assistant Professor, Sociology, Hidayatullah National Law University, Atal Nagar, Raipur

1 Chandra Bhushan (2005), "Assam-its heritage and culture"; Delhi: Kalpaz publication, P. 07.

2 http://www.muslimpopulation.com/asia/India/East%20Bengal%20Rooted%20Mia%20Muslim%20Politics%20In%20Assam% 20Post%20Independent%20Period.php. Accessed on 10/09/18.

the 1951[3] census and serious political considerations have prevented it after that. The stalemate in the NRC issue was due to the barriers created by the Assam movement, the language movement and other ethnic identity movements. Supreme Court finally intervened in 2015 and the draft has now been released.

The NRC updation process had been initiated along the lines of the Citizenship Act of 1955 and the Citizenship (Registration of Citizens and Issue of National Identity cards) Rules of 2003 (as amended in 2009 and 2010).[4] The main apprehension with NRC was that it could possibly be unfair to Hindu Bengalis and Muslim Minorities resulting in their non-inclusion in the draft. This issue was further being used by politicians for their electoral gains.

Consequently, a whopping four million people were left anxious, as their names were not included in the final draft. The Foreigners Tribunals entertained objections of those whose names were excluded and reduced the number of people to one million. These people presently, at the time of writing of this article are illegal immigrants declared by India with no state or national identity and uncertain future. It is unclear as to where the people, whose names have not been included in the final draft, go. The Bangladeshi government is quite adamant that there are no illegal migrants living in India from their country.

Following the publication of the complete draft NRC, to allay the fears of those excluded the Indian Government is maintaining that it is not going to take any hasty step for their exclusion or removal. Individuals who are not listed have been allowed to file a claim requesting their inclusion and the final updated NRC will be published once all claims have been processed. However, it does not secure their future or alleviate the fears of those excluded. By this paper we wish to trace the origin of this controversy, its history, its challenges, the social and political implications it presents and how India should deal with it vis-à-vis its international obligations.

---

3 After the conduct of the Census of 1951, a National Register of Citizens (NRC) was prepared in respect of each village showing the houses or holdings in a serial order and indicating against each house or holding the number and names of persons staying therein, and in respect of each individual, the father's name/mother's name or husband's name, nationality, sex, age, marital status, educational qualification, means of livelihood or occupation and visible identification mark. This was done by copying out in registers the particulars recorded during the Census done in 1951. This NRC was prepared under a directive from the Ministry of Home affairs (MHA). These registers covered each and every person enumerated during the Census of 1951 and were kept in the offices of Deputy Commissioners and Sub Divisional Officers according to instructions issued by the Government of India in 1951. Later these registers were transferred to the Police in the early 1960s.

4 In an order dated 27 March 2018, the Supreme Court directed the Office of the State Coordinator of National Registration to complete the verification process by 31 May 2018 and to publish the complete draft of the updated NRC by 30 June 2018.

II. The History Of Immigration & Population Movement In Assam

The official status given to migrants in Assam has been changing constantly in the course of its history. Therefore, the terms immigrants, migrants and refugees are used interchangeably here.[5] At the local level, these people are called bohiragoto (outsiders), bideshi (foreigners), invaders, Bengali peasantry and land grabbers, among others.[6] Historically, the earliest evidence of large-scale migration from Bangladesh can be traced back to 1820s and 1830s when tea plants were being set up in Assam.[7] The industry expanded and required a large number of workers by 1850. The colonial government too to facilitate the process of bringing workers to work in the tea plantation sector, made a series of legislations from 1863 to 1901.[8] A couple of years after the tea plantation area was created, oil was discovered in Assam. This sector further pulled in numerous workers from different pieces of India, including Bengal. In the colonial era, the Muhammed Saadulla government in Assam was blamed for settling an extensive number of Muslims from Bengal in Assam. In specific quarters, the 'Develop More Food' motto ended up being, as reported by numerous then authorities as, 'Develop More Muslims'.[9] Socially, the migration of the two classes changed the demographic structure of Assam and it began to influence the local culture. To incorporate with the neighborhood populace, various settlers, the vast majority of them from the average working class, took in the Assamese language and attempted to adjust into the Assamese culture.[10]

III. The ascent of Anti-outsiders' Movement

In 1947, India was divided and a segment of the Muslim populace from Assam received Pakistan as its new home due to the partition of territory or because of its religious affiliations. Notwithstanding, 1961 onwards, an uncertainty began developing in the psyches of the local Assamese individuals that Assam was under the animosity of migration. It was trusted that individuals were coming wrongfully from East Pakistan and taking settlement in Assam.

---

5 Datta, A. (2013), Refugees and Borders in South Asia: The Great Exodus of 1971. London And New Delhi: Routledge.

6 Shamshad, Rizwana (2017), Bangladeshi Migrants in India: Foreigners, Refugees, or Infiltrators?, New Delhi: Oxford University Press.

7 Tea plantation in Assam was introduced by Scottish, Robert Bruce. He started company, which expanded trade of Assam tea to the other parts of the world. When Bruce landed in Assam, he discovered tea plants 'growing wild in the upper Brahmaputra valley'. ("History of Indian Tea" Indian Tea Association. \https://www.indiatea.org/history_of_indian_tea. Accessed on 3 December 2018).

8 Gait, Edward (1926), A History of Assam. Calcutta and Simla: Thacker, Spink & Co.

9 Nag, Sajal (1990), Roots of Ethnic Conflict: Nationality Question in North -East India New Delhi: Manohar.

10 Hussain, Monirul (1993), The Assam Movement: Class, Ideology and Identity. Delhi: Manak Publications.

In 1972 a noteworthy political development occurred in mainland Asia, as it birthed another sovereign state by creating of Bangladesh. Because of the atrocities by the Pakistani armed force against the nation's Bengali-speaking population somewhere close to 7.5 and 8.5 million moved to India. After the finish of the war and the freedom of Bangladesh in 1971, a procedure to repatriate the refugees started. Be that as it may, in 1972, by an agreement between India's Prime Minister Indira Gandhi and the President of Bangladesh, Sheik Mujibur Rahman, the two nations chose that the individuals who crossed the border before 1971 were not Bangladeshi residents.[11] The process of migration though reduced, nevertheless continued allegedly from Bangladesh. Eventually this 'migration issue' turned into 'foreigners' issue' in Assam.

IV. The Assam Movement and The Assam Accord

Now, outsiders issue turned into the prime plan of the 'Assam Movement' (1979-1985) started by the 'All Assam Students Union (AASU) and 'All Assam Gana Sangram Parishad (AAGSP)'.[12] They demanded the extradition of foreign nationals from the state. During the time of the Movement, without making any statistical data the political pioneers misrepresented the quantity of the foreign nationals in the state.[13] The All Assam Students' Union in one of their publications printed the number of infiltrators at more than 45 lakhs, of whom more than 15 lakhs had entered their names in the electoral roles. On the off chance that one acknowledged such fantastical figures, the level of refugees would go between 10 to 50 percent of the total population of the state.

A series of dialogues occurred with the Movement Leaders and the State Government bringing no solution, which prompted direct clashes. They were determined to stop the general decision of 1983 using any and all means and thus created an incredibly explosive situation.[14] In February 1983 a huge number of individuals, mostly, women and

---

11 UNHCR Report (1972), A Story of Anguish and Action: The United Nations Focal Point for Assistance to Refugees from East Bengal to India. UNHCR: Geneva.

12 "The Story of Atabor the Bandit, or How the NRC Reinforces Divisive Narratives", Malini Sur, The Wire, 2 August 2018. https://thewire.in/rights/assam-nrc-bangladesh-border. Accessed on 3 December 2018.

13 According to Jogen Hazarika (1979), the Chief Minister, the number of foreign nationals in Assam was two lakhs. Two regional parties of Assam- '*Assam Jatiyatabadi Dal*(AJD)' and the '*Purbanchaliya Loka Parishad* (PLP)' estimated the number of the foreign nationals in the state at 40 lakhs and 13 lakhs respectively. Another exponent of the movement named Bisweshwar Hazarika, counted the number of foreign nationals in the state at 77 lakhs.

14 The Political Demography of Assam's Anti-Immigrant Movement, Myron Weiner, Population and Development Review, Vol. 9, No. 2 (Jun., 1983), pp. 279-292 Published by: Population Council Stable URL: https://www.jstor.org/stable/1973053.

children belonging to the erstwhile East Bengal Muslim community were severely executed at Nagabandha and Neilli of Nagaon District and other different regions of the state.[15] They were assaulted by the local tribes, which consisted of the Tiwas, the Karbis, the Mishings, the Rabhas and the Kochas.[16]

The immediate purpose behind the assault was the participation of huge quantities of Muslims in the 1983 polls, which the AASU and others needed to be boycotted. After the Nellie slaughter, a section of the Muslim individuals from the AASU left the association in light of its developing anti of Muslim tone. Furthermore, during that time, the Indian government ordered the Illegal Migrant (Determination by Tribunal) Act 1983 to be enacted.[17] Later, the Assam Accord was signed in 1985 and it ended the movement.

After a strong controversy and debate, a Memorandum of Understanding, famously known, as 'Assam Accord' was marked between AASU, AAGSP, Central and State Governments in the capital 'New Delhi' in the early hours of Fifteenth August 1985 within the sight of Rajiv Gandhi. The Accord declared the following:

(i) 1st January 1966 as the cut-off date with the end goal of determination and cancellation of foreigners citizenship.

(ii) allowed for citizenship for all people coming to Assam from "Specified Territory" before the cut-off date.

(iii) all people who came to Assam preceding first January 1966 (Inclusive) and up to 24th March 1971 (midnight) will be distinguished as per the arrangements of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1939.

(iv) Names of outsiders so distinguished will be erased from the Electoral Rolls in force. Such people will be required to enroll themselves before the Registration Officers according to law.

(v) On the expiry of the time of 10 years following the date of detection, the names of every single such individual who have been erased from the appointive rolls will be re-established.

15 Kimura, Makiko (2013) The Nelie Massacre of 1983: Agency of Rioters. New Delhi: Sage.

16 In Assam, the tribals and the immigrants have tensions over land. See Mishra, U (2012) 'Bodoland: The Burden of History' Economic and Political Weekly, Vol XlvII No. 36, 36-42. & Hazarika, S (13 August 2012). 'Illegal Migration has no role in the current conflict', The Mint, Retrieved on 27 July 2015 from http://www.livemint.com/Politics/Du3khRBMmLijh1dgNkSfgL/Illegal-migration-has-no-role-in-the-current -conflict.html. Accessed on 12 December 2018.

17 See http://www.india-eu-migration.eu/media/legalmodule/ Illegal%20Migrants%20Act%201983.pdf. Accessed on 4 December 2018.

(vi) Foreigners who came to Assam on or after 25th March 1971 will be detected, deleted and expelled in accordance with the law.

AASU pioneers considered the Assam Accord as their extraordinary accomplishment. They formed a new political party 'Assam Gana Parishad' (AGP) and were part of the electoral race of 1985. AGP in its first race ended up triumphant with an absolute majority. The new Government gave its best shot in locating and expelling the foreign nationals from the state. Be that as it may, it couldn't distinguish and oust even one thousand outsiders from the state. For instance, as of late, 5,234 "illegal migrants" were ousted to Bangladesh in 2013 and 1,822 of the Bangladeshi government somewhere between 2014 and 2017 acknowledged such extradition.[18] As per Hiranya Kumar Bhattacharyya, former Deputy Inspector General of Assam Border Police, 'the Accord was chalked out not to tackle the issue but rather to defuse it. And that is where the student leaders of the agitation were taken up the garden path by cunning bureaucrats with the blessings of then Prime Minister Rajiv Gandhi'[19]

The Assam Movement (1979-1985), Assam Accord (fifteenth August 1985) and the disappointment of the Assam Gana Parishad to distinguish foreign nationals in the state still couldn't convey any political answer for the outsiders' issue. Bengal origin illiterate poor Muslims and a segment of Hindu Bengalis were the suspected as unlawful occupants of the state..[20] A significant number of their essential rights alongside their voting rights were grabbed away by the administration based on dubious citizenship.

V. The 'D' Voters Issue (1997)

In 1997 the election commission of India recognized a segment of Muslims living in the Char Chapari zones of Assam, the linguistic Hindu minorities and the Rajbongshi (royal) people of the state as 'D'voters or doubtful voters.[21] The procedure of identification of 'D' voters was

18 "BJP Plays Politics on 'Ousting Infiltrators', Deportation Data Tells Different Story" The Wire, 3 August 2018. https://www.thewire.in/politics/amit-shah-bjp-nrc-assam-upa. Accessed on 4 November 2018.

19 "Assam Has Already Missed the Bus, Deportation of Immigrants No Longer an Option", Sangeeta Barooah Pisharoty, The Wire, 4 July 2018. https://thewire.in/rights/assam-illegal-immigrants-interview-hiranya-kuma r -bhattacharya. Accessed on 4 November 2018.

20 Poor peasants of riverine areas and internally displaced persons for livelihood go to cities and other places of upper Assam in search of works. These labour class people are often insulted on suspicion as Bangladeshis and 'Miyas'. Though miya means respectable, here in Assam it is used as a derogatory word. The poor do not carry any documents while going out in search of works. They are also not issued any documents by the government. Many of the labours do not have the idea of the importance of documents of citizenship. If they are asked for such documents it becomes problematic for them.

21 ELECTORAL ROLLS WITH SPECIAL REFERENCE TO ASSAM, P.S. Reddi, The Indian Journal of Political Science, Vol. 42, No. 1 (January-March 1981), pp. 27-37

extraordinary. It was alleged that the lower authorities of Election Commission were approached to mark at least 10 to 20 individuals in every town of the state as 'D' residents.[22] Along these lines in numerous families' spouses or husbands ended up dubious residents keeping rest of the individuals Indians. Again in certain families, children and girls were recognized as dubious residents, where, their parents remained Indians. Therefore the authorities from the Election Commission did not pursue any concrete criteria in recognizing doubtful residents but rather all things considered in the process, precluded a noteworthy chunk of people from claiming Assamese populace along with their civil and political rights.

VI. NRC Updation and the Barpeta Riots (2010)

In 2005 the Indian government consented to a refresh the rundown of Indian residents in Assam. On observing anomalies in the NRC updation process, the 'All Assam Minority Students Union' (AAMSU) agitated in front of the Deputy Commissioner's Office, Barpeta, on 21st July 2010 requesting prompt deferment of the pilot task of the existing updation of the NRC. The association additionally requested the settlement of the D voters' concern before beginning the procedure of NRC updation..[23] This led to violence erupting at Barpeta and state government announced the postponement of the NRC updation process in the state.

Despite the fact that the Pilot Project fizzled, the procedure of NRC updation couldn't be ceased. The Barpeta episode deferred and altered the procedure of NRC updation. A significant number of the peculiarities of the Pilot Project were amended and the procedure of NRC updation works under the direct supervision of the Supreme Court had begun in 2015. The Government of India has made the following system for the NRC updation works.

VII. NRC UPDATION AND THE CURRENT SCENARIO

On 30 July 2018, the final draft of National Register of Citizens (NRC) was revealed in Guwahati in the Indian territory of Assam. It announced more than 28.9 million out of about 32.9 million candidates from Assam as 'qualified for Indian citizenship'. The final draft excluded the names of more than four million applicants from various communities. After the protests have been considered this has boiled down to roughly one million.

22 Election Commission and the Assam Accord, Sujit Choudhury, Economic and Political Weekly, Vol. 20, No. 49 (Dec. 7, 1985), pp. 2146-2147.

23 Assam NRC: All happy with first part draft, but what happens next?", Samudra Gupta Kashyap, The Indian Express, 3 January 2018. http://indianexpress.com/article/beyond-the-news/assam-national-register-of-citize ns-nrc-all-happy-with-first-part-draft-but-what-happens-next-5009742/ Accessed on 5 December 2018.

Notwithstanding, as indicated by the draft, of the nine Muslim-dominant part areas of Assam (Dhubri, Barpeta, Darrang, Hailakhandi, Goalpara, Karimganj, Nagaon, Morigaon and Bongaigaon), just five are in the main 16 locales where the greatest quantities of dismissals have been made.[24] The remainder of the 11 locales has a Hindu-majority populace.[25] Strikingly, districts like Morigaon, Karimganj, Goalpara, Barpeta, and Cachar, which have been viewed as being ruled by illicit migrants, or refugees from Bangladesh have generally a lesser number of barred candidates.[26]

VIII. How has the NRC been updated?

Based on the Assam Accord 1985[27] the NRC was updated according to the provisions of The Citizenship Act, 1955 and The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003. According to the two laws, the citizenship status was ascertained on the basis of NRC, 1951, Electoral Rolls up to the midnight of 24th March 1971 and in their absence the list of acceptable documents[28] of Pre-1971 period. Other documents[29] are required if a name, in any of the above-given records, isn't of the candidate but that of his/her precursors, to be specific, father, grandfather or grandmother or great grandfather or great grandmother, (etc) of the candidate. In such cases, the candidate needs to submit documents to demonstrate the association with such precursors whose name shows up in the archives mentioned above..[30]

---

24 This list was prepared by senior journalist Mrinal Talukdar who said that this list may have a margin of errors between 5 to 10 per cent. "Both the BJP and the Trinamool Congress Are Stirring the Communal Pot in Assam", Sangeeta Barooah Pisharoty, The Wire, 5 August 2018. https://thewire.in/politics/bjp-tmc-nrc-assam-communalism. Accessed on 5 December 2018.

25 For example, the highest number of rejections is in the Muslim majority district of Darrang where about 31.95 per cent of the applicants did not find their names in the final draft list. Hojai, a Hindu-majority district, where about 30.30 percent of the applicants have been excluded from the draft list, follows this.

26 "National Register of Citizens: Beginnings and endings", Udayon Misra, The Indian Express, 7 August 2018. https://indianexpress.com/article/opinion/columns/nrc-assam-aasu-bangladesh-assamese-bengali-1971 -national-register-of-citizens-beginnings-and-endings-5294784/. Accessed on 7 December 2018.

27 Rastriya Nagarikpanjir Adyabadhikaran: Assam Gana Parishad Dalor Dristibhangi aaru Daybadhata, Assam Ganaparishad, Guwahati, 2015, P-1.

28 Following are the list of admissible documents- 1951 NRC Electoral Roll(s) up to 24th March 1971 (midnight), Land & Tenancy Records, Citizenship Certificate, Permanent Residential Certificate, Refugee Registration Certificate, Passport, Life Insurance Certificate (LIC), Any Government issued License/Certificate, Government. Service/Employment Certificate, Bank/Post Office Accounts, Birth Certificate, Board/University Educational Certificate, Court Records/Processes.

29 These documents include: Birth Certificate, Land document, Board/University Certificate, Bank/LIC/Post Office records, Circle Officer/GP Secretary Certificate in case of married women, Electoral Roll, Ration Card, Any other legally acceptable document

30 Ibid.

Although the cut-off date is the midnight of 24 March 1971, there are people, whose names are not in the last draft list, who guarantee that their predecessors came to Assam during the 1800s.[31] There are additionally numerous whose names are not in the draft list but rather their predecessors' names are there in the 1951 NRC.[32] There are then a number of women whose names are missing from the list who are from the Indian states of West Bengal and Bihar, and had been married in Assam. The technical reason for their non-inclusion is due to the Assam government's failure to get their legacy data from the two respective states.[33]

IX. CHALLENGES AND CONCERNS OF NRC UPDATION

The NRC has far reaching consequences not only for the country but also for South Asia as a region and the world too. It is full of problems ranging from personal tragedies like that of a single family member left out of hundred plus members of an extended joint families to at places whole communities are being left out. Those excluded include even persons like family members of a former president of India, veterans of Indian security forces, policemen, kith and kin of legislators to the poor who have no papers to show.[34] Many of those excluded complain of reasons behind their exclusion being subjective biases and the inherent flaws in the NRC of 1951 and the electoral rolls of 1961 and 1971 that make up the core of the 'legacy data'. There are many cases in which the direct descendants of those figuring in the NRC of 1951 having been left out from the final draft. This is discussed below.

X. Limitations of NRC 1951

Based on the Census of 1951 the National Register of Citizens was first prepared. This NRC of 1951 was inadequate, as the enumerators couldn't reach numerous riverine islands, chars and remote zones. Besides, Assam furthermore saw mutual communal violence when

31 "Assam citizenship list: Names missing in NRC final draft, 40 lakh ask what next", Tora Agarwala, The Indian Express, 30 July 2018. https://indianexpress.com/article/north-east-india/assam/assam-citizenship- list-names-missing-in-nrc-final-draft-40-lakh-ask-what-next-5283663/. Accessed on 30 December 2018.

32 "NRC update: Relatives of former President Fakhruddin Ali Ahmed, Sepoy Mutiny fighter excluded in final draft", Rahul Karmakar The Hindu, 1 August 2018. https://www.thehindu.com/news/national/other-states/nrc-update-relatives-of-former-president-fakhruddin-ali-ahamed-sepoy-mutiny-fighter-excluded-in-final-draft/article24566329.ece. Accessed on 2 December 2018.

33 "Former President Fakhruddin Ali Ahmed's Nephew Not Included in Assam's NRC", The Wire, 1 August 2018. https://thewire.in/rights/former-president-fakhruddin-ali-ahmeds-nrc-newphew-assam.

34 Claim that updating NRC mandated by Assam Accord false: In this circus, poor and marginalised are being fed to lions", Debarshi Das, *The First Post*, 2 August 2018. https://www.firstpost.com/india/claim-that-updating-nrc-mandated-by-assam-accord-false-in-this-circus-poor-and-marginalised-are-being-fed-to-lions-4 876881. html. Accessed on 4 November 2018.

the procedure of NRC was started. Statistics tell that 53000 Muslim families fled to the then East Pakistan somewhere in the range of 1948 and 1950 because of mutual violence in western Assam..[35] Later the Nehru-Liyaqat agreement of eighth August 1950 gave them a window of two years to come back to India. However, the middle of this period the NRC procedure was already concluded Assam. Sadly the administration did not try to update the NRC of 1951 which was expected of them.

Thus a big number of Muslims were dropped out in the total figure of 1951 NRC and the census. But when in the next Census of 1961 those dropped out citizens' names were enlisted the growth rate of Muslims in Assam was seen very high creating an image of high Muslim influx possibly from East Pakistan whereas they were the original citizens of India to begin with. As a result, a large number of descendants, though legitimate have been excluded. The primary reasons behind this include clerical errors resulting in mis-spelt names right from the parents to those of the claimants now, mismatched relationships and so on. Most of the people being very poor and living in areas routinely affected by floods have also lost their documents.

XI. No Clear Policy Outline for the Stateless

There is no official strategy sketching out the suggestions for the individuals who are rejected from the final NRC. It is reported that they will be treated as outsiders and that their citizenship rights might be renounced without a preliminary hearing. They may further be approached to demonstrate their citizenship at the Foreigners' Tribunals. In December 2017, a local government legislator in Assam was cited as expressing that "the NRC is being done to identify illegal Bangladeshis residing in Assam" and that "all those whose names do not figure in the NRC will have to be deported." [36] These worries have been increased by the confusion created by a High Court judgment[37] where the Court guided the Assam Border Police to open inquiries concerning the relatives of people pronounced as outsiders and to consequently refer them to the Foreigners' Tribunals. In view of this judgment, the State Coordinator of the NRC issued two orders,[38]

35 Report on NRC Updation in Assam: Prospects and Challenges, Centre for the Study of Society and Secularism, Mumbai by Advocate Irfan Engineer, Director CSSS, Mumbai, Prof. Monirul Hussain, Gauhati University, Professor Dilip Borah, Gauhati University and Convener AISF Assam State, Dr. Shahiuz Zaman Ahmed, Assistant Professor, SPP College, Sivasagar, Dr. Hafiz Ahmed, President Char Chapori Sahitya Parishad,Assam, and Susanda Madhab Baruah, Guwahati (2018).

36 "Ram Madhav: NRC limited to Assam, but all Rohingya will be deported", *The Indian Express*, 2 August 2018. https://indianexpress.com/article/india/ram-madhav-nrc-limited-to-assam-but-all-rohingya-will-be-deported-5287307/. Accessed on 2 December 2018.

37 Gauhati High Court, WP(C) 360/2017, Case of 2 May 2017.

38 Memo No. SPMU/NRC/HF-FT/537/2018/15-A dated 2nd May 2018 and Memo no. SPMU/NRC/HC-FT/537/2018/23 dated 25th May 2018.

which require the border police authorities to refer family members of "declared foreigners" to the Foreigners' Tribunals. The obligation to conduct a prior inquiry isn't referenced in the orders. When the necessary NRC authorities have been informed about the referral of a case, the concerned relative will consequently be rejected from the NRC. Their status will be recorded as "pending" until a Foreigners' Tribunal has decided their citizenship. Moreover, the orders negate another earlier High Court judgment,[39] which stipulates that automatic referrals to Foreigners' Tribunals are not permissible as a reasonable and legitimate examination is required before the referral of a case. It is therefore stated that these orders may lead to the wrongful exclusion of close to two million names from the NRC, without a prior investigation and trial.

XII. Foreigners' Tribunals with their Incapacities and Bias

The expanding number of people pronounced to be outsiders by Foreigners' Tribunals has likewise elevated worries about the execution of the NRC update.[40] In this context, it is reported that members of Foreigners' Tribunals in Assam experience expanding weight from State authorities to pronounce more people as outsiders. On 21st June 2017, 19 individuals from the Foreigners' Tribunals in Assam were dismissed on the ground of their under-execution and performance in the course of the last two years. More than 15 additional Tribunal members were issued with a strict warning to increase their productivity.[41] Taking into account that Tribunal Members serve on a legally binding contract only for two years at a time, which might be extended on performance, these activities were seen to be a not so subtle provocation to other Tribunal members to act accordingly.

XIII. Bangladesh and its Refusal

Further complicating the situation is the fact of Bangladesh's stern refusal of having anything to do with those left out. Besides the internal row on the NRC, there is dread that the activity in Assam will influence India's association with Bangladesh. Weeks before its publication that

39 *State of Assam vs. Moslem Mondal and Others*, 3 January 2013, Guwahati High Court, The orders may also contravene section 3 (1) (a) of the Citizenship Act 1955, which grants citizenship at birth to anyone born in India on/after 26 January 1950, but prior to 1 July 1987.

40 Out of a total of 468,934 referals to the Tribunals between 1985 and 2016, 80,194 people were declared foreigners. This figure increased drastically in 2017, reaching 13,434 in just eleven months.

41 Mandates of the Special Rapporteur on minority issues; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on freedom of religion or belief, REFERENCE: OL IND 13/2018, pursuant to Human Rights Council resolutions 34/6, 34/35, 34/18 and 31/16.

started a political debate, India had discreetly informed Bangladesh on the draft National Register of Citizens (NRC) in Assam. It has been reported that it had guaranteed them that there was no discussion of 'extradition' to influence a slide in bilateral ties.[42] Notwithstanding that, the experts in Bangladesh have anyway considered this issue an 'internal matter of India with ethnic undertones.[43] This effectively turns those finally left out as stateless people with nowhere to go adding almost one more million to already huge number of 10 million people currently estimated to be stateless. It is entirely possible that Bangladesh may not accept the people so declared as immigrants without clear cogent proof in that they are Bangladeshi citizens. The inability to furnish documents may take away Indian Citizenship but it doesn't confer Bangladeshi Citizenship either. That gives rise to the fear of large internment camps for those excluded from the final NRC list, violation of their human rights and another humanitarian crisis for the world.[44]

XIV. Sectarian and Systemic Bias against Dalits and Bengali Muslims

There are also large-scale complaints of the sectarian biases based on linguistic identity having played against even genuine claims of many of those left out. There is a systemic bias against Muslims, a religious minority community in India and Dalits, erstwhile victims of untouchability now protected by the constitution and listed as Scheduled Castes. Matua Mahasangha, a backwards caste organization consisting principally of Namashudra Dalits with origins in Bangladesh, gives credence to this argument and claimed most of those affected are members of the community.[45] They felt that they couldn't remain silent, as the citizenship of members of their community was snatched overnight and resorted to protest and rail blockade. While it is recognized that the updation procedure is commonly dedicated to

42 Quietly, Delhi kept Dhaka in NRC loop: No deportation talk", *The Indian Express*, 4 August 2018. https://i ndianexpress.com/article/india/quietly-delhi-kept-dhaka-in-nrc-loop-no-deportation-talk-5291048/. Accessed on 4 December 2018.

43 "No worries over Assam NRC draft", *The Daily Star*, 2 August 2018. https://www. thedailystar.net/back page/nothing-worry-about-over-assam-nrc-draft-1614724. Accessed on December 2018.

44 Written statement* submitted by the Asian Legal Resource Centre, a non-governmental Organization in general consultative status, Human Rights Council Thirty-ninth session,10-28 September 2018, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, United Nations General Assembly.

45 Rail blockade by backward classes outfit: 'Four lakh names left out of NRC" *The Indian Express,* .2 August 2018. https://indianexpress.com/article/cities/kolkata/rail-blockade-by-backward-classes-outfit-four-lakh-na mes-left-out-of-nrc-5287517/. 4 December 2018. Of the 40 lakh (four million) people that have been excluded in the final draft of National Register for Citizens in Assam, about 4 lakh (400,000) people belong to this community.

retaining Indian natives by the NRC, concerns have been brought that local authorities in Assam, which are considered to be especially hostile towards Muslims and Dalits of Bengali descent, may manipulate the framework trying to bar numerous veritable Indian residents from the updated NRC.

The potential unfair impact of the updated NRC ought to be observed in light of the historical backdrop of segregation and violence faced by Muslims of Bengali origin because of their status as ethnic, religious and linguistic minority and their apparent perceived foreignness.[46] Despite the fact that the Bengali origin Muslims in Assam descend from labourers brought from the former Bengal and East Bengal beginning in the nineteenth century under colonial rule, they have for some time been depicted as unpredictable and irregular transient migrants. As a result of this rhetoric, Bengali Muslims have generally been the object of various human rights infringement, including constrained removal, discretionary ejections, and killings. Also, since 1997, the recognizable proof by EC of a substantial number of Bengali Muslims as alleged 'dubious or contested voters', has resulted in their further disenfranchisement and the loss of entitlements to social protection as Indian citizens. It successfully denied them the privilege of political participation and representation. This segregation is anticipated to heighten because of the NRC. The manner in which this update has been led conceivably influences an extraordinary number of Muslims and people of Bengali descent who might be unfairly rejected from the updated NRC on account of their historical and continuing treatment as outsiders and illicit foreigners in Assam. On the off chance that these charges are established, the updated register represents a desperate hazard to a huge number of Indian residents, who may improperly be proclaimed as "outsiders" and therefore be rendered stateless.

XV. The Citizenship (Amendment) Bill of 2016

All the more as of late, the Citizenship (Amendment) Bill 2016 was presented with the objective of making individuals from certain minority networks qualified for Indian citizenship, taking note of that they will not be treated as illicit migrants. While the bill applies to six minority communities – to be specific Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan -

46 "Claim that updating NRC mandated by Assam Accord false: In this circus, poor and marginalised are being fed to lions", Debarshi Das, *The First Post*, 2 August 2018. https://www.firstpost.com/india/claim-that- updating-nrc-mandated-by-assam-accord-false-in-this-circus-poor-and-marginalised-are-being-fed-to-lions-4 876881. html. Accessed on 4 December2018.

Bengali Muslims and other different religious minorities are excluded..[47] Enactment of the Bill will complicate the issue of determination of citizenship in Assam. It will make two classes of Indian Citizens-one with their Names refreshed in the NRC and one without.The second class would comprise of those belonging to Hindu and five other non-muslim religious groups who came to Assam from Bangladesh between March 25 1971 to December 31 2014. This could possibly be to entice about eight lakh Bengali Hindu voters for the upcoming 2019 elections by the ruling government, who would have otherwise been excluded by the NRC process. This could not sit well with the signatories of the Assam Accord, as it wanted all illegal migrants be excluded, irrespective of their religion to promote Assamese indigenous communities. This could emerge as a boiling pot of controversies, resulting in potential violence coupled with the ongoing NRC issue in Assam.

XVI. CONCLUSION

The NRC is proving to be a boiling pot for India, which if not allowed letting off steam soon will blow up in its face with severe consequences. With the current government in power, and the upcoming Lok Sabha Elections of 2019, the refugee policy of India has taken and anti Muslim, anti Dalit and anti minority tone. NRC serves as a useful example by targeting majorly Bengali Muslims and Dalit Namasudras in exclusion. Furthermore, irrespective of its communal tone it is fraught with technical difficulties and methodologies that are risking many genuine citizens to become stateless. This sectarian bias could lead to potential violence and conflict in Assam. It is also urging other states to ask for such a divisive mechanism of census so as to weed out 'foreigners'.[48] This is against the basic constitutional principle of tolerance and inclusivity and ends up only dividing the people. The political parties urge this as a part of their vote bank politics. The biggest losers in this political tug of war are the poor and the marginalized, who lack the voice or the means to demand for their rights, in this case being the legitimacy by citizenship. India needs to guarantee that the substance and execution of the NRC update comply with India's commitments under universal human rights law and standards. Specifically, it

47 The Citizenship (Amendment) Bill, 2016 accessed at http://prsindia.org/billtrack/the-citizenship-amendment-bill-2016-4348.

48 West Bengal: VHP to campaign for NRC exercise", *The Indian Express*, 2 December 2018.https://indianexpress.com/article/cities/kolkata/west-bengal-vhp-to-campaign-for-nrc-exercise-5287508/. Accessed on 2 December 2018. Manoj Tiwari, raised the issue of "illegal immigration" of Bangladeshis and Rohingya. He made a request to the Union Home Minister, Rajnath Singh, for similar campaign in Delhi to deport them. In Mumbai, joining the chorus was several members of the BJP and Maharashtra Navnirman Sena. They demanded setting of the NRC on the lines of Assam to identify and deport the immigrants living illegally in cities like Mumbai. (Maharashtra parties join chorus to 'deport Bangladeshis", Shiv Kumar, *The Tribune,* 2nd December 2018. https://www.tribuneindia.com/news/nation/maharashtra-parties-join-chorus-to-deport-bangladeshis/630948. html.)

should find a way to guarantee that the NRC update does not result in statelessness or human rights infringement, including discretionary hardship of citizenship, mass ejections, and self-assertive confinement. It ought to give shields guaranteeing that individuals from ethnic, religious and semantic minorities are not oppressed in the system of the NRC update and the assurance of their citizenship status. It ought to guarantee access to effective remedies for people prohibited from the NRC. It moreover, in a transparent manner, ought to give disaggregated information on the race, ethnicity, and religion of people who have been barred from the draft NRC just as people who have been proclaimed as outsiders by Foreigners' Tribunals for the open survey. It should clarify on the implications for those individuals who will be excluded from the final NRC. Specifically, it should expound whether they will face confinement or extradition, particularly at this stage, where, considering Bangladesh wants nothing to do with them. It ought to give data on measures embraced to remove any biased treatment of minorities, including the Bengali Muslim minority, with respect to the right to nationality and to guarantee that no individual having a place with ethnic, religious or linguistic minority is self-assertively denied of her or his nationality. It could likewise clarify why they haven't been incorporated into the Citizenship Amendment Bill of 2016. In conclusion, it ought to guarantee satisfactory training of individuals from Foreigners' Tribunals, police and NRC experts on pertinent human rights standards and measures, especially those identifying with non-segregation and to people having a place with ethnic, religious and etymological minorities.

Since the NRC list published on 30 July 2018 is the final list, those who have names missing cannot be out rightly declared as "illegal" citizens or foreigners living in India. Opportunity to raise objections has been given. Chance to raise complaints has to be given. In any case, the question stays regarding what will occur after the publication of the last list post objections. There are theories that India may concede work licenses to those whose names are excluded in the final NRC list and enable them to live in the nation. This could worsen the circumstance, as it will make 'right-less' and stateless individuals in the nation If this happens, it may not affect many people from the dominant communities in Assam or India but it will certainly raise a moral question on the democratic conscience of the world's largest democracy.

Impact Of Globalization On Indian Legal Profession

***Dr. Deepak Kumar SrivaStava**

I. Introduction

> *"International trade, migration and globalized finance are the ingredients of a cocktail named globalization, the recipe of which we haven't yet mastered and the taste of which we may, if we're not careful, find bitter".*
>
> ----------**Pascal Le Merrer**[1]

"Globalization" is a very popular word these days. Whether we read a daily newspaper or watch the morning news bulletin on television or have a look on a business magazine, the term globalization pops up as a synergistic phenomenon of economic, cultural, and political relationship among nations.[2] "The term globalization is generally used to describe an increasing internationalization of markets for goods and services, the means of production, financial systems, competition, corporations, technology and industries".[3] Due to globalization every sector is facing competition with other actors of the market and legal sector is not an exception. With the initiation of globalization wave, various trends introduced in the legal profession, in which legal process outsourcing was the prominent one.[4] Over the years it has been the matter of debate in the United States and other countries over the benefits of outsourcing. As Jayanth K. Krishnan has mentioned that "in conventional discourse outsourcing has come to signify the transfer of services to markets where costs are lower to employers".[5]

Many stories suggest that how countries like America and other European Countries have been increasingly approaching countries

---

* Assistant Professor of Law, Hidayatullah National Law University (HNLU), Raipur, Chhattisgarh, India. E-mail: dr.deepak@hnlu.ac.in.

1 Pascal Le Merrer, The Economics of Globalisation: Opportunities and Fractures, de Boeck, Brussels, (2007).

2 Mary C. Daly, *The Ethical Implications Of The Globalization Of The Legal Profession: A Challenge To The Teaching Of Professional Responsibility In The Twenty-First Century*, 21 Fordham Int'l L.J. 1240 (1997-1998).

3 OECD Glossary of Statistical Term, available at https://stats.oecd.org/glossary/detail.asp?ID=112.(Last Visited on December 15, 2017).

4 Neil B. Nucup, *From nobility to novelty: The legal profession at a crossroad An appraisal of legal process outsourcing And its 'Corporatizing' effect on the practice of law*, 85 Phil. L.J. 190 (2010-2011).

5 Jayanth K. Krishnan, *Outsourcing And The Globalizing Legal Profession*, 48 Wm. & Mary L. Rev. 2192 (2006-2007).

like India, Brazil and China for cheaper workforce to perform lower skilled jobs and establishing the famous call centers.[6] In this scenario countries are forced to liberalize its legal sector and to open up its market for foreign law firms. Many of the countries have their own strict regulation for the legal profession therefore it is not very easy to practice law into other jurisdictions i.e. In India, the practice of law is governed by the Advocates Act of 1961 under which foreign law firms are not allowed to engage in practice of law in India. The inflexible attitude of the regulating authorities to open the legal sector for foreign players is ironic because legal services sector is one of the most growing sectors in India.

II. Globalization and the Legal Services Sector

A. The Concept of Globalization

Globalization is always a controversial concept as most of the people experience its benefits and downside simultaneously. Economist Joseph Stiglitz in his book Globalization and its Discontents, defines economic globalization as:

> *"…the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and (to a lesser extent) people across borders".*

OECD also explained this concept in 1996 in the terms as: *"An Economic phenomenon, globalization is manifested in a shift from a world of distinct national economies to a global economy in which production is internationalized and financial capital flows freely between countries".*[7]

A great economic integration has been witnessed by the world in last three-four decades. During the 1970s and 1980s the transnational economic activity was termed as 'Internationalization'. According to the OECD (Organization for Economic Co-operation and Development) the term internationalization has proved too limited which can be replaced with a new phenomenon Globalization which is more advanced and complex form of internationalization which implies a degree of functional integration between internationally dispersed economic activities.

B. Impact of Globalization on Legal Profession

The first issue before us that what do we understand about the term 'globalization' in the context of legal profession. In the simplest term

6 JagdishBhagwati, Op-Ed., *Why Your Job Isn't Moving to Bangalore,* N.Y. TIMES, Feb. 15, 2004, § 4, at 11.

7 See, OECD, *Globalization: What Opportunity and Challenges for Governments* (OECD, Paris, 1996).

the 'globalization' can be understood in the context of legal profession as to opening up the legal market in a country for foreign nationals so that they can setup the law firms and consultancy services and to practice in the court of law.[8] As we know that legal services do not exist in a vacuum but facilitates cross-border transactions and foreign direct investments ("FDIs") which establishes the multilateral business network.[9]For example, three of the five largest (based on revenues) law firms in the world are headquartered in the United Kingdom (i.e., Clifford Chance, Fresh fields, and Link laters), and each of these firms has over half of its lawyers located in various foreign countries.[10] Laurel S. Terry mentioned that "most of the ten largest global law firms now have more lawyers located outside their home-country office than in their home country".[11] All the business of outsourcing is the result of those with capital seeking lower-cost services within more affordable markets.[12]In order to compete for trade and investments on the global platform, there is a need for Asia specifically for India to embrace liberalization as liberalization is the key factor in attracting foreign direct investments.[13]

C. The International Legal Market

Globalization has increased the size of legal market at international level. According to 2012 Economic Census (the census of U.S. business that takes place once every five years), the market for U.S. legal services totals roughly $289 billion.[14] The UK Legal Services Market Report 2015 from IRN Research reported that the UK legal services market is valued at an estimated £29.3bn and, in 2013; annual growth was the highest recorded for many years.[15] In 2014, revenue growth in the UK legal services market overall was around 6% and growth of around 5-6% per year was expected in 2015 and 2016. In 1991, India also

8 Faisal Fasih,*Liberalization of Legal Profession and Its Implication on Legal Education: Indian Perspective*, *in* GLOBALIZATION AND DEVELOPMENTCURRENT TRENDS156 (ShantanuChakrabarti& KingshukChatterjee ed., 2012).

9 Pasha L. Hsieh, *ASEAN'S Liberalization Of Legal Services: The Singapore Case*, 8 Asian J. WTO & Int'l Health L &Pol'y 485 (2013).

10 SeeMichael A. Hitt, Leonard Bierman&Jamie D. Collins, *The Strategic Evolution of Large U.S. Law Firms,* 50 Bus. HORIZONS (forthcoming Jan.-Feb. 2007) (manuscript at 5 tbl. 2, on file with authors).

11 Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives,* 4 WASH. U. GLOBAL STUD. L. REV. 463, 495 tbl. 4 (2005) (citing *The Global 100,* AM. LAWYER, 2004.).

12 Krishnan, *supra* note 5 at 2197.

13 Chew SengKok&YeapSuan Hong, *Liberalization Of Legal Services Embracing A World of Opportunities In The ASEAN Region*, 10 US-China L. Rev. 142 (2013).

14 William Henderson and Evan Parker , The American Lawyer (December 3, 2015).

15 See UK Legal Services Market Report 2015, IRN Research Report (5th edition 2015), available at http://www.irn-research.com/sector-specific-services/legal-services/. (Last Visited on January 10, 2018).

opened its borders to allow multinational corporations into the country through a number of financial and economic reforms.[16]

According to Economic Survey 2013-14, Indian legal sector also grew by an average of 8.2% annually from 2005 to 2012. This is good enough reason to think about the liberalization in legal profession in India in the form of further reforms in the legal sector. Survey further mentioned that *"India has benefited from opening up to foreign competition in many other areas; India should explore allowing foreign law firms greater access to the Indian market"*.[17]Over the next half century, the balance of economic power is expected to shift dramatically, with Asia transforming into a fast-growing region.[18] Particularly with regard to India, everyone seems to be in India. As we can quote the example of top ten 2011 U.S. Fortune 500 companies as all but one of the top ten 2011 U.S. Fortune 500 companies have a presence in the Indian market.[19] In this regard India is also planning to liberalize its legal profession and in near future foreign law firms may get the right to practice before the Indian Court of law.

III. Liberalization of Legal Profession: Indian Scenario

Like other Asian countries India is also benefited with globalization. India once had a completely closed economy. In 1991, India opened its borders to allow multinational corporations into the country through a number of financial and economic reforms.[20] Globalization in India is now two decade old since the commencement of WTO in 1995. Just after these reforms, government of India actually encouraged and

16 Surendra K. Kaushik, *India's Evolving Economic Model A Perspective on Economic and Financial Reform,* 56 AM. J. ECON. &Soc. 69,78 (1997), ShardulShroff, *An Overview of the Legal Regime Governing Capital/Markets in India and Current Developments, in* DOING BUSINESS IN INDIA *55* (PLI Corp. Law and Practice, Course Handbook Se. No.18730, Feb.-Mar. 2009).

17 Economic Survey: 2012-13, available at http://indiabudget.nic.in/survey.asp. (Last Visited on January 10, 2018).

18 Chew SengKok&YeapSuan Hong, *Liberalization Of Legal Services Embracing A World of Opportunities In The ASEAN Region*, 10 US-China L. Rev. 142 (2013).

19 See About Us, BERKSHIRE HATHAWAY, http://www.berkshireinsurance.com/about-us/ (last visited December 20, 2017) (Berkshire India is a majority-owned non-direct subsidiary of Berkshire Hathaway Inc. incorporated in India); About Us: India, WALMART STORES, http://walmartstores.com/AboutUs/276.aspx (last visited December 20, 2017) (Walmart India has seven stores as of August 31, 2011, and a joint venture with Bharti Enterprises operating as BhartiWalmart Pvt. Ltd.); **ConocoPhillips**, http://www.conocophillipslubricants.com/marketers-distributors/Default.aspx (last visited December 20, 2017).

20 Kaushik, *supra* note 16.

promoted foreign companies to establish their offices, pursuant to which fortune 500 companies opened office in India.[21] We can consider this period as India's time of economic liberalization. With the increase in the trans-border trade and effective FDI, the demand for globalized legal services[22] has also increased that transcends the borders of one jurisdiction.[23]

Although, the service sector in India has grown exponentially since 1991 economic reform wave and became the cornerstone of India's economy but it is also pertinent to mention at this juncture that legal services market in India remains enormously unwilling to adjust with those changing scenario.[24] The service industries already play an important role in the Indian economy and are growing faster than other components of India's Gross Domestic Product (GDP). According to the Economic Survey 2013-14, services account for 59.9 per cent of GDP of India which has been estimated in the Economic Survey 2016-17 up to 53.66% of total India's GVA (Gross Value Added) of 137.51 lakh crore Indian rupees.[25] India's imports in commercial services have grown to US$ 127 billion in 2013 which is 2.9 percent of the total imports of world trade (US$4340 billion) in commercial services. In 2013 India ranked 7th in services imports of the world trade in commercial services. In a recent report of 2015 published by UNCTAD ,India's imports in commercial services were estimated 2.65percent of the total imports of world trade in commercial services.[26]

---

21 About Us: India, WALMART STORES, http://walmartstores.com/AboutUs/276.aspx (last visited December 20, 2017) (Walmart India has seven stores as of August 31, 2011, and a joint venture with Bharti Enterprises operating as BhartiWalmart Pvt. Ltd.); FORD MOTOR COMPANY, http://www.india.ford.com/servlet/Satellite?pagename=DFY/IN (last visited December 20, 2017) (Ford operates in India via Ford India Private Limited); *GE in India,* GENERAL ELECTRIC, http://www.ge.com/in/ company/factsheet in.html (last visited December 20, 2017) (GE has over 13,000 employees in India); *General Motors India Strengthens Its Network in Tamil Nadu,* GENERAL MOTORS, http://media.gm.com/ content/media/in/en/news.detail.html/content/Pages/news/in/en/2011/0721G M_I ndia_strengthensNetworkinTamil-Nadu (last visited December 20, 2017) (General Motors operates in India as General Motors India).

22 KrishnenduSen&RitankarSahu, *Need for FLCs in India with Respect to Honoring GATS,* 6 J. INT'L TRADE L. &POL'Y 25, 27 (2007).

23 Arno L. Eisen,*LEGAL Services In India: Is There An Obligation Under The Gats Or Are There Policy Reasons For India To Open Its Legal Services Market To Foreign Legal Consultants?,* 11 Rich. J. Global L. & Bus. 273 (2011-2012).

24 Manoj Kumar, *Liberalisation of legal services in India, Governance Now*, JULY 27, 2015, available at http://www.governancenow.com/news/blogs/liberalisation-of-legal-service. (Last Visited on November 14, 2017).

25 The Economic Survey 2016-17, was tabled in the Parliament on January 31, 2017, by MrArunJaitley, Union Minister for Finance, Government of India.

26 UNCTAD Stat., which is based on the sixth edition of the IMF Balance of Payments Manual (BPM6).

A. Legal Framework for the Legal Profession in India

The legal profession in India is one of the most lucrative and growing profession, with approximately more than 1.3 million lawyers in India as reported by Bar Council of India in 2011. The annual growth rate of the legal profession between 2007 and 2011 has been reported around 4 percent. After the globalization wave in India, legal sector was also developed profoundly. Therefore, the foreign law firms or professionals can advise in various field of law including their home country law, law of any other country or in the international law for which they are competent and properly qualified.[27] But as a present legal setup in India, foreign law firms are banned from the practice of law before Indian Courts. Domestic law still plays a marginal role in legal services trade due to barriers such as qualification requirements, which are shaped along national lines.[28]

In India, the law practice is regulated by the Advocates Act, 1961 and the Bar Council of India Rules, 1975. There is a regulatory body constituted under the Advocates Act named the Bar Council of India.[29] At present, a foreigner can be registered himself or herself as an advocate in India after obtaining a law degree which is recognized by the regulatory body ie.e the Bar Council of India and that person must belong to a country where on reciprocal basis Indian citizens are allowed to practice law.[30] The term "Practice" is not defined in the Act. However, the combined reading of Sections 29[31], 30[32] and 33[33]

27 See Trade Policy Division, DEPT. OF COM., Gov'T. OF INDIA, A CONSULTATION PAPER ON THE LEGAL SERVICES UNDER GATS, *available at* http://commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf (Last Visited on December 6, 2017).

28 *Id.*

29 See WTO Council for Trade in Services, Legal Services, Background Note by the Secretariat, S/C/W/318, (June 14 2010), available at https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename. *(Last visited on December 16, 2017).*

30 See Section 24 & 47 of the ADVOCATES ACT, 1961. See also Faisal Fasih, *Liberalization of Legal Profession and Its Implication on Legal Education: Indian Perspective*, *in* GLOBALIZATION AND DEVELOPMENT CURRENT TRENDS 156 (ShantanuChakrabarti&KingshukChatterjee ed., 2012).

31 "Subject to the provisions of this Act and any rules made there under, there shall, as from the appointed day, be only one class of persons entitled to practice the profession of law, namely, advocates".

32 Section 30 of the Advocates Act, 1961: "Subject to the provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practice throughout the territories to which this Act extends,—(i) in all courts including the Supreme Court; (ii) before any tribunal or person legally authorized to take evidence; and (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice".

33 "Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any court or before any authority or person unless he is enrolled as an advocate under this Act".

of the Advocates Act, 1961 restricts the term practice to appearance before any court, tribunal or authority; but if we analyze, few paralegal practices like legal advisory, documentation and Alternative Dispute Resolution (ADR) mechanism are beyond its scope.

Section 49 (ah) of the Advocates Act, 1961 provides general power of the Bar Council of India to make Rules regarding the conditions subject to which an advocate shall have the right to practice and the circumstances under which a person shall be deemed to practice as an advocate in a court. According to BCI Rule 2, 1973 of Chapter - III (Conditions for right to practice) (under Section 49 (1) (ah) of the Act) an Advocate cannot inter into a partnership or any other arrangements for sharing remuneration with non-Advocates. In this regard of regulating the legal profession BCI Rule 36 is also very important which prohibits advocates in India to solicit work or advertise, either directly or indirectly for any purpose, and even indicating the area of their specialization. Therefore, we can conclude that legal profession in India is highly regulated by the Advocates Act and rules formulated in this regard where presently there is no scope for the establishment of foreign law firms to practice Indian law. Therefore, the doors of Indian legal sector can only be opened for foreign law firms through the liberalization of legal sector.

B. The controversy Regarding Liberalization of Legal Profession

The issue of liberalizing Indian legal services sector for foreign lawyers is being debated for over 20 years, when in 1993 when three foreign law firms i.e. Ashurst Morris of UK and White & Case and Chadbourne & Parke of the US applied to the Foreign Investment Promotion Board (FIPB) for starting branches in India but their applications were rejected. Under Section 29 of Foreign Exchange Regulation Act 1973 (FERA), they were allowed for a license to open a liaison office for "carrying on any activity of a trading, commercial or industrial nature." They surprisingly did not apply under Section 30 "to practice a profession or occupation".[34] The petitioner, *'Lawyers Collective'*, a group of advocates formed to promote social causes, filed public interest litigation (PIL) in the Bombay High Court and opposed the licences, arguing that the practice of law even for non-litigious work was governed by the Advocates Act of 1961.[35] The Bombay High Court held that:

---

34 Anil Divan, *Restrict foreign access to the Bar*, The Hindu (March 21, 2013), available at http://www.thehindu.com/opinion/lead/restrict-foreign-access-to-the-bar.(Last Visited on January 10, 2018).

35 Ajay Shamdasani, *What now for foreign law firms?*,India Business Law Journal, 29 (Feb. 2010), available at www.nishithdesai.com/.../user.../What_now_for_foreign_law_firms-.pdf. *(Last Visited on October 25, 2017)*

> *"the Reserve Bank of India was not justified in granting permission to foreign law firms to open liaison office in India under Section 29 of the Act" and that practicing the profession of law under the Advocates Act covered both litigation practice as well as "persons practicing in non-litigious matter".*

Regarding the legal practice by foreign consultant or lawyers in India, there was a clear restriction till 2012. Indian policy barred them to practice before Indian courts. On February 21, 2012, however, the Madras High Court, in *A.K. Balaji*v. *Gov't of India,*[36] handed a victory to international law firms keen on entering the Indian market alongside their globalizing clients. A PIL was filed before the Madras High Court by A.K. Balaji(a practicing lawyer) against 31 foreign law firms indulged in practicing the profession of law in India. The Government of India argued that "the Bar Council of India regulates the advocates who are on the rolls but law firms as such are not required to register themselves before any statutory authority nor do they require any permission to engage in non-litigation practice".[37]

Although the Madras High Court has followed the lines of the Bombay judgment but unexpectedly departed from it and derived a new concept of "fly-in and fly-out", which had given the chance to foreign lawyers to visit India for a temporary period of time to advice their clients in India about the foreign laws or on matters connected therewith.[38] Now both the cases are before the Supreme Court of India and the Apex court has been struggling with the question of whether to allow foreign law firms in Indian legal sector to practice law before Indian courts but we think that it is not possible without the intervention of the legislature.[39]

C. Indian Legal Service Market And GATS

Within the global economy, the significance of trade in services is hard to ignore.[40] As in previous section of the article authors have shown the growth of legal services and the effect of globalization on it. In 2013, world commercial services exports was $4.6 trillion which grew at the rate of 6%. The principal international treaty addressing multi-jurisdictional practice (and thus, legal services) is the 1994 General Agreement on Trade in Services (GATS), signed "as part of

36 W.P. No. 5614 of 2010 (Madras H.C. Feb. 21, 2012).

37 Divan, *supra* note 34.

38 Id.

39 Available on http://www.legallyindia.com/supreme-court/scoi-report-uncertainty-ahead-for-foreign-lawyers-case-in-sc-lawyers-collective-make-appearance-with-datar-bci-20150915-6598, (Last Visited on November 18, 2017).

40 A Consultation Paper on Legal Services Under GATS, *supra* note 31.

the set of agreements creating the World Trade Organization".[41] Cross border trade and the temporary movement of natural persons are the two most important modes of supply of legal services under GATS.[42]

GTAS classifies 12 sectors for which commitments may be made by the member countries. In the WTO's "Services Sectoral Classification List"[43], "legal services" are listed as a sub-sector of "business services" together with other "professional services". India as a signatory to the General Agreement on Trade and Services (GATS), hence is under obligation to liberalize its legal sector but has not been able to make much progress in this behalf due to stiff opposition in India.

IV. Proposed Initiative to Liberalize Indian Legal Profession

Section 45 of the Advocates Act which makes it clear that the Act aims at prohibiting "practicing in any Court or before other Authority" and has nothing to do with rendering legal advice outside the Courts, etc.[44] If one reads Section 33 with Section 45 of the Advocates Act 'practicing in any Court or before any authority' is only confined as the professional right to the advocates but 'counseling' or 'advise' as a professional activity has not been made the monopoly of the professional right kept with only advocates.[45] In 2014 the Ministry of Commerce began working on a cabinet paper through a 15-20 member inter-ministerial group with limited representation from non-government experts.[46]In January 2015, then Commerce Secretary Mr. Rajeev Kher said that the government has started discussions with the Bar Council of India and other stake holders to open up legal services sector to foreigners in a calibrated manner.[47]

---

41 Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers,* 34 VAND. J. TRANSNAT'L L. 989, 998 (2001).

42 A CONSULTATION PAPER ON THE LEGAL SERVICES UNDER GATS, *supra* note 31.

43 Services Sectoral Classification List - MTN/GNS/W/120, available on https://www.wto.org/english/tratop_e/serv_e/sanaly_e.htm.

44 Sec. 45 Penalty for persons illegally practicing in courts and before other authorities - Any person who practices in any court or before any authority or person, in or before whom he is not entitled to practice under the provisions of this Act, shall be punishable with imprisonment for a term which may extend to six months.

45 See Report on TRADE IN LEGAL SERVICES, Project Study Sponsored by Ministry of Commerce Government of India, "TRADE IN SERVICES: OPPORTUNITIES AND CONSTRAINTS", 13 (1999).

46 See The Liberalization Buzz in the Indian Legal Sector, Legal League Consulting, available at www.legalleague.co.in. (Last Visited on *December 16, 2017*).

47 PTI, Government discussing opening up of legal sector to foreign firms, The Economic Times, Jun 29, 2015, available at http://articles.economictimes.indiatimes.com/2015-06-29/news/63937872_1_indian-law-firms-advocates-act-commerce, (Last Visited on *September 8, 2017*).

One initiative has been taken by the Department of Industrial Policy and Promotion (DIPP) who is working in this area and has come up with a proposal according to which foreign lawyers and law firms may be given opportunity to operate in India at least for non-litigious and arbitration services.[48] Other bodies also working in this behalf like Society for Indian Law Firms as President of Society for Indian Law Firms (SILF), a representative body of corporate law firms also suggested that the foreign lawyers and firms should be allowed in phased manners, which would take 5 to 7 years. Adopting a cautious approach, India has also informed World Trade Organization (WTO) members that it is looking at opening up its legal services sector to foreign lawyers and law firms, but would do so only after consultations with all stakeholders, including the Bar Council of India (BCI).[49]

On January 3, 2017, the Ministry of Commerce and Industry has taken a positive move to liberalize legal market by issuing notification in the Gazette of India amending the Special Economic Rules governing Special Economic Zones (SEZs). Economic Times reported that foreign law and accountancy firms now have a chance to operate in India on their own. In a meeting in July 2017 at the law ministry in Delhi, Commerce Secretary Rita Teaotia pointed out that the issue is a top priority for the government in order to liberalize Indian legal sector. This meeting was attended by various stake holder of Indian legal system including Minister of Law and Justice, the chairman Bar Council of India, Society of Indian Law Firms (SILF) and various representative of various bar associations.[50]

V. Conclusion

Our discussion in this paper itself raises a critical policy question: whether the time has come to take deregulation of the Indian legal profession seriously. Jack Guttenberg likewise asserts that the current system of lawyer regulation is based upon outdated assumptions about the nature of the profession and the practice.[51] In my opinion, we have always suffered from Xenophobia or the fear of the unknown. This fear is responsible for our protectionist approach in legal profession in India

48 Read more at: http://www.livelaw.in/dipp-proposal-foreign-legal-firms-to-operate-in-india-through-proprietary-concerns-only-for-non-litigious-services/.

49 AmitiSen, *Opening up of legal sector only after consultations with all: India to WTO*, The Hindu Bussiness Line, August 16, 2015, available at http://www.thehindubusinessline.com/news/opening-up-of-legal-sector-only-after-consultations-with-all-india-to-wto, (Last visited on September 16, 2017).

50 See, Modi set to liberalize legal sector, India Business Law Journal, August 24, 2017, available on https://www.vantageasia.com/modi-set-liberalize-legal-sector/, (Last visited on January 16, 2018).

51 Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give,* 2012 MICH. ST. L. REv. 415.

but when this protectionism gets beyond a point, it puts us in a smaller silo where the levels of ambition also get limited. It is really three things that matters - professional ethics, competence and cost.[52] I really do not understand why we cannot beat the world in these three things. I strongly believe that time has come for a massive change to liberalize legal profession in India, if not to beat the rest of the world but atleast compete and capture the global space for us.

52 Finance Minister Mr. ArunJaitley, Global market turmoil an opportunity to grow in The Financial Express dated August 25, 2015.

Linkage Between Human Rights and Climate Change: An Analysis In International Perspective

***Rana Navneet Roy**
****Manan Dardi**

"Climate Change, human-induced climate change, is obviously an assault on the ecosystem that we all share, but it also has the added feature of undercutting rights, important rights like the right to health, the right to food, to water and sanitation, to adequate housing, and, in a number of small island States and coastal communities, the very right to self-determination and existence."

-Flavia Pansieri

I. Introduction

The natural environment provides to human beings in which they live with the resources so that they can achieve lives of dignity and well-being, i.e., clean air to breathe; clean water to drink; food to eat; fuels for energy; protection from storms, floods, fires and drought; climate regulation and disease control; and places to congregate for aesthetic, recreational and spiritual enjoyment. These environmental endowments are generally ecosystem services and are considered to be essential for the core survival and are vital for human prosperity.[1] In *'The Future We Want'*, the outcome document of the 2012 Rio+20 Conference, as the nations of the world declared, sustainable development requires an angle toward "harmony with nature."[2] To attain this idea, there must be balance in economic, social and human development with "ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges."[3]

The idea of the linkage between the human rights and environment has been discussed for quite a long time. However, now it has been recognized that a clean, healthy and functional environment is

* Assistant Professor of Law, Hidayatullah National Law University, Naya Raipur (C.G.), Email: ranabhu@gmail.com.

** LL.M., Hidayatullah National Law University, Naya Raipur (C.G.), Email: manan_dardi@outlook.com.

1 JovanaMalinovic, "Human Rights Council, Study Guide: Detrimental effects of Climate Change on Human Rights" *MUNLawS* (2017).

2 The Future we want, 2012 outcome document of the United Nations Conference on Sustainable Development, Rio de-Janeiro.

3 *Ibid.*

considered to be integral for the enjoyment of human rights, such as the rights to life, health, food and an adequate standard of living. This recognition offers one reason that the international community has united together through multilateral environmental agreements (MEAs) to prohibit illegal trade in wildlife, to preserve biodiversity and marine and terrestrial habitats, to reduce trans-boundary pollution, and to prevent other behaviors that harm the planet and its residents or in short it can be said that "Environmental protection protects human rights". In the mean time, adherence to human rights such as those that ensure public access to information and participation in decision making contributes to more just decisions about the utilization and protection of environmental resources, and protects against the potential for abuse under the auspices of environmental action. Therefore, domestic environmental laws and MEAs can both be reinforced through the incorporation of human rights principles, even as they contribute to the ongoing realization of human rights.

Anthropogenic climate change is one of the biggest and most pervasive threat to the natural environment and human rights. Climate change has already begun to have far reaching environmental impacts, including many adverse effects on wildlife, natural resources and the ecological processes that support access to clean water, food, and other basic human needs. These impacts, combined with direct harms to people, property, and physical infrastructure, pose a serious threat to the enjoyment and exercise of human rights across the world.[4] Hence it is essential that human rights be given full regard while handling the super underhanded issue of climate change.

II. Issues Of Human Rights And Climate Change

An issue of this extent warrants immediate cooperative action from the international community. However, scientific studies show that the emission reduction commitments made by States have been inadequate (they are objectively insufficient to effectively address climate change) and inadequately implemented (numerous countries are not on track to meet their commitments).[5] There are substantial difficulties to effective collective action on climate change. Immense differences exist between nations in terms of contributions to the stock of carbon in the atmosphere, industrial advancement and wealth, nature of emissions use, and climate vulnerabilities. In some parts of the world, poverty is increasing along with persistent inequalities

4 USDA, *Effects of Climate Change on Natural Resources and Communities: A Compendium of Briefing papers*, Available at https://www.fs.fed.us/pnw/pubs/pnw_gtr837.pdf, Last visited on 10.7.2018.

5 *The Governance of Climate Change in Developing Countries*, Available at https://issuu.com/objectif-developpement/docs/governance-climate-change-developing-countries, Last visited on 10.7.2018.

within and between countries. There is a marked reluctance in many polities and societies to modify existing lifestyles and development pathways, and to complex climate change problems opinion is divided on the promise of technological solutions.[6]

Operating within these constraints, States have over the past two decades established an international legal regime, albeit an evolving one, to address climate change and its impacts. The first significant step in international community's to collectively address these concerns were constituted by the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol. These instruments have attracted near universal adherence. Their primary objective is to set in place an international legal framework for common but differentiated responsibility for the reduction of greenhouse gas (GHG) emissions, and support for national adaptation efforts with a specific concern for the special needs of developing and vulnerable countries.[7]

The UNFCCC's chief decision-making body is the Conference of Parties (COP). In 1997, the Kyoto Protocol was adopted and it has entered into force in 2005. It sets legally binding obligations on its 187 member States including binding limits on GHG emissions for Annex-I countries during the first commitment period of 2008-2012 (as distinct from the UNFCCC which only encouraged mitigation and adaptation measures). States must furnish specific information on emissions and emission reduction measures, and the Kyoto Protocol provides a range of mechanisms to facilitate this, namely a "Joint Implementation (JI), an international Emissions Trading (ET), and the so-called Clean Development Mechanism (CDM)."[8]

Unlike the International Human Rights Regime, the UNFCCC and the Kyoto Protocol do not include express provisions for remedial measures for individuals or communities in light of a particular environmental harm. But, subsequent agreements have called for consideration of the social and economic consequences of response measures as well as enhanced international cooperation.[9]

---

6 Tucker Davey, *Developing Countries can't afford Climate Change*, Available at https://futureoflife.org/2016/08/05/developing-countries-cant-afford-climate-change/, Last visited on 10.7.2018.

7 *Major International Frameworks for Mechanism to limit Green-House Gases Emission*, Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/104703/7/07_chapter%204.pdf, Last visited on 11.7.2018.

8 Siobhan McInereny-Lankford, Mac Darrow, and et.al, *Human Rights and Climate Change: A review of the International Legal Dimensions,* The World Bank, Washington D.C., (2011). p. 8.

9 *Climate Change and the Human Rights to Water and Sanitation*, Available at http://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf, Last visited on 11.7.2018.

It is significant to emphasize that, while the UNFCCC treaty regime is addressed to a quaint essentially global problem based upon the principle of reciprocity between participating States (e.g. Article 7 UNFCCC),[10] International Human Rights law principally concerns the responsibilities of States towards individuals within their own territory or effective control. This is so notwithstanding the fact that both treaty regimes create mutual or common rights and obligations, unless they give rise to self-executing obligations, and that it is only when they are given effect to in domestic law that they may create State responsibilities towards individuals.[11]

III. Linking Climate Impacts To Human Rights

In spite of the fact that the UNFCCC seeks to "protect the climate system for the benefit of present and future generations of humankind," it is not meant to provide human rights protections, humanitarian aid or redress to individuals or communities consequent upon environmental harms. The UNFCCC is instead an agreement between States to "anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects." The nascent interest in human rights in the climate change context can perhaps be attributed to some degree to widely felt frustrations with the pace and directions of multilateral diplomacy. Consensus driven welfare based approaches stand in uneasy relief, in the eyes of many, against the very tangible climate change harms already evident in many nations. The slow progress of international negotiations appears to be increasing out of step with scientific knowledge and the pace of climate change itself.

Much of the recent interest in the human rights dimensions of climate change has been sparked by the plight of the *Inuit*[12] and the Small Island States, at the frontlines, albeit different ones, of climate change. In their 2005 petition before the Inter-American Commission on Human Rights it was claimed by the Inuit that the impacts of climate change could be attributed to acts and omissions of the U.S., and violated their fundamental human rights in particular the rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home. It was argued that these rights were protected under several international human rights instruments, including the American Declaration of the Rights and Duties of Man. Although the

10 UNFCCC, 1992 adopted by United Nations.

11 Ibid.

12 Inuit Circumpolar Council Canada, *Inuit petition Inter-American Commission on Human Rights to oppose Climate Change caused by the United States of America*, Available at http://www.inuitcircumpolar.com/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america.html, Last visited on 11.7.2018.

Inuit Petition did not fare well before the Commission, it drew attention to the links between climate change and human rights and led to a "Hearing of a General Nature" on human rights and global warming.

In the climate negotiations, indigenous groups more generally have delivered strong statements on the impacts of climate change on indigenous people's health, society, culture and well being. Indigenous people's organizations have been admitted to the Convention process as non-governmental organizations (NGOs), with constituency status.[13]

IV. Human Rights Impacts Of Climate Change

Two problematic features of the climate change make it distinctive. First, the effects are predicted to be life changing, far beyond any environmental problem the international community has yet confronted. Second, the climate impacts are distributed in an uneven manner. Some regions are far more vulnerable than others including: the Arctic, because of the impacts of high rates of projected warming on natural systems and human communities; Africa, as a result of low adaptive capacity and projected climate change impacts; small islands, where there is high exposure of population and infrastructure to projected climate change impacts; and Asian and African mega deltas, due to large populations and high exposure to sea level rise, storm surges and river flooding. These two problematic distinctive features of the climate change provide the necessary context within which human rights impacts should be explored.[14]

At the outset of this discussion, numbers of conceptual premises are worth outlining in brief. First, invoking the notion of human rights involves both rights and duties, and in each situation, for human rights to have meaning, one must recognize a right-holder and a duty-bearer. According to one of the sources of public international law each should be anchored in legal terms (traditionally identified with those specified under Article 38 of the Statute of the International Court of Justice), or some relevant provision of domestic law. Connected with this is the implicit assumption that there is something distinct about addressing climate change from a human rights perspective, and that this approach is distinguishable from an approach that simply addresses the social or human impacts of climate change. This is also in the light of the fact that not all human or social impacts may amount to human rights impacts. Therefore, it is important to emphasize at the outset that climate change may threaten or interfere with the

13 Rachel Baird, *The impact of Climate Change on Minorities and Indigenous peoples*, Available at http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Minority_Rights_Group_International.pdf, Last visited on 11.7.2018.

14 NASA, *The consequences of Climate Change*, Available at https://climate.nasa.gov/effects/, Last visited on 11.7.2018.

enjoyment of a particular human right without necessarily implying that those bearing responsibilities under international law for the realization of that right have violated their obligations under human rights law. Not all infringements of human rights violate human rights law. In the context of climate change there may be serious challenges in disentangling the complex causal relationships between emissions from a particular country and a particular harm caused by climate change in another country, and in separating out the harm due to climate change from other possible causes.

Another implicit element of the ensuing discussion is that human rights brings 'value added' to the discussion of approaches to the problem of climate change. Implicit in the discussion that follows are notions about the nature of that 'value added', including in legal terms. The discussion aims in part to articulate how an approach predicated on human rights can improve the understanding of climate change and make international legal and political measures to address it more effective.

This segment develops the foregoing premises, by linking specific social and human impacts of climate change to particular human rights standards under international human rights treaties, thereby confirming the former as human rights impacts, yet without digging into difficult evidentiary and procedural questions that would be necessary to resolve specific human rights claims. The following analysis examines a sampling of human rights protected under public international law that may be or already are being adversely impacted by climate change. As a subject of obligations these are rights under treaties signed by the vast majority of countries, and in which State Parties have obligations to respect, protect and fulfill.[15]

The obligations principally in focus are those under the ICESCR and the UNFCCC, and the paradigmatic examples will that of a State which is party to both of these instruments with binding obligations under both which must be given effect to in good faith. The analysis focuses on the rights to life, food, health, housing and water, contending that these and other rights are presently at risk from climate impacts, andthe risks appear to be on the rise.[16]

V. Deterioration of Right to Life due to Climate Change

The ICCPR, the CRC and three regional human rights treaties, i.e. the European and American Conventions and the African Charter

15 Centre for International Environment Law, *States' Human Rights Obligations in the Context of Climate Change*, Available at http://www.ciel.org/reports/states-human-rights-obligations-context-climate-change/, Last visited on 11.7.2018.

16 *Ibid.*

protect right to life. Under Article 6 of the ICCPR in its General Comment on the scope and content of the right to life, it was emphasized by the Human Rights Committee that the "inherent right to life" cannot be interpreted in a restrictive manner, and positive measures are required to be taken by the States for the protection of this right. It would appear from previous interpretations of the Committee's that a failure by State institutions to take action to prevent, mitigate or remedy life-threatening harms from climate change within that State's territory or effective control could potentially constitute a violation of the right to life.[17]

Climate change has direct implications for the right to life. In its report on climate change and human rights of January 2009, the OHCHR states, on the basis of the IPCC assessment of 2007:[18]

A number of observed and projected effects of climate change have been seen which will pose direct and indirect threats to human lives. IPCC projects with high confidence an increase in people suffering from death, disease and injury from heat waves, floods, storms, fires and droughts. Similarly, climate change will affect the right to life through an increase in hunger and malnutrition and related disorders impacting on child growth and development, cardio-respiratory morbidity and mortality related to ground-level ozone. Climate change will exacerbate weather related disasters, which as of now have devastating effects on people and their enjoyment of the right to life, specifically in the developing world.[19]

With respect to this, a resolution recently was adopted by the UN General Assembly recognizing climate change as a possible threat to international peace and security.[20]Climate change by redrawing the maps of water availability, food security, disease prevalence, population distribution and coastal boundaries has the potential to exacerbate insecurity and violent conflict on a potentially large scale. Whereas, the threats to life are more immediate in some countries and regions than others, a recent report by the Center for Naval Analyses in the U.S. argues that climate change acts as a threat multiplier in already fragile regions, exacerbating conditions that lead to failed states and breed

17 UN Human Rights Committee, *General Comment No. 36- Article 6 Right to Life*, Available at https://www.penalreform.org/wp-content/uploads/2015/06/HRC-Art.- 6-submission.pdf, Last visited on 11.7.2018.

18 OHCHR, *Report 2009*, Available at http://www.ohchr.org/Documents/Publications/I_OHCHR_Rep_2009_complete_final.pdf, Last visited on 11.7.2018.

19 Ibid.

20 United Nations, *Peace and Security*, Available at http://www.un.org/en/sections/issues-depth/peace-and-security/index.html, Last visited on 11.7.2018.

terrorism and extremism, concluding that "projected climate change poses a serious threat to America's national security."[21]

Some communities, such as those living in the Arctic and in coastal regions, are particularly at risk, and are already starting to experience the adverse effects of climate change on their right to life.

VI. Deterioration of Right to Adequate Food due to Climate Change

The ICESCR includes the right to adequate food as an element of the right to an adequate standard of living.[22] The ICESCR has contended that the right to food[23] is fundamental to the inherent dignity of the human person and indispensable for the fulfillment of other human rights enshrined in the International Bill of Rights. It infers the right to adequate food as encompassing both availability of and accessibility to food and has recognized the interdependence between the environment and the right to food, noting that the right to adequate food requires the adoption of "apt economic, environmental and social policies."[24]

The risks caused by climate change to the right to food have been apparent to the ICESCR for some time. According to the ICESCR, "even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals."[25]

The UNFCCC in its Article 2 underscore the importance of ensuring availability of food. It requires the stabilization of GHGs in the atmosphere to be achieved within a time frame sufficient to "ensure that food production is not threatened."[26] Climate impacts,

21 The CAN Corporation, *National Security and the Threat to Climate Change*, Available at https://www.npr.org/documents/2007/apr/security_climate.pdf, Last visited on 11.7.2018.

22 OHCHR, *The Right to Adequate Food*, Available at http://www.ohchr.org/ Documents/ Publications/FactSheet34en.pdf, Last visited on 11.7.2018.

23 OHCHR, *Special Rapporteur on the Right to food*, Available at http://www.ohchr.org/ EN/Issues/Food/Pages/FoodIndex.aspx, Last visited on 11.7.2018.

24 OHCHR, *Climate Change and the Human right to adequate food*, Available at http:// www2.ohchr.org/english/issues/food/docs/climate-change-and-hr-adequate-food. pdf, Last visited on 11.7.2018.

25 International Covenant on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food (Article 11),* Available at https://www.nichibenren. or.jp/library/ja/kokusai/ humanrights_library/treaty/data/CESCR_GC_12e.pdf, Last Visited on 11.7.2018.

26 Federal Environmental Agency (Umweltbundesamt), *Reasoning Goals of Climate Protection.SpecificationofArticle2UNFCCC*,Availableathttps://www.researchgate.net/ profile/Juergen_Scheffran/publication/260828534_Reasoning_Goals_of_Climate_ Protection_Specification_of_Art._2_UNFCCC/links/55e0554708ae2fac471b182f/ Reasoning-Goals-of-Climate-Protection-Specification-of-Art.-2-UNFCCC.pdf, Last visited on 13.7.2018.

and possibly climate response measures may threaten both availability and accessibility to food.[27] The IPCC documents, across a range of temperature increases, complex, localized negative impacts on small holders, subsistence farmers and fishers. For lower latitudes, even for small local temperature increases, crop productivity is projected to decrease, thereby increasing the risk of hunger.Increases in extreme weather events, including droughts and floods, will also negatively affect crop production, thereby placing both availability and accessibility at risk. Climate change is projected to aggravate this vulnerability. The right to adequate food may also be placed at risk by policies and measures to mitigate climate change, the use of bio-fuels as an alternative to high GHG emitting fossil fuels. The use of food and feed crops for fuel increases the role of energy markets in determining the value of agricultural commodities that are direct or indirect substitutes for biofuel feed stocks. Food prices, hitherto on a downward trend, could increase once more, thereby affecting accessibility.[28]

In spite of the fact that a State's human rights obligations are largely owed to persons located within its own territory, jurisdiction or effective control, human rights treaty obligations may have extra-territorial dimensions in certain circumstances, for all kinds of rights. The ICESCR has recognized a number of obligations with extra-territorial effect, in the case of the right to food, arising from Articles 2(1), 11, and 23 of the Covenant.[29] These include the requirement to respect the enjoyment of the right to food in other countries (e.g., refraining from food embargoes), to protect that right to facilitate access to food, to provide the necessary aid when required, and to ensure that the right is given due attention in international aid agreements. The UNFCCC regime has comparatively well defined the obligations relating to international assistance and cooperation.[30]

VII. Deterioration of Right to Health due to Climate Change

The ICESCR recognizes the right to the "highest attainable standard of physical and mental health,"and considers that this right is indispensable for the enjoyment of other human rights.[31] The

27 United States Environmental Protection Agency, *International Climate Impacts*, Available at https://archive.epa.gov/epa/climate-impacts/international-climate-impacts.html, Last visited on 13.7.2018.

28 UNDP, *Human Development Report 2016*, Available at http://hdr.undp.org/sites/default/files/ 2016_human_development_report.pdf, Last visited on 13.7.2018.

29 Fons Coomans, *Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organizations*, Available at http://www.mpil.de/ files/pdf1/mpunyb_14_coomans_11.pdf, Last visited on 13.7.2018.

30 *Supra* Note 8 at p. 15.

31 ICESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12),* Available at http://www.refworld.org/pdfid/4538838d0.pdf, Last visited on14.7.2018.

right to health is widely protected in other international and regional instruments and under national constitutions. As interpreted by the ICESCR and other authoritative or adjudicatory bodies, the substantive content of this right includes timely and appropriate health care, access to safe and potable water, adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health related education and information.

The link between environmental protection and human health has long been recognized. Most MEAs acknowledge and address the impact that environmental harms can have on human health.[32] The UNFCCC in its definition of "adverse effects of climate change"[33] includes "significant deleterious impacts on human health and welfare,"[34] and it requires Parties to take, *inter alia*, health impacts into account in relevant social, economic and environmental policies.As provided by CRC that, States parties shall take appropriate measures to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution."[35]

Climate change is expected to have significant health impacts, including by increasing, *inter alia*, malnutrition; the number of people suffering from death, disease and injury from heat waves, floods, storms, fires and droughts; and cardiorespiratory morbidity and mortality associated with ground level ozone.As predicted by IPCC also that the adverse health impacts will be greatest in low-income countries. At greater risk, in all countries, are "the urban poor, the elderly and children, traditional societies, subsistence farmers, and coastal populations."[36] Health equity is also at risk, as are the prospects for achieving the health related Millennium Development Goals (MDGs).

---

32 WHO, *Human Rights, Health and Environmental Protection: Linkages in Law and Practice*, Available at http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf, last visited on 14.7.2018.

33 Article 1(1) of the UNFCCC.

34 Ibid.

35 UN Committee on the Rights of the Child (CRC), *Article 24 of the CRC General Comment on the Right of the child to the enjoyment of the highest attainable standard of health*, Available at http://www.refworld.org/docid/51ef9e134.html, Last visited on 14.7.2018.

36 Health Protection Agency, *Health Effects of Climate Change in the UK 2012*, Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/371103/Health_Effects_of_Climate_Change_in_the_UK_2012_V13_with_cover_accessible.pdf, Last visited on 14.7.2018.

Relying on the IPCC assessment, the OHCHR report on climate change and human rights states:[37]

> "Climate change is projected to affect the health status of millions of people, including through increases in malnutrition, increased diseases and injury due to extreme weather events, and an increased burden of diarrhea, cardio respiratory and infectious diseases. Global warming may also affect the spread of malaria and other vector borne diseases in some parts of the world. Overall, the negative health effects will disproportionately be felt in Sub-Saharan Africa, South Asia and the Middle East."[38]

In addition to the duty to respect, protect and fulfill the right to health under the ICESCR, Article 12 requires States to cooperate, and to take joint and separate action in order to achieve the full realization of the right to health.[39] As proclaimed by the Alma-Ata Declaration, "the gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries."[40] In light of this, it would appear that climate impacts would only increase the onerous burdens, which developing countries already face in addressing health.

VIII. Deterioration of Right to Water due to Climate Change

The right to water, as an essential condition for survival, is not just a self-standing right, yet is recognized as inextricably linked with other human rights such as the right to an adequate standard of living, the right to the highest attainable standard of health, and the rights to adequate housing and adequate food.[41] The availability of water is seriously affected by the climate change. The Stern Review records that even a 1 degree Celsius rise in temperature will threaten water supplies for 50 million people, and a 5 degrees Celsius rise in temperature will result in the disappearance of various Himalayan glaciers threatening water shortages for a quarter of China's population, and hundreds of

37 OCHRC, *Human Rights and Climate Change*, Available at http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx, Last visited on 14.7.2018.

38 *Ibid.*

39 WHO, *OCHRC, The Right to Health, Fact Sheet No. 31,* Available at https://www.ohchr.org/Documents/Publications/Factsheet31.pdf, Last visited on 14.7.2018.

40 Declaration of Alma-Ata, *International Conference on Primary Health Care, Alma-Ata*, Available at http://www.who.int/publications/almaata_declaration_en.pdf, Last visited on 14.7.2018.

41 ICESCR, *General Comment No. 15: The Right to Water (Articles 11 and 12)*, Available at https://www.escr-net.org/resources/general-comment-no-15-right-water, Last visited on 14.7. 2018.

millions of Indians.[42] The OHCHR report on climate change and human rights relies on the IPCC assessment of 2007 has stated:

> "Loss of glaciers and reductions in snow cover are projected to increase and to negatively affect water availability for more than one-sixth of the world's population supplied by melt water from mountain ranges".[43]

The impact on water supplies can also be due to weather extremes, such as drought and flooding. Thus, climate change will exacerbate existing stresses on water resources and compound the problem of access to safe drinking water, currently denied to an estimated 1.1 billion people globally and a major cause of morbidity and disease."[44]

As with the rights to food and health, in addition to the duties to respect, protect and fulfill this right, States have a general obligation under the Covenant to cooperate with others to achieve full realization of this right. The duty of cooperation is strengthened by the principled requirement in UNFCCC Article 3 to give the specific needs of developing countries full consideration, and in UNFCCC Article 4 to "cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture."[45]

IX. Deterioration of Right to Adequate Housing due to Climate Change

A range of international and regional human rights instruments protects the right to adequate housing. Article 11 of the ICESCR recognizes components of the right to an adequate standard of living, the right to adequate housing is understood by the ICESCR as "the right to live somewhere in security, peace and dignity."[46] Its core substantive elements include security of tenure, protection against forced evictions, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.

---

42 Stern Review: The Economics of Climate Change, *The impact of Climate Change on Growth and Development, How Climate Change will affect people around the World*, Available at http://www.climate-change-two.net/stern-review/chapter-03.pdf, Last visited on 14.7.2018.

43 *Ibid.*

44 United States Environmental Protection Agency, *Climate Impacts on Water Resources*, Available at https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-water-resources_.html, Last visited on 14.7.2018.

45 *Supra Note* 8 at 17.

46 ICESCR, *General Comment No. 4: The Right to Adequate Housing [Article 11 (1)]*, Available at http://www.refworld.org/pdfid/47a7079a1.pdf, Last visited on 14.7.2018.

In many ways, climate change may impact upon the right to housing, as 2009 of the OHCHR report observes, drawing from United Nations Development Programme (UNDP) and IPCC assessments: "Sea level rise and storm surges will have a direct impact on many coastal settlements. In the Arctic region and in low-lying island State's such impacts have already led to the relocation of peoples and communities. Settlements in low-lying mega-deltas are also particularly at risk, as evidenced by the millions of people and homes affected by flooding in recent years."[47]

By the year of 2050, it is estimated that the number of people likely to be displaced by climate change.[48] Migration within and beyond borders will be a last alternative for many vulnerable populations. However as the International Organization for Migration (IOM) has observed, the ability to migrate is a function of mobility as well as resources both financial and social; hence "the people most vulnerable to climate change are not necessarily the ones most likely to migrate."[49] Therefore, those unable to move away from the negative effects of climate change whether due to poverty, insecurity, disability, ill health or other factors will find their right to adequate housing most acutely threatened.

X. Effect of Climate Change on the Realization of a Range of other Human Rights

As far as rights are discussed, climate change may impact the progressive realization of a range of other rights as well. Climate change has been characterized as a "profound denier of freedom of action and a source of disempowerment."[50] Climate impacts extreme weather events, increased flood and drought risk, changing weather and crop patterns, among others will likely hamper the realization of the rights to private and family life,property,means of subsistence,freedom of residenceand movement.For indigenous groups, climate impacts will fundamentally alter their way of life, affecting a further set of protected rights and interests,in particular the right to the benefits of their culture,and the right to freely dispose of natural resources.[51]There are concerns among certain groups that policies and measures to reduce emissions from deforestation, a significant contributor to climate change, may have

47 *Supra* Note 21.

48 Ibid.

49 GSDRC, *Research Report: Climate Change and Migration*, Available at http://www.gsdrc.org/docs/open/hd613.pdf, Last visited on 14.7.2018.

50 Mac Darrow, *Climate Change and the Right to Water*, Available at https://www.cambridge.org/core/books/human-right-to-water/climate-change-and-the-right-to-water/B1A08468680E1A1B1628DA03594A4C53, Last visited on 14.7.2018.

51 United Nations, *United Nation Declaration on the Rights of Indigenous Peoples*, Available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf, Last visited on 14.7.2018.

direct relevance to indigenous peoples' rights particularly in relation to traditional rights to forest produce.For these and other communities whose very existence is threatened, such as those living in small island states, climate change threatens their right to self-determination, protected by both the ICCPR and the ICESCR.[52]

Research shows that inequalities within countries are a marker for vulnerability to climate shocks. One recent quantitative assessment of the human impacts of disasters found that "countries with high levels of income inequality experience the effects of climate disasters more profoundly than more equal societies."'The effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations due to factors such as poverty, gender, age, minority status, and disability.'[53]For instance, there is a growing body of scholarship that documents the gendered impacts of climate change and climate change policy and the disproportionate impacts on women's rights.The nature of that vulnerability varies widely, cautioning against generalization. However, because women form a disproportionate share of the poor in developing countries and communities that are highly dependent on local natural resources, women will in many instances, be disproportionately vulnerable to the impacts of climate change.[54]

The situation is further exacerbated by gender differences in property rights, political participation, and access to information and in economic, social and cultural roles.The CEDAW Committee has issued a statement on Gender and climate change as a contribution to the COP 15 negotiations, drawing attention to the gender differentiated impacts of climate change and the need for equal participation of women and men in decision-making.[55]

Children are another particularly vulnerable group. The report of OHCHR states that: "overall, the health burden of climate change will primarily be borne by children in the developing world."[56]In 2007,

---

52 Ibid.

53 United Nation Development Programme, *Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a divided World*, Available at https://is.muni.cz/el/1423/jaro2010/SOC777/HDR_20072008_EN_Complete.txt?lang=en, Last visited on 14.7. 2018.

54 Ibid.

55 *CEDAW Committee recommends a Gender-Based approach to Environmental Disasters*, Available at http://www.ijrcenter.org/2018/03/20/cedaw-committee-recommends-a-gender-based-approach-to-environmental-disasters/#gsc.tab=0, Last visited on 14.7.2018.

56 United Nations, *10/61 Report of the office of the United Nations High Commissioner for Human Rights on the relationship between Climate Change and Human Rights*, Available at https://www.right-docs.org/doc/a-hrc-10-61/, Last visited on 14.7.2018.

Save the Children UK reported that within the next decade up to 175 million children are likely to be affected every year by natural disasters brought about by climate change.[57]The United Nations Children's Fund (UNICEF) recently researched and identifies a wide range of circumstances ranging from physical attributes of children to structural factors determining the distribution of economic power and social roles, such as the gendered divisions of labour that will render climate change especially threatening to children by exacerbating existing health risks; destroying clinics, homes and schools; disrupting the natural resource base sustaining community livelihoods and nutrition and water security; provoking population displacements; and undermining support structures that protect children from harm.[58]Extreme weather events and reduced quantity and quality of water already are leading causes of malnutrition and child death and illness. Climate change will again exacerbate these stresses.

XI. EFFECTS OF MITIGATION AND ADAPTATION ON HUMAN RIGHTS

The way in which governments and other actors act to the challenges of climate change can also affect the enjoyment of human rights. This is true for actions undertaken to mitigate the greenhouse gas (GHG) emissions that contribute to climate change, as well as projects undertaken to adapt to the impacts of climate change.[59]

Mitigation Measures

The Bali Action Plan clearly contemplates additional emission reduction commitments for industrialized Countries, and introduces the concept of nationally appropriate mitigation actions (NAMAs) by developing Countries, which are to be supported by technology, financing, and capacity building. Although the contours of the post-2012 mitigation regime are unclear at this point in the negotiations, the mitigation measures necessary to address climate change will undoubtedly impact human rights.

The UNFCCC and Kyoto Protocol require Countries to reduce their GHG emissions using various mitigation strategies. The Protocol established market-based mechanisms, such as the Clean Development Mechanism (CDM) and Joint Implementation, to allow developed Countries to meet their treaty obligations by investing in developing Countries. Other

57 UNICEF, *Children's Vulnerability to Climate Change and Disaster Impacts in East Asia and the Pacific*, Available at https://www.unicef.org/media/files/Climate_Change_Regional_Report_14_Nov_final.pdf, Last visited on 14.7.2018.

58 Ibid.

59 *Climate Change Action Plan*, Available at https://www.ontario.ca/page/climate-change-action-plan, Last visited on 14.7.2018.

mitigation strategies, such as reducing emissions from deforestation and forest degradation programs, could provide funds to developing Countries, indigenous peoples, and forest-dependent communities involved in forest conservation.[60]

Adaptation Strategies

Adaptation policies attempt to increase the capacity of societies and ecosystems to deal with the risks and impacts of climate change. Undoubtedly, governments and other actors will take action to face the changes brought about by climate change. In this regard, the duty in human rights law to protect people from harm is universally recognized. However, these adaptation measures have the potential to infringe on human rights.

Due to the nature of the climate system and the long-term effects of increased greenhouse gas concentrations, climate change will continue over several decades, and therefore adaptation strategies are key to protecting vulnerable populations. A variety of adaptation measures implicate human rights, such as measures regarding food, water, and the availability of other resources to support the adaptation needs of vulnerable populations. Similarly, disaster risk management could address the particular situation of the most vulnerable and marginalized.[61]

XII. CONCLUSION

Climate change is not only an environmental issue, but now is quickly turning into the greatest human rights challenge of our time. It is an issue of justice and inequality for large number of individuals and communities around the world who already are experiencing climate harms. Also, it is an issue for future generations who will undergo increasingly severe loss and damage. The historic and present failures of the international community's to take urgent action to mitigate climate change is further threatening these rights, particularly for vulnerable peoples and communities who are as of now encountering the adverse impacts of climate change. However, the worst climate impacts can be reduced only if the international community acts urgently with ambition and scaled-up resources.

60 UCAR, *Climate Mitigation and Adaption*, Available at https://scied.ucar.edu/longcontent/climate-mitigation-and-adaptation, Last visited on 14.7.2018.

61 UNFCCC, *Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries*, Available at https://unfccc.int/resource/docs/publications/impacts.pdf, Last visited on 14.7.2018.

Unveiling The Concept of 'Isr' (The Individual Social Responsibility)

***Mr Vishal Dixit**

"No man is an Island, entire of itself; every man is a piece of the Continent, a part of the main."

- John Donne

I. Introduction:

In this fast-changing era of globalization, national barriers are giving way to the Individual choices. Although the 'individual' was always at the center of the lawmaking and execution thereof, the renewed renascence of individual liberty laced with the material enrichment of human lives justifies the pushing need of massive overhauling of our existing legal machinery and justice delivery systems. This article is a modest attempt to look for the innovative but sustainable solutions for the social intricacies of the present times. 'Individual Social Responsibility' (ISR) as discussed in the following lines may hold an enduring response to these lingering social distortions.

II. Singulos Status in Legis Est Scriptor (Individual's Status in Law)

Individuals are at the center of any society. In fact, the rationale of society revolves around the interpersonal relations of the individuals and their rights inter se, authority, duties and liabilities; the existence, extent, approval, determination, the denial, enforcement or otherwise remedial treatment of such rights, authority, duties and liability. Every school of jurisprudence, whether natural, positivist (analytical), socialist, historical or realist puts individual in the center of the legal system.

Jeremy Bentham, who is considered to be the founder of positivism (the school which believes in the law being the command of sovereign and sanction), believes that the function of law is to unshackle individual from the restraints and riders on his freedom. He propounds the theory of 'utilitarianism' i.e. maximization of pleasure and minimization of pain of the individuals in a society through the law and legal processes.

The contemporary legal theorists swear by the virtues of individual liberty and justify it by saying that 'liberty' is not unbridled freedom to do anything of one's choice and to conduct oneself in any manner

* Assistant Professor, HNLU, Raipur.

whatsoever one please to, but a well cherished usufruct of the evolved human civilizations in the world, often deemed as an arch rival of the arbitrariness; the later being characterized as whims and caprice of the competent few willingly transgressing upon the domain of other's (who often form majority in strength but rest at the downward strata of the social pyramid) right.

All streams of law, irrespective of their nature, form or substance whether enacted, customary or Judges made remain focused upon the conduct of a person either individually or as the fundamental ingredient of the object group.

Impact of the 'laissez-faire' behavior is not only predominantly visible in the economic arena but also in all other walks of life of the day. The thought has percolated the human civilization to such a degree that even modern day international law readily delves into the individual's rights, communications, lifestyles and living patterns. Various international treaty and conventions including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women etc. all alike harp upon the necessity of ameliorating the Status of individuals as human being and as global citizens irrespective of any tag attached to them, be it concerning their nationality, race, colour, creed, region, religion or the likes.

III. Right-Duty Nexus

Jurist Hohfield in his table of jural-correlatives lists 'duty' as a jural-correlative of 'right'. It implies that according to him, no right can sustain without there being a corresponding duty. Sir John Salmon defines right as an interest recognized and protected by a rule or justice. It is an interest in respect of which there is a duty and the disregard of which is a wrong.[1]

The eminent French Jurist Duguit believes in the notion of 'social solidarity, advocates against the idea of human will being the source of right. For him, human will is contrarian of the social good as it inevitably gives rise to the interpersonal conflict and he, thus concludes that there is no right available to an individual except a right to perform his duty.

1 Dr. N. V. Paranjape, Studies in Jurisprudence and Legal Theory, Central Law Agency, Allahabad, (8th Edn.- 2016), p.386 .

The welfare states of the day don't synchronize with the 'Protection Theory' of the legal rights, making individual dependent upon the state's desire.

The other two popular theories of the jurisprudence, concerning the 'right' in its legal sense are the 'Will Theory' of the legal rights supported by Hegel, Immanuel Kant, Hume and others; and the 'Interest Theory', which finds support in the German Jurist Ihering and JC Gray among others. While the former of it spells a legal right as expression and exercise of human will but at the same time subjecting such vivid expression of the will to other fellow individuals' legal rights, the later theory connotes legal rights as 'legally protected interest'.

Obviously, none of the great Jurists believed in the self-sustaining rights or the grossly absolute rights.

IV. The Concept of Duty in the traditional Society

Traditionally, Indian society has been duty oriented and community-centric. It was a common belief that an Individual's interest is subordinate to the interest of his community. The fact that the ancient Indians had a great sense of reverence for the Nature and its various forms is further reinforced by the well-known discoveries of the statues of the Matra Devi or the Mother Goddess and Pashupati Shiv during the Harappan excavations, and the mention of Agni, Rudra and Indra etc. in the Rigvedic texts.

The earlier Indians had a great bent of thinking towards the purity of thoughts, speech and action and the underlying principle of the civic life of that time remained responsible behavior; determination of every individual's liability as an ingredient of his society; conduct of mutual respect; less emphasis on establishing rights and more on preventing the breach of duties fixed by social norms and obligations; safeguard, conservation and thoughtful exploitation of the natural resources and the fear of group denunciation or social proscribe in case of having any deviant approach. Curiously enough, the same mark of respect towards nature and an attempt of fixing the individual accountability can be observed in almost all ancient human civilizations around the world.

V. Evolving Dimensions

Like ancient Indian society, in evolved civilizations also there cannot be any unbridled right and the limits of one's right are well defined so as to prevent any active or incidental encroachment of others' rights. This sort of protection afforded to one's rights adorned with the sense of respect for others' rights, is the cornerstone of any sophisticated society and differentiates it from the autocratic patterns of living.

Here, while preserving one's own rights is individual's superior and in fact the most substantial right, not to injure others' right in the process of establishing or exercising one's right is also an equally important duty.

A society based on reciprocal respect and concern for other's rights i.e. having a sense of botheration for admiring others' rights (e.g. right of public security, clean environment and mutual assistance etc.) shall undoubtedly be much well-ordered and synchronized. This shall inevitably lead to lasting happiness and the common good, reflected through all-encompassing growth and prosperity.

On the contrary, a society too conscious of individuals' rights with the least concern for the corresponding duty shall cause inevitable acrimony, disharmony and feuds, thereby hampering public welfare and peace, due to the frequent conflicts of interest among the individuals or group of individuals.

VI. The Empirical State of Affairs

Every year UN Sustainable Development Solutions Network releases the World Happiness Report in which countries are ranked on the basis of per capita income, life expectancy, how people perceive about the social support, citizen's personal liberty, freedom from corruption and generosity levels. The report considers the real gross domestic product per capita as one of the key measurements. The information collated and deduced is used to generate a happiness score from 1 to 10.

In the year 2017, a total of 155 countries were ranked. The Norway was ranked as the happiest country in the world displacing three-time winner Denmark and the top 10 happiest countries were - Norway, Denmark, Iceland, Switzerland, Finland, Netherlands, Canada, New Zealand, and Australia and Sweden (which were tied at the ninth place).

Among the SAARC nations Pakistan was ranked at 80th position, Nepal stood at 99th, Bhutan at 97th, Bangladesh at 110th while Sri Lanka was at 120th. India ranked at 122nd and was the least happy country among the SAARC nations. It dropped four slots from last year i.e. 2016.[2]

In the year 2018, 156 countries were rated on the same continuum and while Finland overtook Norway as the world's happiest country,

2 https://www.indiatoday.in/education-today/gk-current-affairs/story/world-happiness-report-2017-967008-2017-03-22 visited on 22nd July 2018 at 1040 Hrs.

followed by Nordic neighbors Norway, Denmark, Iceland[3] and India was ranked abysmally at 133rd.[4]

Thus the Republic of India, the fastest growing national economy, continued its downward trajectory by falling further to secure 24th slot from the lowest end. Juxtaposed to its micro economic performance, India is the undisputed growth engine of the world and the fastest growing economy in the world is projected to leapfrog Britain and France in the year 2018 itself to become the world's fifth-largest economy in dollar terms.[5]

Every year UNDP (United Nation's Development Program) also publishes a report titled as the Human Development Report or HDR, based on the realistic gathered and studied statistical data. Countries are ranked to their state of development through the Human Development Index (HDI). The HDI is an average measure of basic human development achievements in a country and is a composite index based on the levels of life expectancy, education, and per capita income indicators.

So, the HDI is one more efficient summary measure for assessing long-term progress in three basic dimensions of human development — a long and healthy life, access to knowledge and a decent standard of living and was evolved by the noted Indian economist Amartya Sen and Pakistani economist Mahbub ul Haq. Determined by the score of HDI a country is classified in one of the four tiers of development.

There is always a time lag in the HDI due to intense data collection and processing. In the year in the 2016 HDI rankings India was ranked 131st among the 188 countries. India scored 0.624 and was put in medium human development category. India ranked lowest among BRICS nations. Russia (49), Brazil (79), China (90), South Africa (119) and followed even Sri Lanka (73) and Maldives (105) among the SAARC nations.[6]

In Economical parlance there is an excellent indicator of inequality called 'Gini's Coefficient' or at times simply as 'Gini Coefficient'. This Gini Coefficient is a measure of inequality of a distribution and may take values anywhere between 0 and 1. It is often deployed to measure

3 https://nordic.businessinsider.com/finland-tops-world-happiness-rankings-followed-by-nordics--/ visited on 22nd July 2018 at 1050 Hrs.

4 https://currentaffairs.gktoday.in/world-happiness-index-2018-india-ranks-133-03201853440.html visited on 22nd July 2018 at 1055 Hrs.

5 https://www.reuters.com/article/us-global-economy-league/india-to-leapfrog-uk-and-france-in-2018-britains-cebr-predicts-idUSKBN1EK00H visited on 22nd July 2018 at 1245 Hrs.

6 https://currentaffairs.gktoday.in/india-ranks-131-2016-human-development-index-03201742722.html visited on 22nd July 2018 at 1135 Hrs.

income as well as wealth inequality. A Gini Coefficient of 'zero' value expresses perfect equality, where all values are the same i.e. every unit of the surveyed population has the same income, whereas Coefficient of 'one' value (or 100%) expresses maximum inequality among the subject i.e. only one person has all the income qua others, who have no income of their own.

The share of wealth held by the top 1% in India is only second to the United States among the major countries for which the data is available. The Gini of wealth in India in 2017 stood at 0.83, which puts India among the countries with highest inequality countries. The increase in wealth inequality is consistent with the trend of rising inequality in the country in other dimensions."[7]

So, while on one hand the largest democratic nation State on the globe, India is rapidly climbing high on the pyramid of development, the benefits of growth and liberalization have not yet reached the last man and the same is evident from the fact that on many socio-economic parameters. Also to be noted is the grim fact that we are lagging against our far too small and resource starved neighbors as well against some impoverished African countries, which were heretofore considered to be quite isolated lowly placed on the development curve.

The widespread inequity in the incomes and distribution of the National wealth; ubiquitous corruption and self-centeredness originating from apathetic attitude towards other's rights; the overinflated self-consciousness and concern for one's own rights visible in the un-thoughtful overexploitation of the limited natural resources; irreversible environmental degradation and noteworthy climate change; eroding faith of masses on the organs of state, growing NCRB (National Crime Record Bureau) reported numbers, despair among the victims of heinous crime, evolution of system tilted towards criminal protection and failure of the justice delivery systems; mutual mistrust, inter se among the individual citizens and high handedness of anti-social elements at the pretext of liberty and various types of freedoms are such blots on the Indian society which no argument, howsoever cogent it may sound, shall be able to justify.

Let's take a usual instance from life in the Indian society to grasp the deliberation. When after a gruesome road accident, one accident victim is lying helplessly in a pool of blood and only human intervention may save his life. A number of onlookers would witness his pitiable condition but move on, some out of apathy and others out of fear of their probable unintended persecution in the subsequent judicial

7 https://counterview.org/2018/04/04/gini-of-wealth-in-india-in-2017-is-at-0-83-which-puts-india-among-countries-with-high-inequality/ visited on 22nd July 2018 at 1445 Hrs.

proceedings. Further, there being no corresponding enforceable duty in law to save the life of other person engulfed in the danger, despite there being sufficient opportunity to do so, if the accident victim (ibid) succumbs to his injuries and bids adieu with all his rights including the most precious one i.e. the right to life, on the road itself or even in the hospital (due to delay in receiving medical assistance), no duty can be clamped on any of those who could have actually saved him by the minimal consciousness for the duty.

Indian society is full of such everyday happenings which predictably promote a vicious cycle of insensitive interactions and undermine the faith of Individual citizens in the innate human values expected to form the basis of a happy, healthy and peaceful social order.

Another, example from the usual Indian life may be the predominant culture of tax evasion which is amply corroborated by the dismal direct taxes incidence rate in India, despite being high on the growth trajectory for more than 2.5 decades.

VII. Fundamental Duties in the Constitution of India

The Fundamental Duties of Indian citizens as enshrined in Part IV-A of the Constitution of India, were added as its Article 51-A by the 42nd Amendment, 1976 on the recommendation of 'Swaran Singh Committee', the idea had motivation from erstwhile USSR and concerns Indian citizens and their nation.

The 'Fundamental Duties' are non-justiciable and are termed as the constitutional obligations of all Indian citizens in whom the ultimate sovereignty of the Indian State finds its validity and Their presence has been commensurate with Article 29 (1) of the Universal Declaration of Human Rights and largely in line with provisions in several modern Constitutions.

Significantly, these 'Fundamental Duties' were to compliment the 'Fundamental Rights' by serving as a reminder to the citizens of India that while enjoying rights they also have some duties to follow. Besides, they are sort of a caution against the anti-national and antisocial doings, and in turn a benign initiative towards establishing a value-oriented society.

Despite being non-justiciable in nature, they aid the Indian Judiciary in ascertaining the constitutional vires of the law and policy matters and are of particular import in vetting the 'reasonableness' of the restrictions placed on the exercise of the 'Fundamental Rights'.

In a remarkable Judgment in a Case involving whether the revised History Syllabus for Class VIIIth introduced by the West Bengal Board of Secondary Education, with effect from January 1983 would be valid

or not as the same allegedly violated Article 51A(b) of the Constitution of India, the Calcutta High Court has held[8] that -

"We do not also accept the contention of the appellants that the impugned syllabus is violative of Article 51A (b) of the Constitution. Article 51A (b) imposes a duty on every citizen of India to cherish and follow the noble ideals which inspired our national struggle for freedom. The performance of the duty is quite personal to every citizen of India. No duty has been imposed on the State but on the citizens of India. There is much difference between right and duty. While a right can be claimed against another, a duty has to be performed.

It is not necessary for us to consider whether the duty imposed on every citizen of India under Article 51A of the Constitution can be enforced against a citizen or not. A citizen cannot claim that he must be properly equipped by the State so as to enable him to perform his duties Under Article 51A which does not confer rights but imposes certain duties. So a student cannot claim that he must be taught the Indian history in Class-VIII so that he can perform his duty Under Clause. (b) of Article 51A of the Constitution. In our opinion, therefore, there is no substance in the contention of the appellants that the impugned history syllabus has been prepared in violation of the provision of Article 51A (b) of the Constitution."

On 24th April 2017, the Supreme Court of India has been pleased to dismiss a PIL filed by Advocate Ashwini Kumar Upadhyay and seeking directions to the Government of India for the implementation of the recommendations of the Justice J S Verma committee to make the 'Fundamental Duties' provided in the Constitution of India effective, in letter and spirit.[9] (Justice JS Varma Committee was constituted in the year 1998 to make Fundamental Duties of citizens effective. The year 1999 report of Justice Verma committee on Fundamental Duties suggested ways and means but they never saw the light of the day.)

The Parliament can enforce them, if it decides to do so, via proper legislation and if the State makes a law to prohibit any act or conduct for preventing violation of any of the duties, the courts would uphold that as a reasonable restriction on the relevant fundamental right.

VIII. The Principle of the 'Corporate Social Responsibility'

The word 'Corporate Social Responsibility' (CSR) is not a thing of ancient origin because the jurisprudential concept of 'Corporate Personality' itself is not of much antiquity.

---

8 West Bengal Head Masters' vs Union Of India (UoI) & Others, AIR 1983 Cal 448, 87 CWN 597

9 https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-dismisses-pil-seeking-implementation-of-fundamental-duties/articleshow/58339592.cms, last visited on 19th July, 2018 at 1115 Hrs.

Companies were declared to possess their own personality in the historic Case 'Salomon v Salomon and Co Ltd'.[10] The principle established in this epic English Case is still much relevant throughout the universal commercial law regime.

Although a creation of law, a company ultimately operates within a social environment and there is a two-way interaction between a company and its atmosphere. Also, notwithstanding the historical fact that a company owes its origin to the needs of capital mobilization with limited liability, risk aversion and profit maximization, certain degree of balancing of the conflicting interest of various stakeholders is preemptive of its long-term sustenance as well as for the synergy of efforts and the consequent benefits' (not the 'profit' alone) optimization.

CSR is a concept with many definitions and procedures. The way it is perceived and practiced differs vastly for each country, but the objectivity of CSR remains the same i.e. to contribute to sustainable development by distributing economic, social and environmental benefits among all stakeholders.

Moreover, CSR is a very broad concept that addresses varying topics such as human rights, corporate governance, health and safety, environmental effects, working conditions and contribution to economic development. Whatever be its form the purpose of CSR remains to drive the processes towards sustainability.

Although it is difficult to be on the forefront on all aspects of CSR, some companies may still achieve remarkable imprints with unique CSR initiatives e.g. environment protection efforts by a company in the form of afforestation activities on a portion of its own compound may be cited as a good example of CSR.

In fact, 'CSR' found an echo in environmental concerns of the international community only and it was in the year 1972 that the UN Conference on Human Development that the expected role of business enterprises in sustainable development was recognized. In 1987, the Brundtland Commission Report also demarcated the role of the trans-boundary business activities on our environment. Principle-16 (propounding the 'Polluter Pays' principle') of the Rio Declaration, 1992 was, in fact, the first direct instance in delineating the idea of 'Corporate Social Responsibility' (although restricted in its approach and confined to the environmental concerns only).

Although, every multilateral agreement on environment and development entered into in last few decades, acknowledges the role of the private sector and the number of CSR initiatives has also seen a rapid rise, the prevalent voluntary system has only a limited scope

10 [1897] AC 22

and its binding counterpart in the nature of 'Corporate Accountability' is largely missing.

When CSR requires the Corporations to think of their liability towards various stakeholders, 'Corporate Accountability' mandates to ensure that they do not act against the wider social interest. While for complying the CSR norms Companies find justifications in their own long-term aspirations, lack of Corporate Accountability creates a big void.

Since long a dire need of moving past the era of voluntary initiatives through an effective 'International Convention on Corporate Social Responsibility and Accountability' for regulating the not much traversed.

IX. CSR in Indian Context

Earlier there was no mention of the CSR in the Indian Corporate Jurisprudence. Some Indian corporate houses were still actively involved at their own in the works of community welfare and most of such works were of the philanthropic nature. Now the Companies Act, 2013 has crystalized the idea of CSR.

Section-135 of the Act provides for the CSR liability of any Company either with the net worth of Rupees Five Hundred Crore or more, or with an annual turnover of Rupees One Thousand Crore or more, or alternatively having net profit of Rupees Five Crore or more during any financial year. It stipulates that such a Company (ibid) shall ensure to spend, in every financial year, at least two per cent of its average net profits during the three immediately preceding financial years and this has to be done in pursuance of its CSR Policy framed by a CSR Committee of the Board consisting of three or more directors, further providing that among these directors constituting the CSR Committee at least one director shall be an independent director.

If the company fails to spend the stipulated amount, the Board shall, in its report (as to be made under clause (o) of sub-section (3) of section 134), specify the reasons for not spending the amount. It may be highlighted that the newly incorporated CSR provision (supra) do not seek to make it mandatory on the part of company to comply with the obligation.

Another rider within Section-135 of the Companies Act, 2013 that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities casts aspersions on the legislative intent as there is a great industrial divide among various geographic regions and use of the word 'shall' in this proviso is enough to deter equitable distribution of the resources.

Notwithstanding all the Criticism, there cannot be any denial as to the importance of the initiative in recognizing and appreciating the much-desired role of the corporate houses in ameliorating the state and status of the various stakeholders.

X. Company Vs Individual Paradox

The inherent purpose of the incorporation is to sub serve the common human aspirations of growth and well-being, besides achieving the synergy of competencies and comparatively better marginal utility from the available resources.

In many a landmark case when the question of fixing the liability came up Courts worldwide have righteously deployed the instrument of 'raising the veil' to confirm the actual knowledge, participation and role of the real beneficiaries because as a legal personification an otherwise inorganic conglomerate, a corporation cannot possess its own will.

The Supreme Court of India held in the famous 'Bennett Coleman & Co. & Ors vs Union Of India & Ors'[11] that the corporations cannot validly hold all the fundamental rights, which are available to the ordinary citizens of India but the shareholders of the corporation may enforce their rights (viz. fundamental right under Article-19 of the Constitution of India) in their Individual capacity as citizen of India.

In concrete terms, these are only individuals and not somebody else who get represented by or do secure their ulterior benefits from the acts of the device called 'corporation', which happens to be nothing more than the clothed expression of the clubbed human aspirations.

XI. 'Individual Social Responsibility' (ISR)

All legal systems and processes are inherently and unsurprisingly directed towards an individual only. Individual is central to all human conduct whether it be as a discrete member of group/organization/community/ society/state; as a stakeholder, participant (actor) or purpose of all sorts of the governance/regulatory activities, institutions or systems; as source/performer/recipient of all the socio-political activities past, whether extant or ensuing; as an ultimate subject as well as object of all commercial or non-commercial interactions, whether contractual or otherwise; as an originator, controller, participant or beneficiary in various economic pursuits of varying size and subject matter , pertinent to all sorts of property as well as financial transactions including their incidental and consequential by-products (e.g. factor contribution and stake determination, operational issues, credit arrangements, equity, profit, interest, dividend, taxation, subsidy, pollution, environmental degradation…….blah, blah) and also as a decisive element in the local/

11 1973 SCR (2) 757

national/international institutional functioning and policy formulation coupled with the ground execution thereof.

Isn't it a sorry state of affairs that despite knowing the fact of penultimate nature of institutional functioning and execution of the Corporate Affairs, and despite being aware of an individual's standing as a doer and beneficiary, we want to delve more on the 'Directive Principles of State Policy' contained in the Part-IV of the Constitution of India and the CSR provisions of the Company Act and to notoriously gloss over the responsibility and accountability of an individual citizen.

While the voluntary provision of CSR has silently crept into the Indian Corporate Jurisprudence through the window of Section-135 of the Company Act, 2013, not much has been done on the ISR front.

Obviously, who can deny the great and ever-growing scope of 'Individual Social Responsibility' or 'ISR', as we may call it?

Further, A right driven individual can do neither a lasting good to the society nor ensure wherewithal of his own rights against the mighty contenders who vie for the similar privileges but on a rather larger scale and with superior emphasis. The predominance of the eternal quest for rights is sure to lead the human elements composing the society (ibid) to a never-ending clash of interests and the individual in such a society never perceives the material utility of other's actions, be it the actions of government, regulators, group or even family for that matter. They (individuals) always seek prevalence of their own rights without caring for the others'.

Indian citizens do not feel much liability towards the society and environment, and even our Judicial Sermons (Verdicts from the higher judiciary having the force of Stare Decis) are exclusively right oriented.

The 'ISR' also has twin aspect i.e. preemptive and prohibitive. While the former aspect mandates a responsible and reasoned conduct, the latter requires an attitude of respect for others' rights.

XII. Law and Morality Tug of War

With the mechanization of the production processes and the introduction of the 'division of labour' models (the compartmentalization of the mankind), a thinking of the optimum exploitation of the natural resources and the maximization of the gains crept into all the walks of life from the sphere of economic planning and industrial management. People of the industrialized world coined a new ideal, 'money moves the world' and Jurists of the time started making improved efforts in justifying the segregation of the morals from the law.

Efforts aimed at divorcing the law and morality led to the fall of the 'rational rule' pushed by the Natural Law School of the Jurisprudence,

and the Positive School of Jurisprudence emerged. Thus the natural law school gave way to the ardent supporters of the sovereign authority.

Now, the flag bearers of various generations of rights and protagonists of liberty may find it deplorable to emphasize duty qua right. The advocates of ever expanding domain of rights, for whom the right to life has innumerable facets, including impermeable privacy and liberty of sexual orientation, may not agree with the notion of ISR as for them it is nothing but an extended dimension of morality and as such has nothing to do with the law. But, nobody would disagree with the fact that any law bereaved of morality is no law because the authority of law lies in its acceptability.

Even the much-criticized analytical school jurists have not challenged the need of morality in law e.g. Jeremy Bentham categorized jurisprudence into the censorial and expository jurisprudence and had not been unaware of 'moral' aspect of law in its ideal form.

Further, we find that merely on considering Austin's position over three chapters in his work 'The Concept', Professor Hart concluded 'the last three chapters are therefore the record of a failure and there is plainly need for a fresh start.' One of the most important aspects of Hart's 'fresh start' was in his discussion of the relationship between law and morals. Unfortunately, the nature of Austin's claim got badly misinterpreted. The misunderstanding arises for we are told of this claim selectively.

The father of English Jurisprudence John Austin was an ardent positivist. He joined army at a very tender age and served therein for almost five odd years. He had undoubtedly suggested that we need to clearly separate law and morality yet he expressly claimed in the preface of his renowned book "Lectures on Jurisprudence or The Philosophy of Positive Law" that the "Positive law (or jus), positive morality (or mos) together with the principles which form the test of both, are the inseparably connected parts of a vast organic whole. To explain their several natures, and present them with their common relations, is the purpose of the essay on which the author is employed."[12]

Similarly, though there has been lots of deliberation upon the historic Hart-Fuller debate, which was an exchange between Lon Fuller and H. L. A. Hart published in the Harvard Law Review in 1958 and underlined obvious differences between the analytical and natural law philosophy. Hart supported the analytical view in arguing that morality and law were different things Fuller argued for morality as the basis of law's enforceability.

12 http://netk.net.au/LegalTheory/10Chapter7a.asp visited on 27th July 2018 at 2150 Hrs.

But even Hart acknowledges that law and morals are bound to intersect at some point and according to him, legal interpreters should display the truthfulness or veracity about the law, by concentrating on what it says rather than focusing on the aspect on what one wishes it to be said.[13]

Essentially the dichotomy (supra) that the ISR is merely a moral concept and as such cannot be implemented through law has no substance in itself.

XIII. Implementing ISR (Indian Context)

The effective setup of ISR shall require not only the determination of individual accountability through amendments in the existing legal provisions governing patterns of social behavior but in fact a holistic practice of the carrot and stick strategy.

On one hand it may seek actual empowerment of the individuals through the statutory devices of the Right to Information Act, 2005; the Gujarat (Right of Citizens to Public Services) Act, 2013 (and other similar provincial laws); Lokpal and Lokayuktas Act, 2013 (which is yet to acquire the level of full-fledged operationalization); the Whistle Blowers Protection Act, 2011 (yet to be implemented in the original legislative intent) and the Bihar Right to Public Grievances Redressal Act, 2015 (and other provincial enactments of the sort) etc.

On the other, it has to be coupled with the effective determination of the individual's liability through proper streamlining of various laws.

Most of our social evils revolve around our personal approaches and while moral education at the elementary levels of education may be significant, strengthening of the ISR systems should ensure the lasting solutions by curtailing the deviant activities at the genesis itself and doing away with the 'passing the buck' practices. It shall inculcate a habit of law-abidingness; and shall ensure responsible and orderly social interactions thereby confirming social equity and stability.

XIV. Conclusion

Can we afford to wait for the buildings to fall and bridges to collapse due to deep-rooted corruption and to find easy exits by subsequent declaration of public reliefs; can we expect an accident victim to succumb to his injuries due to a fellow being's callousness; can we allow the crowd justice, in the shape of mob-lynching drills, through irresponsible social media thrills; can we defer the duty of the police and Courts to ensure witness protection or should they continue to die for the reason

13 Sonali Banerjee, "The Relevance of the Hart & Fuller Debate Relating to Law and Morality- A Critical Analysis", International Journal of Law and Legal Jurisprudence Studies (2015).

of witnessing the truth; can we allow unlimited commercialization of the professions, unmindful of the huge social cost underneath; can we pass on the liability for the pilferage of taxes by many upon the counted few honest taxpayers; can we promote socially responsible attitude through voluntary measures of corporate social responsibility or through optional tax savings in the form of Section 80-G of the Income-tax Act, 1961? How can we do so?

The remedy is only a successor to breach, as the performance might not be feasible. Life once lost in an avoidable accident can never be recovered. Un-liquidated damages are incapable of ensuring effective protection to 'jus-in-rem' and often give rise to protracted legal proceedings wherein eventually both parties are at loss. Criminal Justice Systems are crippling due to the accused-purging or sainthood attitude of the Courts. Criminals are becoming ambassadors of goodwill and witnesses are running for life. Paid media houses decide the destiny of the nation and its citizens (what to talk of often heard unbridled media trail of a high profile Case).

The solution of the said ills or the likes can be traced to the proper appreciation of ISR. The effectiveness of the Right to Information Act, 2005 must be a good illustration as to how ISR can change the things positively. Grass-root empowerment and individual role determination are the twin pillars of ISR. Since mere empowerment of the masses without, making them responsible in their individual capacity shall remain futile. Besides being an offshoot of the society, law is also an optimizer of the society, its values and orientation. When in the present age we often come across the ear-pleasant Court verdicts on the individual rights and liberty, we cannot restrict our discussions to the evolving group dynamics only. As the disease mutates over time so varies the prescription. New social equations cannot be resolved through outdated legal formulas. ISR imparts us with the much-desired ray of hope. It can be expedient not only in gauzing the efficiency of our legal framework but also in fine tuning our laws to the social expectations and harmonizing of the individual interest dynamics of the society.

Comprehensive research in the field of ISR may help produce more refined and balanced legal systems having popular recognition, much sought for in a democratic society like ours.

Foucault Notions of Law: A Reading of Discipline and Punish

***Ms Priya Mathur**

I. Introduction

The concept of power and law is intertwined in number of Foucault's works from *Madness and Civilization*[1] where he talks about reason, science and law used as tool for marginalizing certain human behavior by terming it as 'mad' to *History of Sexuality*[2] which talks about how sexuality was politicized in legal and medical discourse to control individual behavior and to create categories of normal and abnormal sexuality. Between these opposite ends lies *Discipline and Punish*[3] which talks about similar theme of power and law but now in relation to the concept of birth of prison. What he does novel in this is that here the role of legal comes in focus more clearly and precisely to explain how power operates in society by not just attacking the body but by disciplining the soul.

We can argue that Discipline and Punish challenges the orthodox notions of power which blur the boundaries between power and domination. For Foucault power is not a property of single class, individual or institution like Marx would believe but for him power is rooted in network of relations. It is not hierarchical: one over another because that is domination but rather in relation with each other which is power. Foucault argues:

> …power exercised on the body is conceived not as a property, but as a strategy; that its effects of domination are attributed not to 'appropriation', but to dispositions, maneuvers, tactics, techniques, functioning's; that one should decipher in it a network of relations, constantly in tension, in activity, rather than a privilege that one might possess... In short, this power is exercised rather than possessed; it is not the "privilege," acquired or preserved, of the dominant class, but the overall effect of its strategic positions–an effect that is manifested and

* Ph.D. Scholar, Centre for the Study of Law and Governance (CSLG), JNU, New Delhi.

1 Michael Foucault, Madness and Civilization: A History of Insanity in the Age of Reason, Pantheon Books, New York, (1965).

2 Michael Foucault, The History of Sexuality, Volume I: An Introduction, Pantheon Books, New York, (1978).

3 Michael Foucault, Discipline and Punish: The Birth of The Prison, Pantheon Books, New York, (1977).

> sometimes extended by the position of those who are dominated… This power is not exercised simply as an obligation or a prohibition on those who "do not have it"; it invests them, is transmitted by them and through them.[4]

Law is one of the manifestations of power and since power is not an instrument of a particular class, by the virtue of it law is also not a property of a single class for Foucault. He traces the history of legal system where law in combination with power has moved from being visible in the sovereign to being invisible and decentralized yet deeply rooted in society. For him then the law/power dynamic leads to a society where social control is exercised on individual through the knowledge produced. This knowledge is new and intertwined with power. Its emphasis is not on brute force but subtle forms of discipline to control individuals. For Foucault then:

> Power produces knowledge…power and knowledge directly imply one another… there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations. These power-knowledge relations are to be analyzed, therefore, not on the basis of a subject of knowledge who is or is not free in relation to power…It is not the activity of the subject of knowledge that produces a corpus of knowledge…but power-knowledge, the processes and struggles that traverse it and of which it is made up that determines the forms and possible domains of knowledge.[5]

The major debate that has surrounded Foucault discussion of law has been the expulsion thesis of Hunt and Wickham[6] which argues that Foucault puts law and discipline in opposition to each other and thus gives a secondary position to the former. They allege that Foucault see law as pre-modern and like Austin reduce it to law as command of the sovereign. Victor Tadros[7] defend Foucault against this claim and argue that Hunt and Wickham fail to make a distinction between Foucault's understanding of the word 'legal' and 'juridical' and when Foucault talks classical age he does not mean law as only command of sovereign

4 Ibid., p. 26-27.

5 Ibid., p. 27-28.

6 Alan Hunt and Gary Wickham, Foucault and Law: Towards Sociology of Law as Governance, Pluto Press, London, (1994).

7 Victor Tadros, "Between Governance and Discipline: The Law and Michel Foucault", 18.1 Oxford Journal of Legal Studies 79-81 (1998).

but rather he is talking about specific theory of power as sovereignty. So, for Tadros, the question of legal and disciplinary in opposition to each other does not arise.

I criticize Hunt's interpretation of Foucault in this paper and also argue that while Tadros puts a good defense of Foucault even he misses the point. Where he is right is in calling out Hunt and Wickham reductionist analyses of Foucault's law as only command of sovereign. Where he is wrong is to interpret that Foucault is not talking about the legal but just power in monarchial sovereignty. I argue that Foucault is in fact talking about the legal but for him legal is not just what Austin interprets but is something more even in the classical age. Law and power is not just command of sovereign if we look at Chapter 3 of Discipline and Punish and focus on Foucault's discussion of power in lower jurisdictions in that chapter.[8] I argue that both Hunt and Tadros forget that Foucault intertwined law and power and by the virtue of that what he is really talking about is evolution of law/power dynamic from classical age to modern times and how legal techniques evolved from visible to invisible hence the disciplinary power that law exercises. However, I do recognize that such interpretation would then rest on our interpretation of 'legal' and what we see as law and not law. Whether we see disciplinary power as part of 'legal'? I would then argue that his concept of normalization in the book shows that he does see discipline as a legal tactic and law as a tool for normalization. Lastly, I would like to address what Foucault's interpretation of law means for feminist legal theory in India.

II. Evolution of law/power dynamic in discipline and punish

Foucault starts off the book by contrasting two very different styles of punishment. First is the public execution in 1757 to show the severity of violence on the body in the criminal justice system and second is the timetable in 1837 which focuses less on inflicting pain on body and more on disciplining the soul. He does that to show the evolution of the criminal legal system in terms of the shift in its aims and techniques from classical times to 19th century. For Foucault two things happened: "disappearance of torture as public spectacle"[9] and "body as major target of penal repression disappeared"[10] and together the two produced prison as the dominant form of modern punishment. In the modern times trial and sentencing was put in limelight contrary to classical age where the search for truth was carried out in secrecy while punishment became 'hidden part of penal process'[11] rather

8 Michael Foucault, Discipline and Punish: The Birth of The Prison, Pantheon Books, New York, (1977), p. 78-82.

9 Ibid., p. 7.

10 Ibid., p. 8.

11 Ibid., p. 9.

than the public event it used to be. It was now carried out in a more institutional organized detailed way. What changed also were effects of these legal techniques on the body. In modern times it is less about inflicting pain on the accused body to make an example out of him rather it is now about affecting his soul through his body by depriving him of his liberty. The shift from scaffold to prison, from body to soul represents the shift in the criminal legal system.

For Foucault law still manipulates the body but now it's not about striking in a single blow but rather doing it from a distance by imposing strict rules on the accused like 'food rationing, sexual deprivation, solitary confinement'.[12] Now executioner of the classical age is replaced by doctors, wardens, psychiatrists who put up the show of good image of law which is concerned about the welfare of the accused, inflicting less pain on him even when giving death. The focus has also shifted from crime to the criminal. The judgment is passed less on crime and more on criminal, his instincts and passions. The point is not to punish the act but rather to punish the motivations, desires and intentions behind the act. As Foucault argues 'acts of aggression are punished, so also, through them, is aggressivety'.[13] The judges now judge the soul of the criminal. Foucault argues that in the penal judgment since now the focus has changed role of experts has increased especially the psychiatrist to spot the insanity in the criminal and to work for his rehabilitation. In reality however, this has become a way to produce categories of normal and abnormal in society. The intent behind correcting the offender is to produce a normal obedient individual. This includes gathering detailed knowledge of the individual, regulating him rather than using violence against him to 'improve' him. For Foucault then the criminal justice system has become a tool of normalization. This we will discuss in detail in section two.

Foucault argues that we should not see these shifts as merely evolution of legislation or penal system but rather see them in law/power dynamic where these are new tactics of power operating within the legal system and beyond it. He argues that we should see punishment as political tactic and by analyzing 'penal leniency as technique of power one might understand how man, soul, normal, abnormal individual'[14] categories have come about. This involves understanding political technology of the body. We need to recognize then that soul did not come about due to Christian theology but was a result of 'methods of punishment, supervision and constraint.'[15] It arises out of the view of body.

12 Ibid., p. 16.

13 Ibid., p. 17.

14 Ibid., p. 24.

15 Ibid., p. 29.

Foucault recognizes the role of body in classical age and argues that body was used to produce and reproduce the truth of crime. From torture to execution:

> The body, several times tortured, provides the synthesis of the reality of the deeds and the truth of the investigation, of the documents of the case and the statements of the criminal, of the crime and the punishment. It is an essential element… in penal…which it must serve as the partner of a procedure ordered around the formidable rights of the sovereign, the prosecution and secrecy.[16]

Public execution of Foucault is a political ritual as any crime committed was seen as crime against the sovereign and attack on his power as 'law represented the will of the sovereign'[17]. Public execution then becomes a tool to restore power of monarch. The role of body is important here as it is body of the condemned man that is used to show the strength and power of the monarch to silence any revolutionary forces. Why then the shift occurred? Foucault argues that public execution was also about public spectacle in which role of people was very important. Glorification and romanticization of the crime started happening when public executions became a site to mock authorities and challenge sovereign and support the condemned and see him as a hero. The people revolted against executions where they believed injustice has happened or one of their own was being executed. This led to weakening of the monarchial power. Hence there was a need for shift in techniques of punishment and legal system. However this was not due to any humane reasons but based on self interest as there was also a shift in criminality where crime against property took over from crime against bodies and criminals became more professionalized. This was accompanied by a change in economic and social structure of society with development of capitalism. This led to strict attitude towards violations of law especially crime involving property. Foucault argues that this led to rise in tactics of surveillance, information collection and partitioning of population. Reformers however were also attacking the irregularities in the power to punish: 'multiplicity of courts'[18] and 'overlapping and conflicts between different legal systems.'[19] There was too much power in lower jurisdictions'[20] and 'there was too much power at side of prosecution'[21]. The point then was to correct such

16 Ibid., p. 47.
17 Ibid., p. 47.
18 Ibid., p. 78.
19 Ibid., p. 78.
20 Ibid., p. 79.
21 Ibid., p. 79.

distribution of power which was plagued by corruption and was less about cruelty and power of the sovereign. Thus Foucault argues:

> The reform of criminal law must be read as a strategy for the rearrangement of the power to punish…more regular, more effective, more constant and more detailed in its effects; in short, which increase its effects while diminishing its economic cost (that is to say, by dissociating it from the system of property, of buying and selling, of corruption in obtaining not only offices, but the decisions themselves) and its political cost (by dissociating it from the arbitrariness of monarchical power).[22]

The change in the legal system was accompanied by intolerance of popular illegalities. Previously the non-observance of law by least favored sections of society was tolerated but now with rise of capitalism it threatened the bourgeoisie property control, the discourse shifted from being about illegality to get rights of peasants to illegalities against the property of bourgeoisie. This shows how the legal structure was affected by the economic and social changes in society and the need for detailed 'strategy and techniques of power'[23] to legislate and punish arises out of the personal need of bourgeoisie to organize society for their own self interests. Foucault also make a contractual argument saying that it was believed that individual on his own will enter into a contract with society so by committing any crime he broke the pact of the society and thus is the enemy of the society. By virtue of that society has right to punish him. So power of the legal has shifted from 'revenge of sovereign to defense of society.'[24] The point for law is not to punish the crime but to prevent its repetition and for this purpose codifying and organizing the criminal law becomes absolute necessity. What is also necessary is to shift focus from body to mind, to apply laws to criminals and not just crime. In this sense what is taken into account is soul of the criminal, his wickedness or intentions, and then sentencing becomes an individual matter.

Foucault points out that gentle way of punishment was argued in the legal system where punishment was unarbitrary, it was temporary and duration was fixed to make it more effective in order to correct the criminal's behavior, and made crime seem less attractive.[25] The aim was to establish a natural link between crime and punishment so that any legal decision should be seen as justified and not arbitrary based

22 Ibid., p. 80-81.

23 Ibid., p. 87.

24 Ibid., p. 90.

25 Ibid. p. 104-112.

on personal power of few. Here he argues that prison became the most important institution because it became a 'machine for altering minds' which needed 'knowledge of individuals'.[26] What Foucault is trying to say is how modern law collects the information about the individual/ criminal and categories them in prison/society. After doing this it 'decides what steps to be taken to destroy his old habits'.[27] This shows how law operates to create categories of accepted and not accepted behavior in society and then sets out to correct it. Prison here can be seen as a metaphor in the legal normalization project. Foucault argues that in late 18th century there was three ways of law to operate: one was monarchial aimed at vengeance, second was reforming jurists who saw law and punishment as a way to re-qualify individuals as subjects and third was the prison which is based on focus on training. Foucault argues that this is not just about theory of law but how technologies of power are operationalized.[28] To add to what Foucault says we can argue these technologies of power use law as its framework to operate.

Through his section on discipline Foucault illustrates how the disciplinary techniques are embedded in the modern legal system. Through the metaphor of prison, he illustrates how now law today is not just rules and commands written on a text but a whole lot more which molds the behavior of individuals in society. It now aims to train the body in order to transform the soul. What Foucault means here is that law does not operate as something enforced from outside but rather something that evolves obedience from inside the individual. This involves certain techniques like organizing space and time but the most important is hierarchical observation and normalization. In the former the space is organized and individuals are distributed in this space in such a way that it becomes possible to keep surveillance on them but they do not know in facts whether they are being observed.[29] This surveillance makes it possible to then spot deviances from conformity. Hierarchical observation[30] is based on keeping an eye on activity of individual. By doing this what law does is that it spots the general average behavior in society and sets out to promote it as the norms of society. The obedience to dominant perspective of law is then camouflaged as conforming to norms of society. It seeks to homogenize the experience of individuals and in doing this creates categories of normal and abnormal behavior. Any deviance from the 'correct behavior' is then seen as abnormal and something to be corrected. He calls this

26 Ibid., p. 125.
27 Ibid., p. 126.
28 Ibid., p. 130-131.
29 Ibid., p. 141-169.
30 Ibid., p. 170-177.

'normalization'[31] which law uses by 'creating binary of permitted and forbidden'.[32] Such discipline produces individual in society.

Foucault's point about the internalizing discipline that now law produces is clear in his discussion of Bentham's Panoptican.[33] For Foucault the knowledge of being observed that the criminal has produces obedience by him. The fact that he knows that he is being checked yet he does not who is keeping this check produces a sense of vulnerability which in turn produces self-control by the individual. This is the trick of law now which is no more about repression from the outside but to induce a psychological discipline in the mind of the individual to behave in a manner desired by it. The law then is not personal but impersonal as it is not identified with one individual.

Foucault argues that a lot of criticism has been placed against the centrality of prison in the criminal justice system yet it continues to exist because it produces the category of delinquent who represents imprisonment and encourages individuals to avoid breaking the law. So, by making an example out of criminal it controls the society. He then argues that disciplinary tactics are not restricted to law and prison but has now reached school, factories and families. This has only led to more severe project of normalization where the aim is now to spot the departure from the norm and then to correct it. This leads to 'normalization of the power of normalization'.[34]

III. Is Foucault talking about the legal and is discipline a legal tactic?

As already mentioned in the introduction the major debate has been what Foucault interprets as law and is he talking about the legal or just concept of power. This debate has been kicked off by Alan hunt and Gary Wickham interpretation which see Foucault understanding of law as command of the sovereign. According to Hunt[35] Foucault puts sovereign power and disciplinary power in opposition to each other and situates law in the former only and thus arises the 'expulsion of law'[36] when Foucault gives secondary importance to law in comparison

31 Ibid., p. 177- 184.

32 Ibid., p. 183.

33 Panoptican is a circular building designed by Jeremy Bentham in late 18th century in whose center there is tower from where every cell can be watched while the inmates in the cell cannot see if they are being watched or not. This introduces a sense of vulnerability in the inmates as knowledge of being watched yet not identifies who is watching them produces discipline in the inmates. For Foucault this was especially important as power for him in modern times is faceless.

34 Michael Foucault, Discipline and Punish: The Birth of The Prison, Pantheon Books, New York, (1977), p. 296.

35 Alan Hunt, "Foucault's Expulsion of Law: Toward a Retrieval", 17. 1 Law & Social Inquiry 1-38 (1992).

36 Ibid., p. 1.

to disciplinary power. So according to them there is no correlation between disciplinary power and law in Foucault's understanding of law. The debate essentially centers on one line that Foucault makes in chapter on Panopticism[37] that is "discipline, in its mechanism, is a 'counter-law'…operates, on the underside of the law".[38]

According to Hunt and Wickham disciplinary power is not in opposition to law rather they complement each other if we look at norms, a point that Foucault misses. My argument against them is that Foucault does not miss this point but rather stresses regularly on this point. Hunt and Wickham interpretation is faulty because they take the word counter-law in literal sense. When Foucault talks about counter-law he does not mean law as only command of sovereign but rather he is tracing the evolution of law where it was identified as command of sovereign: something imposed from above to law as discipline: something that evolves from within. What essentially, I am arguing here is that Foucault is arguing about law in relation to power and while in monarchy power of law was imposed by sovereign, in modern times this power is used by law in a subtler yet effective way in which individuals due to a psychological threat of being punished discipline themselves into acting in accordance to law. Law has shifted its aim from punishing to regulating the society. Hunt also argues that since "law does not constitute an object of inquiry for Foucault he has no special interest in exploring…with the rise of the disciplines there has occurred a change in the form of law".[39]

My reading of discipline and punish suggests that the object of inquiry for Foucault is in fact law and he is tracing disciplinary tactic as a legal technique and thus illustrating how law has changed and evolved. Such interpretation depends on our interpretation of legal. Do we see legal as text, sanctions, commands that are codified or identified with a particular body or we see legal as a tool which organizes society? If seen as the later than disciplinary tactic is a legal technique. Law does not enter only when someone has committed the crime, major function is to prevent the crime, to structure and regulate society in a way where deviations from accepted behavior does not occur. Point then is to not punish deviations but first prevent deviations and law does that. Foucault illustrates that law does that through discipline, by creating and legitimizing norms in society and by generalizing average behavior as the correct behavior. We cannot forget that than this

37 Michael Foucault, Discipline and Punish: The Birth of The Prison, Pantheon Books, New York, (1977), p. 195- 230.

38 Ibid., p. 223.

39 Alan Hunt, "Foucault's Expulsion of Law: Toward a Retrieval", 17. 1 Law & Social Inquiry 24 (1992).

correct behavior is also codified in texts of law even if it is section 377 of Indian law or law against homosexuality in various countries.

Hunt is absolutely right that "state law is always involved with, if not preoccupied with, the task of either exercising control over or exempting from control the different forms of disciplinary regulation".[40] However, he is wrong to assume that Foucault neglects that. Rather what Foucault does is to show that in the modern system law becomes faceless and impersonal in its regulation. At least it aspires to give that image. He nowhere says that state law has no hand in disciplinary regulation rather what he says is that power of law cannot be traced to a single institution.

Hunt argument that Foucault discussion of norms and normalization only plays a minor role in Discipline and Punish is also something we can disagree with.[41] I argue that Foucault discussion of discipline has to be seen in law/power dynamic and this he proves through his repeated arguments on normalization in discipline and punish. In chapter one Foucault links law and normalization when he talks about introduction of discourse of insanity in law and role of psychiatrics after 1832 in arriving at judgment. He argues that though 'sentence was formulated in terms of legal punishment yet it implied judgments of normality'[42], 'they are directly integrated in the process of forming the sentence'[43]. He also puts this point across in chapter four when he talks about how prison categorizes criminal which is his metaphor of how law and society after creating categories of normal and abnormal differentiates individuals. Foucault's reading of law then forces us to think about law in two ways: law as text which talks about equality of all and law as operation in which law itself create categorization and distribution of individual and when this categorization is accepted as norms of society these norms are codified in constitutions.

Foucault states 'power of the norm appears through discipline' and 'is this new law of modern society?'[44] He argues that 'surveillance and normalization…great instruments of power at end of classical age… power of normalization imposes homogeneity, but it individualizes… differences.'[45] In the last chapter also David Garland[46] points out Foucault argues:

40 Ibid., p. 22.

41 Ibid., p. 21.

42 Michael Foucault, Discipline and Punish: The Birth of The Prison, Pantheon Books, New York, (1977), p. 20.

43 Ibid., p. 20.

44 Ibid., p. 184.

45 Ibid., p. 184.

46 David Garland, "Foucault's 'Discipline and Punish'--An Exposition and Critique", 11.4 American Bar Foundation Research Journal 847-880 (1986).

> Penal law in effect becomes a hybrid system combining the principles of legality with the principles of normalization. Its jurisdiction is thus ex-tended so that it now sanctions not just "violations of the law" but also "deviations from the norm.[47]

Thus Hunt assumptions that Foucault does not focus on interplay of norm, discipline and law does not hold its ground.

The debate on whether Foucault talks about the legal or not is carried forward by Victor Tardos in his criticism of Hunt and Wickham. He produces a counter claim that Foucault is not talking about the legal but juridical and what Foucault is really talking about is a theory of power which situates power in command of sovereign. So, no question of putting law and discipline in opposition arises. Tardos argues:

> Foucauldian account of law is obscured if the term 'juridical' is read as synonymous with the term 'law'. The shifting structure of power relations provides the background against which the evolution of law can be understood.[48]

Juridical for Tardos means:

> The term as referring both to a code which is used to describe power (a juridical discourse) and as a real network of power relations that was once in place.[49]

For him then Foucault is talking about power which in one form manifests in sovereign but no longer is the only form in modern times. His focus on discipline is not done to expel law at the margins but rather to show that command-based understanding of power no longer applies. Tardos give a sound defense which nevertheless can be criticized. Firstly, it is important to stop categorizing discipline and punish as either about law or either about power. Rather an approach is needed to appreciate the text which intertwined the concept of both power and law. Implications of such understanding would be then that we cannot say Foucault is only talking about theory of power and law comes in the background as Tardos argues but rather power is rooted in law and law creates a framework through which power operates from classical to modern times.

Even if we look at chapter 3 of discipline and punish Foucault does not see power as only vested in sovereign in classical age as Tadros

47 Ibid., pp. 865.

48 Victor Tadros, "Between Governance and Discipline: The Law and Michel Foucault", 18.1 Oxford Journal of Legal Studies 80 (1998).

49 Ibid., p. 82.

argues. Foucault himself states that there were 'two types of power: that which dispenses justice and formulates a sentence by applying law and that which creates the law itself'.[50] In classical age the power of dispensing justice was also decentralized in 'multiplicity of courts' and 'overlapping and conflicts between different legal systems'[51]. This was the result of both corruption (selling of legal offices by the king) and the administrative apparatus (sovereign courts, bailiff's courts and presidial courts existed in conflict with each other along with police authorities, provincial administrators and the king).[52] Foucault states that there was 'too much power in lower jurisdictions'[53] and even though power is identified in the monarch it does not exist only there and multiple apparatuses of jurisdiction limit the king's absolutism.[54] Thus Tardos interpretation of Foucault understanding power as command of sovereign in classical times is questionable.

IV. Implications of Foucault's notion of law for feminist legal theory

Foucault's analysis of law and power illustrates how the project of normalization is rooted in the way legal and social apparatus is structured in society. This has implication on the gender biases in the world where humane behavior and body are categorized into categories of normal and abnormal. This is specifically pointed out by the queer theory which argues how homosexuality is marginalized in favor of heterosexuality which is seen as the accepted sexual behavior. Foucault's disciple and punish is important in this light because it points out the interplay between knowledge and power and each constitutes the other. The production of knowledge in society is layered by power relationships and thus the creation of accepted norms is also layered by networks of power. Any deviance from the hetero-normativity i.e. deviance from heterosexuality is then seen against society and nature. Foucault shows that such norms which is legitimized and normalized in society are not dictates from god but rather is result of power/ knowledge dynamic. Foucault's discussion of normalization then shows that law codifies these norms to further legitimize them. This is clear in Section 377 of Indian Penal Code which criminalized homosexuality. Law also discipline the society into following 'accepted' behavior when number of gay men get married to women in order to avoid coming out or being prosecuted for homosexuality. Judith

50 Michael Foucault, Discipline and Punish: The Birth of The Prison, Pantheon Books, New York, (1977), p. 78.

51 Ibid., p. 78.

52 Ibid., p.78-79.

53 Ibid., p. 79.

54 Ibid., p. 80.

Butler[55] shows Foucauldian influence. Sneha Annavarapu[56] cites S. Salih[57] to point out that for Butler:

> Sex and gender are in fact the results of discourse and law itself since law does not just produce but also represses the very identities and desires it produces in order to maintain more rigidly the justification of the sanctioned gender and sex identities. For instance, hetero-normativity produces the possibility of deviance (because it has rigid boundaries) and then prohibits these very possibilities in order to justify the 'naturalness' of the order. It is a reinforcing cycle of power and discourse which makes a rigid ordering of society appears natural.[58]

Foucault's argument of power as productive and not just repressive also has clear implications for feminist notion of victimhood which see patriarchy as the only dominant form of women subordination. It fails to mark a clear distinction in domination and power since the later would also involve how women experiences and their self-notions are also constructed in and through power relations. Disciplinary power produces and not just represses the individual. Foucault's discussion on the body and soul also shows how women bodies often become a tool in structuring the patriarchal society when their bodies are disciplined into conforming to the domesticated feminine roles in family. The important point that Foucault makes is that power and discipline is not just restricted to law but is then spread to other institutions such as hospitals, asylums, schools. This in turn shows that dominant notions of feminine roles are not just articulated in law but rather is disciplined in women's soul through education and other institutions affecting the individual.

55 Judith Butler, Gender Trouble: Feminism and the Subversion of Identity, Routledge, New York, (1990).

56 Sneha Annavarapu, "Hetero-normativity and Rape: Mapping the Construction of Gender and Sexuality in the Rape Legislations in India", 8.2 International Journal of Criminal Justice Sciences 248-264 (2013).

57 S. Salih, Judith Butler: Routledge Critical Thinkers, Routledge, London, (2002).

58 Sneha Annavarapu, "Hetero-normativity and Rape: Mapping the Construction of Gender and Sexuality in the Rape Legislations in India", 8.2 International Journal of Criminal Justice Sciences 252 (2013).

V. Conclusion

In the end we can argue that Foucault's analysis of law has to be seen with his concept of power. The two concepts have an equal position in discipline and punish and to suggest that one gather primacy over the other is to overlook law/ power dynamic Foucault focuses on. Such interpretation however rests on what we understand as legal, role of legal in society and techniques of legal. If we see legal more than rules and sanctions but rather a system that organizes society than Foucault is in fact talking about law and power and not just power. In line with this argument, then, the interpretation of both Hunt and Wickham is questionable as they fail to appreciate how power and law is intertwined in Foucault's thought. The question for us to examine is what implications Foucauldian thought has for feminism and we can argue that an answer to such question can only be explored in relation to his concept of body and normalization.

Need For A Witness Protection Program in India

***Mr Kshitij Gupta**
****Mr Shivam**

I. Introduction

The rockpile of administration of justice is based on deposition of witness before the court of law without any fear, favor, intimidation or allurements. A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence.[1] This is how a witness serves the court of law in discovering the truth.

Witness can be defined as those individuals who might be having the knowledge of any evidence pertaining to a case, or having the knowledge of relevant facts and incidents related to the case at hand which are crucial for investigative purposes. Or any person who is ordered by the court to produce important clue, documentation or evidences essential for the case[2]. The legal status of witness is of no relevance when it comes to adjudication by courts.

II. Global trends

If we see the pattern around the world with respect to witness protection then we find that it is quite systematic, proficient and productive. The International Criminal Council for Rawanda and Yugoslavia and the International Criminal Court give different protective measures in their statutes which incorporate development of a Victim and Witness Unit to give protective measures, security arrangements, counselling and proper help to witnesses.[3] International Criminal Court likewise provides provisions for closed hearings, complete non- disclosure of data regarding identity of the witness by use of voice and image alteration devices, delay in disclosure of details of witness to defence and allowing testimonies to be given by one way closed circuit television.[4]

If we observe the Witness Protection programs of different countries around the world then countries like U.K., U.S.A., Australia, New Zealand and South Africa have the most developed Witness Protection Programs and enabling Statutes for the same.

* Student of B.A. Ll.B. IV Year, Dr. RMNLU, Lucknow.

** Student of B.A. Ll.B. IV Year, Dr. RMNLU, Lucknow.

1 Swaran Singh v. State of Punjab, AIR (2000) 5 SCC 668 para 36.

2 The Witness (Identity) Protection Bill, 2006; §.2 cl.g.

3 Rome Statute of the Internatial Criminal Court. art. 43, cl.2, 1998 adopted by United Nations.

4 Rome Statute of the International Criminal Court. art. 68, & 69, 1998 adopted by United Nations.

III. Indian scenario

Presently the major issues faced by witnesses in the country are danger to their life, their relatives and their property by the accused. Frequently critical witnesses are influenced, threatened, harmed or allured before testifying in the courtroom. This situation additionally gets aggravated when witnesses understand that there is no legal obligation on the state to extend security, in case if it is required. This is one of the reasons for witnesses turning hostile and individuals avoiding to becoming a witness. To guarantee that equity and truth prevail in the country, India needs a witness protection program that can ensure safety and security of witnesses in any conceivable way.[5] In addition the Apex Court stressed on the role of state in protection of the witnesses. "State has a constitutional obligation to protect the life and liberty of the citizen and as a protector of citizens, the state has to ensure that witness could safely depose the truth before the court without any fear of being threatened by the opposite party."[6]

The procedure that has been followed in India is one reason for a man to detest from turning into a witness.[7] Presently India doesn't have any enforceable legislation or procedure to guarantee the safety of witnesses. A witness who feels threatened has three measures to guarantee his safety[8]-

- He can approach the local police station and ask for safety;
- The witness can approach High Court through a writ petition and request a directive to police for the protection of witness;
- Witness can ask the trial court judge to arrange police to give security.

Our society suffers equally by wrong acquittals as it does from wrong convictions and one reason for witnesses turning hostile is that they don't have the courage to give a statement against an accused on the grounds of dangers to their life, this phenomenon is more common when the offenders are habitual criminals or have acquired a high stature in the Government and possess political, economic or muscle power.[9] Another participating factor are the

5 Jayshree Bajoria, *Why India needs a victim and witness protection law,*Available at, http://indianexpress.com/article/gender/why-india-needs-a-victim-and-witness-protection-law-4989649/, Last visited on 18.05.2018

6 Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others, (2006) 3 SCC 374

7 Swaran Singh v. State of Punjab, AIR 2000 SC 2017

8 Editor, *The Need for Witness Protection Laws in India: A Necessity or a Luxury?*, Available at https://rostrumlegal.com/journal/the-need-for-witness-protection-laws-in-india-a-necessity-or-a-luxury, last visited on 19.05.2018

9 Krishna Mochi v. State of Bihar, AIR 2003 SC 886

drawn out trials and harassment of the witness and the primary reason for this is the snail paced working of the judiciary and non-responsive attitude of courts towards delaying tactics of the defence.[10]

IV. Consequence of Hostility of Witnesses

The gravest outcome of witnesses turning hostile can be observed in the cases resulting into acquittals of accused in the most heinous crimes. This phenomenon was observed in more than 60% of trials relating to heinous offenses.[11] However, Delhi High Court issued certain guidelines to Delhi police regarding safety of witnesses. An accused can be acquitted if a witness turns hostile, this is a problem of great magnitude and needs prompt addressal.[12]

V. Incidents Involving Threats to Witnesses

Various incidents involving dangers to witnesses can be followed in number of Indian cases-

A total of twenty-five witnesses died in the prominent Vyapam scam of the Madhya Pradesh Professional Examination Board.[13]

In Asaram Bapu case, the god-man who faced two rape charges, is presently in prison. A key witness, 35-year-old Kirpal Singh, who died of his wounds, was shot by unidentified attackers in Shahjahanpur. Prior to the slaughtering of Kirpal Singh, two witnesses in Gujarat and Uttar Pradesh were executed.[14]

Gulab Kataria, a cabinet minister from Rajasthan along with Amit Shah who was the BJP President at the time were released in the Sohrabuddin Sheik fake encounter case. 52 out of the 76 witnesses inspected by CBI turned hostile leading to the release of the accused.[15]

---

10 G.S.Bapai, *WitnessintheCriminalJusticeProcess:AStudyofHostilityandProblemsAssociated with Witness, Centre for Civil and Criminal Justice Administration*, Available at http://www.bprd.nic.in/WriteReadData/userfiles/file/201608240419044682521Report.pdf, last visited on 10.05.2018

11 *Id.* at 4.

12 Neelam Katara v. Union of India, 2003 SCC OnLine Del 952

13 Sumeda, *Vyapam:All you need to know about the killer scam*, Available at http://indiatoday.intoday.in/story/vyapam-scam-madhya-pradesh-deaths-shivraj-chouhan-probe /1/449441.html, last visited on 20.05.2018

14 Editor, *Asaram Bapu and 5-year-old rape case: From skirting bail to murder of eyewitnesses; a look back at the case,* Available at https://www.firstpost.com/india/asaram-bapu-and-5-year-old-rape-case-verdict-today-from-skirting-bail-to-murder-of-eye-witnesses-a-look-back-at-the-4444817.html, last visited on 20.05.2018

15 Adeeti Singh & Sudipti Saxena, *India Needs a Protection Programme to Stop Witnesses From Turning Hostile,* available at https://thewire.in/law/hostile-witnesses-protection-sohrabuddin-best-bakery, Last visited on 14.05.2019

In the much talked about Salman Khan 2002 hit-and-run case, Sachin Kadam who was the prime witness in the case being the security guard of Neelsagar Hotel which was situated opposite the site of the accident, conflicted with his own statement given by him previously to the authorities.[16]

Every one of these incidents has occured because of the absence of any concrete witness protection scheme protecting the interests of witnesses in India.

VI. Legislative trends

In India Witness Protection has been regarded in a confined sense, it has been seen not as physical harm but rather as general distress and burden and consequently in the prior Law Commission Reports it was considered in a constrained sense to the provision of facilities.

Commission and Committees on Witness Protection in India-

- In the **14th Report by the Law Commission**[17] the comfort, convenience and reimbursement of the witness was regarded within the ambit of 'witness protection'.
- The **Fourth Report by the National Police Commission** dealt with harassment and inconveniences suffered by witnesses and the effect it causes in judicial administration.[18]
- Trust in the system ought to be built in the minds of witnesses as stated in the **154th Report by the Law Commission**[19] but physical protection of witnesses from the accused or any measures which could be taken up regarding the same were not elaborated upon.
- Rape laws present in the nation were inspected in the **172nd Report by the Law Commission**[20] which prescribed that the declaration of a victim, if minor should be recorded as soon as possible in a Judge's presence and an individual providing or assisting with child support. Video-taped meeting and declaration by CCTV cameras of the minor ought to be permitted

16 Adeeti Singh & Sudipti Saxena, *India Needs a Protection Programme to Stop Witnesses From Turning Hostile*, Available at https://thewire.in/law/hostile-witnesses-protection-sohrabuddin-best-bakery, Last visited on 14.05.2019

17 Law Commission of India, *Reform of Judicial Administration*, Report No. 14 (1958)

18 Law Commission of India, *Witness Identity Protection and Witness Protection Programmes*, Consultation Paper (August 2004), Available at http://lawcommissionofindia.nic.in/Consultation%20paper%20on%20witness%20identity%20Protection%20and%20witness%20protection%20programmes-%20web%20page.pdf, Last visited on 14.05.2019

19 Law Commission of India, *The Code of Criminal Procedure, 1973 (Act No. 2 of 1974)*, Report No. 154 (1996)

20 Law Commission of India, *Review of Rape Laws,* Report No. 172(2000)

by the judiciary and that the interrogation of the minor should be conducted by the Judge in perspective of the inquiries by the defence in written form.

- One of the issues in relation to protection of witnesses was preventing witnesses from turning hostile and the safety measures which could be taken up by the police, the same were tackled on by the **178th Report of the Law Commission**.[21] However concealment of identity of a witness or physical security were some issues which were left unattended.
- The proposal for summary punishment of the witness if the witness repudiated his earlier statements or if prevarication is because of inducement, pressure, threats or intimidation were given in the Criminal Law (Amendment) Bill, 2003
- Various recommendations for the protection of witnesses which included "a law along the lines of the one followed in the United States" for the physical protection of witnesses were prescribed by a brief part of the **Report of the Justice Malimath Committee on Reforms of Criminal Justice System.**[22] This report also highlighted the miserable conditions of the witnesses in India and made recommendations for their protection.
- The **198th Report of Law Commission**[23] fabricated a well-structured roadmap for protection of witnesses in India. The procedure for witness protection suggested by the Supreme Court is mentioned by the Law Commission in its report.[24] However it does not deal with it elaborately.
- The **study of the Bureau of Police Research and Development** concluded with the variety of forces which pressurize the witnesses like acquaintances, money, social pressure, muscle power etc. where muscle power and money were predominant and also that witnesses were physically assaulted typically the under-privileged category.

VII. Judicial trends

- The Apex Court ordered that that a 9 year old girl who was the eyewitness along with other witnesses must be provided

21 Law Commission Of India, *Recommendations for Amending Various Enactments, Both Civil and Criminal*, Report No. 178 (2001)

22 Government of India, Ministry of Home Affairs, *Committee on Reforms of Criminal Justice System*, (2003), Available at https://mha.gov.in/sites/default/files/criminal_justice_system.pdf, Last visited on 14.05.2019

23 Law Commission of India, *Witness Identity Protection and Witness Protection Programme,* Report No. 198 (2004)

24 *Id* at 171.

protection so that they can testify freely by putting a stay on the transfer petition.[25]

- The Supreme Court recommended that cameras must be introduced interfacing two rooms since there was urgent need for witness security laws which led to evidence with video-link being regarded as admissible when this observance was reiterated. [26]
- Section 16 of Terrorist and Disruptive Activities (Prevention) Act, 1987[27]which protected the identity of the witnesses was held to be valid.[28]
- The Apex Court observed that in the light of the alarming rise in the number of hostile witnesses, the governing body must authorize a law to stress prohibition against corrupting the victims, witnesses, or informants and reiterated the need for a witness protection program[29]
- The Supreme Court explained the need of fair trial and said that criminals usually have access to the police and influential people which makes protection of the witnesses a vital duty of the government and also reiterated that the Union or State Government does not have any standing legislation offering security to the witnesses.[30]
- The Apex Court held that if the witness is presented to the fear of brutality and is unwilling to depose in the court, in such cases the accused against whom the witness has testified cannot be allowed to cross examine the victim[31]
- The cost incurred for providing witness protection assumed center stage wherein Section 312 of the Code of Criminal Procedure, 1973 was debated upon.[32]
- The Court expressed its concerns on information and identity disclosure relating to witnesses and stated that for the purposes of cross-examination, the information relating to witnesses may be disclosed before the commencement of the trial; but with a prior qualification where the court can exercise its discretion in such cases.[33]

25 Leelawati and Another v. Ramesh Chand and Others, (2004) 9 SCC 63

26 Sakshi v. Union of India and Others, (2004) 5 SCC 518

27 Terrorist and Disruptive Activities (Prevention) Act, 1987; §.13

28 Kartar Singh v. State of Punjab, (1994) 3 SCC 569

29 Zahira Habibullah Sheikh and Another v. State of Gujarat, (2006) 3 SCC 374 (2006)

30 National Human Rights Commission v. State of Gujarat and Others, (2009) 17 SCC 616

31 Gurbachan Singh v. State of Bombay and Others, AIR 1952 SC 221

32 Swaran Singh v. State of Punjab, (2000) 5 SCC 668

33 Bimal Kaur Khalsa v. Union of India and Others, 1987 SCC OnLine P&H 918

- The Apex Court recongised the need for maintaining confidentiality of the identity of rape victims and recommended ensuring that the name of the victims must be concealed and the same must be held from the media and general public.[34]

VIII. Statutory trends

Some special enactments regarding the protection of witnesses also exist under Indian law–

- Section 13 of the Terrorist and Disruptive Activities (Prevention) Act[35]offered a definite method of activity for the 'protection of identity' of witnesses who were risking their lives while deposing in a criminal trial for the actions culpable under the Act. The legitimacy of section 16 of the Act was maintained by the Supreme Court[36] when it was reinstated in 1987 and under this section of the new Act the identity protection of witnesses was referenced.
- Identity protection of witnesses and other protective measures like camera proceedings are provided under section 30 of the POTA.[37] The Supreme Court upheld its validity[38] when POTA replaced TADA.
- Unlawful Activities (Prevention) Act, 1967 was amended when POTA was repealed. Sec.44 of the UAPA[39] specifies witness protection which has the same wording as Sec. 30 of POTA.
- The JJ, Act[40] under section 21 provides that a report regarding a minor in violation of law shall not reveal any details leading to the identification of the minor/juvenile under any circumstance.
- The Criminal Law (Amendment) Bill, 2005 amended Section 195A to the Indian Penal Code, which made intimidating or influencing anyone to give false evidence illegal.
- Through a proviso inserted to Section 273 of the CrPc[41] the 172nd Law Commission Report recommended putting a screen in front of a minor so that he may not be influenced or intimidated by the close proximity to the accused. Another recommendation was the insertion of Section 164A[42] which directs recording of

34 Delhi Domestic Working Women's Forum v. Union of India and Others, (1995) 1 SCC 14

35 Terrorists and Disruptive Activities (Prevention) Act, 1985T; § 13

36 Kartar Singh v. State of Punjab, (1994) 3 SCC 569

37 Prevention of Terrorism Act, 2002; §. 30

38 People's Union for Civil Liberties and Another v, Union of India, (2004) 9 SCC 580

39 Unlawful Activities (Prevention) Act, 2004; § 44

40 Juvenile Justice (Care and Protection of Children) Act, 2000; §. 21

41 Code of Criminal Procedure, 1973; §. 273

42 Code of Criminal Procedure, 1973; §. 164A

statement and signatures of material witnesses at the earliest in a Magistrate's presence in crimes where the sentence is 10 years or greater to discourage witnesses from turning hostile.

- Section 154 of the Evidence Act[43] deals with the evidence by a hostile witness and its admissibility.
- Section 17 of the NIA, Act[44] specifies that when an application is filed by a witness or by the Public Prosecutor, if the Court is satisfied that there is a threat to the witness's life, identity of such witness may be kept confidential.

The statutory provisions mentioned above are applicable in specific cases only. The individuals witnessing heinous crimes aren't protected under any other law.

IX. Current Challenges in the Witness Protection Program and the Road Ahead

There are different issues which emerge with regards to implementation of witness protection programs, the most practical issue being the cost of execution and infrastructure of the program. The cost included will undoubtedly be extravagant when we discuss giving bodyguards, security, relocation to another area, change of identities, providing financial support et al. Another issue is the absence of sufficient man-power in our nation, according to the information of Bureau of Police Research and Development the actual strength of policemen in India is 1,721,101 while the sanctioned strength is 2,263,222. India is still shy of 5 lakh policemen.[45] Information from the United Nations Office on Drugs and Crime (UNODC) demonstrates that in 2013, there were 138 police personnel for each lakh of populace in India. India was placed fifth lowest among the 71 nations for which the organization gathered these figures.[46]

The more kosher issue is that of corruption rooted in the Administration and Judiciary of India. According to the most recent positioning of Transparency International on Annual Corruption Index, India positioned 81 out of 180 nations. The Corruption Perception Index, 2017 likewise singled out India as one of the "worst offenders" in the

43 Indian Evidence Act, 1872; §. 154

44 National Investigation Agency Act, 2008; §. 17

45 BureauofPoliceResearch&Development,*DataonPoliceOrganisations*, (2015),Availableathttp://bprd.nic.in/WriteReadData/userfiles/file/20160712123517412530 3FinalDATABOOKSMALL2015.pdf, Last visited on 15.05.2018

46 Editor, *India's ratio of 138 police personnel per lakh of population fifth lowest among 71 countries*, Available athttps://economictimes.indiatimes.com/news/defence/indias-ratio-of-138-police-personnel-per-lakh-of-population-fifth-lowest-among-71-countries/articleshow/48264737.cms, Last visited on 15.05.2018

Asia-Pacific region.[47] This demonstrates that the Indian administrators including the politicians and police indulge in corruption. The absence of proficient witness protection program also plays a significant role in these corrupt practices as in its absence there is no lucidity and accountability in the trial procedure and financially or politically equipped criminals get adequate opportunities to subvert the criminal justice system.

Before building up a witness protection program, the main hurdle before us is to recognize that witness protection is an obligation of state. There are different court judgments which accommodate the same however there is no concrete statutory law as of now. Another problem is recording of statements of the witnesses by magistrate so as to ensure that witness should not be influenced by anyone during recording of statement. But this is totally unpragmatic in the present set-up because of low number of courts and staff deficient Judiciary. This is additionally the reason behind the long pendency of cases because of which the other party gets time and opportunity to influence, threaten or allure the witnesses to withdraw from their statements.

Aside from this there remains a challenge in the implementation of Witness Protection Law as the right of protecting the identity of the witness must be balanced with other provisions of law for example, will a law that conceals the identity of the witness trade off the right of the accused to demand a fair trial, as the accused would want to check the credibility of the witness?

After observing different aspects of Witness Protection at an international level, the Law Commission in its 198th report recommended the establishment of a Witness Protection Program which will be restricted to serious offences only. This program will similarly apply to Prosecution and Defense witnesses in case of risk to their life or property. According to the recommendation, the Patron-in-chief of the program would be the Chief Justice of High Court who will have the authority to control funds through the State Legal Service Authority.[48]

The witnesses for protection should be selected by the judge on the recommendation of Superintendent of Police or any Senior Police officer. Further, it is to be communicated to the State Legal Service Authority to issue relevant orders to District Legal Service Authority to discharge funds to carry out the orders. If physical and identity protection given to witness is influencing the rights of the accused

47 Ajai Sreevatsan, *India's ranking in corruption perception index falls to 81*, Available at https://www.livemint.com/Politics/5cvYn8GTxsik5xSwoN0DhK/India-ranks-81st-in-global-corruption-perception-index-by-Tr.html, Last visited on 17.05.2018

48 Law Commission of India, *Witness Identity Protection and Witness Protection* Programmes, Report No. 198 (2006)

then he can approach High Court in an appeal. In case of refusal by magistrate to admit the witness to the program the witness can directly approach High Court under appeal. Regarding funds for the program, the commission suggested for equal contribution from both central and state government.[49]

- The procedure given by the commission in our opinion is lengthy and time taking which would ultimately nullify the primary objective of the witness protection program-providing protection to witnesses as early as possible.
- Further the commission totally disregarded the concern of allocating this task of extremely sensitive responsibility to an autonomous body or association which is free from any political pressure. According to the recommendation this task has been given to police, and the nexus between police and the politically or economically powerful is no mystery, it is so extreme that sometimes the judiciary is left with no option except to dance to the tunes of the powerful and influential due to scarcity of sufficient evidence.
- This program should be managed by an independent body presided by legal experts, which is free from any political or economic pressure. This body should be made by an Ad Hoc Central Act of the parliament, with central and state level units. It should be done in synchronization with the international treaties and agreements to ensure international management and cooperation. This body should not rely on the central or state government for funds as it will cause unnecessary delay and conflict, in emergency where urgent protection is required for witness. It should be granted as a separate fund as part of the annual budget via approval by parliament, which will make the allocation of budget quick and easy.
- The commission gave its recommendation regarding relocation and change of identity of witness but was silent about providing survival assistance or a job to the witness, which is imperative.
- After giving due concern to all the fallacies in recommendation, the authors recommend establishment of a witness protection cell. It can be divided into two parts, first will be the deciding authority and second will be the protection group who will implement the orders regarding protection of targeted one. To follow this structure National Human Rights Commission (hereinafter referred as NHRC) and State Human Rights Commission (Hereinafter referred as SHRC) would be the best

49 Id.

option for us. Here, NHRC and SHRC would be the deciding authority and recognized NGO's along with Police officers would be the protection group. NHRC and SHRC satisfy all the parameters required by an independent body to supervise this witness protection program. This body has been legitimately created by Parliament via The Protection of Human Rights Act, 1993 (hereinafter referred as PHRA) which was further amended in 2006 for enhancing the protection human rights in India. This act provides for a national level body i.e. NHRC and provincial level body i.e. SHRC. This body has been established in accordance with Paris Principles adopted by the United Nations National Human Rights Commission in 1992. These principles relates to the status and functioning of National Human Rights Institutions for the protection and Promotion of Human Rights. This body established under international resolution has requisite international cooperation and support which makes it more efficient when it comes to identity protection and relocation of witnesses throughout the world. It possess people from legal arena as its composition include Judges from Supreme Court and High Courts,[50] which gives it a strong legal background and make them well equipped to deal with all kinds of violation of rights be it human, civil, economic, social or political. By PHRA, 1993 this body is purely independent and self-sufficient when it comes to financial resources, as its budget forms the part of the overall annual budget presented before the finance ministry thereafter passed by the Parliament.[51]

- National Human Rights Commission of India has been accredited 'A' status member by the Global Alliance of National Human Rights Institutions.[52] The working mandate of NHRC is not limited to violation of specific rights, it has jurisdiction over any type of human rights violation, it can inquire suo motu in any issue related to violation of human rights, and neither the state nor the police can interfere and jeopardize the functioning and liberty of the NHRC.[53] This shows that NHRC is free from any social, economic or political pressure which further builds its independency and functional sovereignty. These factors play a vital role when it comes to giving protection to the witnesses.

50 The Protection of Human Rights Act, 1993; §. 3 cl. 2.

51 The Protection of Human Rights Act, 1993; §. 32.

52 Global Alliance of National Human Rights Institutions, *Status of National Human Rights Institutions*, (2018), Available athttps://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf, Last visited on 30.07.2018.

53 The Protection of Human Rights Act, 1993; §. 12.

- This model scheme obviously requires funding and new appointments for witness protection program will burden the government. India being developing country can't bear the same. To avoid this burden the proposed scheme can be accommodated in the present framework by giving it to NHRC.
- To raise extra funds for the program and reducing the burden of financial support by government, the authors recommend raising funds from various possible ways
  - Raising funds from individuals, organisations and NGO's (working for witness protection) and to incentivize their contribution government can give tax rebate on their contribution.
  - NHRC and SHRC can raise funds from International Agencies like UNESCO as various International Instruments allocate budget for human rights issues in developing nations.
  - Various Corporations can be statutorily mandated to contribute to this program from share of their profit as a part of Corporate Social Responsibility.

V. Conclusion

The authors submit here that India is in dire need of a very strong witness protection program which can be adjusted as per the future needs of criminal justice system of India. By analyzing various judicial pronouncements, law commission reports, and dispersed statutory provisions related to witness protection leads us to conclude that the Indian legal system is mature enough to adopt or change policies regarding this burning issue of witness protection. There are some questions which remain unanswered as to what would be the extent of this program. How India being a developing country would manage its socio-economic conditions, resources and priorities. There would be conflicts in balancing large number priorities within available resources. Tackling all these issues would be a slightly difficult task but not an impossible one.

Decisional and Informational Privacy: India's take on Medical Abortions and Data Protection

***Mr Wilfred Synrem**

I. Introduction

The right to privacy is known to have originated from the pioneering essay 'The Right of Privacy', authored by Samuel Warren and Louis Brandeis[1]. Assuming that privacy was itself a condition and a state of psychological security, they reinstated the concept of right to privacy. In simple terms, for Warren and Brandeis the right to privacy was the right of each individual to protect his or her psychological integrity by exercising control over information which both reflected and affected that individual's personality.[2] To corroborate, philosophers such as Aristotle identify two spheres of an individual's life – 'polis' the public sphere and 'oikos' the private sphere.[3] Within the international realm, this right of privacy has been well implied, protected and safeguarded with the help of international conventions and treaties. For example, International agreements such as the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR") recognize privacy as a fundamental human right.

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[4]

Determination of this right of Privacy has been a tough and unprecedented journey travelled in the Indian Courts, when compared to US jurisprudence. Therefore, the first section of this paper would be a study on the brief history involving the evolution of the Right to Privacy in India and especially on the important breakthrough of the new Supreme High Court judgment. It will analyze the specific case law and lay down as to what extent the adjudication on privacy is conclusive.

The theory of privacy can be structurally manifested into a triangle; a "triangle of privacy". This structure encompasses three abstracts of privacy namely, Zonal privacy, Relational privacy and Decisional

---

* Student of B.Sc. Ll.B. III Year, GNLU, Gujrat.

1 Warren and Brandeis, *the Right to Privacy*, 4(5) HLR 1, 193 (1890).

2 Dorothy Glancy, *the Invention of Right to Privacy*, 21(1) ALR 1, 2 (1979).

3 Aristotle, B. Jowett and H.W.C. Davis, Aristotle Politics 6 (Clarendon Press 1908).

4 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N Doc. A/180 at 71 (1948).

Privacy.[5] The zonal right refers to the right to be secure in one's own home against unreasonable searches[6], the relational right confers privacy to intimate relationships within the bedroom[7], like the privacy of a married couple and the decisional aspect of privacy covers the personal rights of an individual against the world. It is important to understand that Zonal Privacy and Relational privacy are certainly overlapping to the extent that it is enforceable against the State but are different in the idea that the former is a right for a set of associations and the latter is for a person in a relationship. Nonetheless, the author opines that decisional privacy is more technical than the other two modes; therefore, the second section of this paper would discuss the same elaborately. To be more specific, the author would critically analyze the Medical Termination of Pregnancy Act and to what extent can the mother exercise the right to abort her child.

The third section would comprise a new form of privacy evolved due to the advancements in technology, namely informational privacy, which entails about the principle of data protection. In this part of the paper, certain provisions of India's only data-protection legislation, the Information Technology Amended Act, would be scrutinized. Thereafter, the author would focus on the necessity of data protection in India by juxtaposing it with European standards and whether a separate data-protection statute is required in India.

II. Evolution of *'Right To Privacy'* In India Through Judicial Interpretation

The central debate around Privacy is whether this right is an implied fundamental right or not, since there is no express provision for the same in the Constitution. Earlier in *M.P. Sharma v Satish Chandra.*[8] the Supreme Court negated the right of privacy because it was not specified in the Constitution, unlike the Fourth amendment of the US Constitution. Another landmark judgment of *Kharak Singh v State of UP*[9]discussed the challenge of police surveillance wherein the majority reiterated the previous judgment. On the other hand, the minority emphasized that the "right is an essential ingredient of personal liberty" under article 21[10] of the Indian Constitution. However, the minority did not recognize the right of privacy but only declared surveillance as unconstitutional.

5 Thomas, Kendall, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443-48 (1992).
6 U.S. CONST., amend IV.
7 Koppelman and Andrew, The Right to Privacy?, 2002 U. Chi. Legal F. 105, 106 (2002).
8 M.P. Sharma v Satish Chandra, 1954 AIR 300.
9 Kharak Singh v State of UP, 1963 AIR 1295.
10 Art. 21, Constitution of India, 1950.

Further, the popular case of *Manenka Gandhi v UOI*[11] concisely held that the right to privacy is not a fundamental right penumbral to the right of personal liberty, by introducing the **'Integral Part Test'**. Justice P.N. Bhagwati stated that "even if a right is not specifically named in an Article, it may still be a fundamental right covered by some clause of that Article, if it is an **integral part** of a named fundamental right or partakes of the same basic nature and character as that fundamental right". The Supreme Court after citing the *All India Bank Employees' Association* case, it held that right to privacy did not form an integral part of the fundamental right of "personal liberty" and therefore cannot even broadly be construed as a fundamental right.

It is to be noted that following these cases, the judicial interpretation of the concerned right had significantly changed. More specifically, the Supreme Court had recognized the right to privacy under article 21 of the constitution, as a part of right to life and personal liberty, in subsequent decisions. For example, when it came to a woman, no one had the power to invade her privacy at their own will.[12] The Supreme Court had even held that "telephone-tapping"[13] as unconstitutional unless conducted by a lawful procedure, because conversations through telephone imply privacy.

Nonetheless there are two major drawbacks regarding the latter judicial pronouncements. First, the right to privacy was not recognized as a fundamental right, but an ancillary right to the right of "personal liberty". This was iterated in the early case of *Gobind v State of Madhya Pradesh*,[14] where the Supreme Court held that the right belonged to the "penumbral zones" of fundamental rights and this right would evolve via "case by case developments". One such case being, *Mr. 'X' v Hospital 'Z'*,[15] where the Supreme Court laid down that a "compelling State interest" would always trump an individual's right of privacy.

The second drawback is that the cases of Kharak Singh and M.P Sharma were adjudged by six judges and eight judges respectively, which made their adjudications the law of the land. Therefore, the judgments following it held more of a persuasive value rather than a binding one. Certain specific legislations or an authoritative judgment were in the need of the hour. Fortunately, a recent judgment by nine judges in *K.S. Puttuswamy v Union of India*,[16] resolved the debate by declaring the right to privacy as a fundamental one:

11 Manenka Gandhi v UOI, 1978 AIR 597.

12 State of Maharashtra v. Madhukar Narayan Mardikar, AIR 1991 SC 207.

13 People's Union for Civil Liberties v. Union of India, (1997) 1 SCC 301.

14 Gobind v State of Madhya Pradesh, AIR 1975 SC 1378.

15 Mr. 'X' v Hospital 'Z', (1998) 8 SCC 296.

16 K.S. Puttuswamy v Union of India, (2014) 6 SCC 433.

"The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution."

On a meticulous analysis of the new landmark judgment, three important conclusions were inferred by the author. *First*, declaring the right to privacy as a fundamental one, the Supreme Court had both impliedly and expressly overruled the cases of M.P. Sharma and the Kharak Singh. It held that privacy formed the basis of "personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation" and that personal choices were an important component of privacy. *Second*, the Court had negated the arguments of the attorney general by stating that the right of privacy is not an "*elitist construct*" but a privilege available to everyone including the lower strata of the society.[17] It held that the essential attributes of privacy i.e. autonomy and dignity concern every individual irrespective of social strata or economic well being. *Last*, the Court laid down that just like every other legal right the right to privacy is not an absolute one to the effect that it has some restrictions imposed on it. The invasion of privacy can be justified by a fair, just and reasonable procedure of law.

Justice Chandrachud in his separate judgment had overruled two important judicial pronouncements. The first case which he implicitly overruled was *Suresh Kumar Koushal v Naz Foundation*[18], which criminalized "carnal intercourse" by upholding the validity of section 377 of the Indian Penal Code. The Supreme Court held that since sexual orientation came within the ambit of privacy, s. 377 of the Penal Code[19] could be in violation of the right to privacy.[20] It further mentioned that even if the LGBTQ population was miniscule in comparison, it does not take away their constitutional rights. Second, Justice Chandrachud had overruled his father's judgment in *ADM Jabalpur v Shivakant Shukla*[21], which held that fundamental rights could be suspended in periods of Emergency. He had placed his reliance on J. Khanna's dissenting opinion of the same case, and concluded that the case was an "*aberration of constitutional jurisprudence*". The Court held that not only was ADM Jabalpur against the right to life and personal liberty but also the 44th Constitutional Amendment had by default overruled ADM Jabalpur. The 44th amendment had mentioned that fundamental rights enriched in articles 20 and 21 could not be suspended during the period of Emergency.

17 K.S. Puttuswamy v Union of India, (2014) 6 SCC 433, at ¶ 154.

18 Suresh Kumar Koushal v Naz Foundation, (2014)1 SCC 1.

19 § 377, Indian Penal Code, 1860.

20 K.S. Puttuswamy v Union of India, (2014) 6 SCC 433, at ¶ 124.

21 ADM Jabalpur v Shivakant Shukla, 1976 AIR 1207.

As a result, the Supreme Court in the event of this historic judgment expressed its desire of a new legislation based on data protection. However, the Court had simultaneously placed concern on the recommended legislation to the extent that there should be a "careful and sensitive balance between individual interests and legitimate concerns of the state."[22] There is no doubt that the esteemed judges of the case above have decided the debate over the right to privacy in a conclusive manner. However, in concurrence with Justice Chandrachud, the author opinions that there are many other issues ancillary to privacy which are yet to be addressed. Thus, the author would be focusing on a couple of important questions in the following portions of the paper.

iii. Decisional Privacy in the form of Medical Abortions

Both on national and international levels, abortion dictates a controversial issue of whether a mother can terminate pregnancy at her own will, by ending the "life" of the unborn child.[23] According to Betty Friedman, the right to have an abortion is *"a matter of individual conscience and conscious choice for the woman concerned*".[24] Indeed medical termination of pregnancy falls under the ambits of privacy.

In *toto*, medical abortion can be said to be of two types: one which is administered at home and the other that is administered at clinics or hospitals. When it comes to the aspects of privacy, the two modes of abortions have a difference within the "triangle of privacy".

In order to understand the differences between the two types, an explanation of zonal, relational and decisional privacy is essential. As an illustration, let us take a case where a family wanted to instill a particular set of religious values into their own children.[25] To further explain, we must assume that the state is against those very religious values. Zonal privacy is that aspect where the state cannot unreasonably interfere into any business of the 'home' of the family. Relational privacy is that aspect where the family, which is a "set of persons" that have the right not to be interfered on the basis of the religious values they practice or preach, especially when the State is not in favour of those values. Decisional privacy relates to that aspect where the child himself believes in another religion, and inherently has the right to follow it without any interference from the world at large.

22 K.S. Puttuswamy v Union of India, (2014) 6 SCC 433, at ¶ 186.

23 Sai Gochhayat, *Understanding of Right of Abortion under Indian Constitution*, Manupatra, (1 July 2018), http://www.manupatra.com/roundup/373/Articles/PRESENTATION.pdf

24 Betty Friedan, Abortion: A Woman's Civil Right 39 (Linda Greenhouse 1st edition 1999).

25 Wisconsin v. Yoder, 406 U.S. 205 (1972).

Coming to the difference, medical abortions at the hospital or clinics are under the umbrella of decisional privacy, whilst medical abortions at home are within the ambits of zonal and decisional privacy.[26] However there is no difference in its working, both the home and hospital/clinic are central to clinical supervision, telemedicine and self-induction. In medical abortions at home, the 'home' indicates a zonal or spatial type of privacy from the interference of the state or general public. And the decisional privacy is common to both because it deals with the consent of the individual. It is solely based on the value of freedom from coercive interference with decision making that affects "intimate and personal affairs".[27] US constitutional cases also vehemently suggest that decisional privacy exists in acts such as abortion,[28] contraception,[29] homosexuality,[30] choosing one's own spouse[31] and the possession of sexual accessories at home.[32]

Earlier, the question was posed whether the right to privacy sanctioned abortions as legal or not. There was a clash between the libertarian and utilitarian views on the topic. The libertarian view suggested that the mother's individual autonomy must be given preference and the reproductive rights of hers could not be restricted by the State. The utilitarian theory opinioned "potential life" and that the interests of the community must be given importance by creating a "greater good for the greater number".[33] This community at that time was the Catholic one, which supported the idea of pro-creation and that abortion was murder.

In fact there were two cases in the US which laid down that medical abortions were deemed legal as it was guarded by the fourth amendment; *Roe v Wade*[34] and *Planned Parenthood of Southeastern Pennsylvania v Casey.*[35] Before the Roe judgment it was generally believed that a twenty-eight week old fetus could survive outside the womb, however this could not be proved by medical experts.[36] However, the judgment declared that a fetus could not be considered as a constitutional

26 Lindgren, Yvonne F., *the Doctor Requirement: Griswold, Privacy, and At-Home Reproductive Care*, 32 Constitutional Commentary 1, 357(2017).

27 Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 Cin. L. Rev. 1, 461 (1987).

28 Roe v. Wade, 410 U.S. 113 (1973).

29 Griswold v. Connecticut, 381 U.S. 479 (1965).

30 Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

31 Loving v. Virginia, 388 U.S. I (1967).

32 Stanley v. Georgia, 394 U.S. 557 (1969).

33 Andrew heywood, Political Theory: An Introduction 358 (Palgrave Macmillan 2004).

34 Roe v. Wade, 410 U.S. 113 (1973).

35 Planned Parenthood of Southeastern Pennsylvania v Casey, 505 U.S. 833 (1992).

36 Anita L. Allen, *supra* note 27, at 475.

person and does not have the right to life. The Court also developed a trimester framework based on which the State could regulate abortion. In the first trimester, the state could not interfere because there were no maternal risks involved. In the second trimester, the state could provide for regulations in abortion in order to reasonably protect maternal health. However, in the third trimester, after the viability period or the "quickening" the state restricted abortion except if it is mandatory to preserve the mother's life. This trimester system was eventually replaced by the "undue burden" theory in the case of *Planned Parenthood of Southeastern Pennsylvania v Casey*. This principle of 'undue burden' settled that any regulation which caused any adversity impact on the mother's right to abortion was held to be unconstitutional.

In India, the law was initially very stringent on abortion and then it evolved a more liberal view. Sections 312 to 316 of the Indian Penal Code were incorporated to criminalize abortions and then in 1971 the Medical Termination of Pregnancy Act (MTP) provided exceptions to abortions in India. The objective of the Act is to control the mortality rate of women through safe and legal abortion. However, there are certain restrictions as to which women could go for abortion under this act. The cardinal rule of the MTP Act is that pregnancy termination was allowed only if the pregnancy period did not exceed 20 weeks. Under section 3[37], the main purpose of abortion is to save the mother, if her life is in risk or to prevent the child from being born with abnormalities as it would be burdensome for both the child and parent in the future. Another restriction imposed by the Act is that an abortion could be permitted if the woman has suffered from a grave physical or mental injury due to the pregnancy. To corroborate, the explanations to this section mention that only rape victims or married women could apply for a legal medical abortion.

On critically analyzing the MTP Act, there are a few massive flaws in it. *First*, the Act does not give any right or privilege to the woman but gives complete reliance on the discretion of the medical practitioners.[38] If the practitioners approve the abortion in good faith, then only can one go on with the abortion. *Second*, if the "anguish" caused by the failure of contraception in the case of married women legalizes abortion, then this explanation to section 3 is a flaw to the extent that it should also allow mentally anguished spinsters, widows or divorcees to abort their child. The author is of the opinion that this explanation is in contravention of article 14[39] of the Constitution and should be held unconstitutional. Although the main objective of the said explanation is family planning

37 § 3, The Medical Termination of Pregnancy Act, 1971.

38 Sai Gocchayat, *supra* note 23.

39 Art. 14, Constitution of India, 1950.

and population control, there is no equal application of the law to all women. *Third*, married women have to prove before the practitioners that the pregnancy had occurred due to a failure of contraceptives. This is in clear violation of 'relational privacy' of the woman and her husband, especially that the right to privacy is fundamental one. Last, the twenty weeks condition does not seem exhaustive for cases where there might be abnormalities in the unborn baby. There are three tests required to perform on the mother for detecting any abnormalities in the fetus: Double Marker Test (10-13 weeks). Triple Marker Test (18-20 weeks) and the Anomaly scan which is taken after twenty weeks.[40] Thus there are many cases where the genetic problems of the baby are discovered after the twenty week mark. Hence, this time period should be extended to a considerable and safe threshold.

When US jurisprudence is juxtaposed with the views of the Indian Courts, there is a common consensus on the requirement of parental in cases of abortion in minors. The US Courts have interpreted that the state has a "broader authority" when it comes to minors,[41] whilst the MPT Act has clearly mentioned that parental consent is a must. However, there is a differing view between the US and Indian Courts of law when it comes to spousal consent. In *Sushil Kumar Verma v Usha*[42] and *Satya v Siri Ram,*[43] the Courts had held that if the husband had "a legitimate craving for a child", then the abortion without his consent would amount to cruelty. Whereas in the US, Courts have laid down that the woman's decision should be primarily respected due to the fact the pregnancy would affect their health and lifestyle only, and not the husband.[44] Seconding the views of the US Courts, the author is of the opinion that spousal consent is in contravention of the right to decisional privacy of the woman and that Indian laws must change substantially in order to give prime importance to the woman.

The most important question regarding abortions is whether the unborn child has rights or not, more importantly the right to life. Article 21 of the Constitution of India says that no person shall be deprived of his life and personal liberty. The International Covenant on Civil and Political Rights (ICCPR) reverberate the same, "*Every Human Being has the inherent right to life*".[45] From a superficial point of view, one can

40 Pyali Chatterjee, *Medical Termination of Pregnancy Act: A Boon or a Bane for a Woman in India - A Critical Analysis*, 5(9) IJSR1, 237 (2016).

41 Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976);

42 Sushil Kumar Verma v Usha, High Court of Delhi, First Appeal Order Appeal No. 251 of 1983.

43 Satya v Siri Ram, AIR 1983 P H 252.

44 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 912 (1992).

45 International Covenant on Civil and Political rights, art. 6, ¶ 1, Dec. 16, 1966, 999 UNTS 171.

say that the term 'human being' covers unborn babies who are alive in the womb of its mother. Thus, international obligations also seem to suggest that they do not protect the acts of abortion.[46] In toto, all these rights depend on when the child's life actually begins. In the *Roe* judgment the Supreme Court had thoroughly held that:

"We need not resolve the difficult question of when life begins. When those trained in their respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus; the judiciary…is not in a position to speculate."

There still has not been a great bit of progress even now, as to ascertain when life begins. Some have contended that a fetus does not have any life in it until the third trimester.[47] Others have said until the twenty-sixth week the fetal brain would not be developed enough to feel any pain.[48] Therefore, we must look into the intention of the words used in International obligations to ascertain whether prenatal life is also protected or not. Article 1 of the Universal Declaration of Human Rights states that, "*all human beings are born free and equal in dignity and rights*." However, from a history of events, it is suggested that prenatal application of the article was impliedly and explicitly excluded by the word "born".[49] Even the drafters of ICCPR rejected that the application of article 6 would extend to prenatal life.[50]

Hence, we must tend to the view that abortion is not equivalent to murder and that the mother's reproductive rights should be respected and be kept private. A normal human being would have an interest in his physical health therefore he has a right to visit a doctor for his/ her maintenance. An unborn child cannot have any rights because he does not have any interest as such. The interests of the mother are very much in existence, therefore she has right to give birth or not, and this decision of hers shall be held personal under the fundamental right of privacy. A fetus cannot separately exist and would need a mother's womb for existence. Therefore, even if the fetal interest is recognized, it cannot prevail over the mother's rights.[51]

---

46 Bhavish Gupta and Meenu Gupta, *The Socio-Cultural aspect of abortion in India: Law, Ethics and Practice*, Winter Issue 2016 ILI Law Review 1, 141 (2016).

47 Ronald Dworkin, Freedom's Law: The moral reading of the American Constitution 90 (Oxford University Press 1999).

48 Clifford Grobstein, Science and the unborn: choosing Human futures 13 (Basic Books, 1988).

49 U.N. GAOR 3rd Comm., 99thmtg, ¶ 110-124, U.N. Doc. A/PV/99 (1948).

50 U.N. GAOR Annex, 12th Session, Agenda Item 33, ¶ 96, 113 and 119, U.N. Doc. A/C.3/L.654.

51 Lakshmi Dhikta & Others v Government of Nepal, Writ No. 0757, Jestha, 2066 (2009) (Supreme Court of Nepal).

iv. Informational Privacy In The Form of Data Protection

With the new dawn of technology over mankind, it is imperative to break away from the "triangle of privacy" and include a new dimension to that structural manifestation; Informational Privacy. It is defined by Ruth Gavison as "the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention".[52] The second section of the paper specifically elaborated on a form of decisional privacy in India. If seen logically, one can say that informational privacy could be an implicit component of decisional privacy because the former protects the autonomy of an individual and its regime is based on consent. However, there is a distinction between the two theories of privacy. Decisional privacy focuses on freedom from invasion of privacy when making certain fundamental decisions.[53] Whereas, informational privacy is privacy in relation to the use, transfer, and processing of personal data generated in daily life.[54]

This section mainly focuses on whether India is in need of a legislation based on data protection principles, especially because right to privacy has been declared as a fundamental one. Therefore, we must pay careful attention to the Information Technology Amended Act, 2008 ("ITAA" herein), the only legislation in India which provides on data protection to some extent. In fact, the original Information Technology Act, 2000 was amended just to accommodate data protection principles, after recommendations from an Expert Committee on Cyber Laws.[55]

Sections 43A and 72A of the ITAA spells two liabilities for the non-protection of personal data. Section 43A[56] of the ITAA creates a civil liability in relation to a body corporate which handles, possesses, or deals with "sensitive personal data or information" in a negligent manner. On the other hand section 72A[57] confers a criminal liability for persons, including intermediaries, for disclosure of information in breach of lawful contracts. It provides that if a person discloses any personal information about another in breach of a lawful contract, then that person would be punished with at most three years imprisonment and /or a fine of five lakh rupees.

In order to establish data protection on a more comprehensive level and further support the ITAA (2008), the Government introduced the

52 Ruth Gavison, *Privacy and the Limits of Law*, Vol. 89 YALE L.J. 421, 437 (1980).

53 Subhajit Basu, *Policy Making: Technology and Privacy in India*, Vol. 6 IJLT 1, 68 (2010).

54 Ibid.

55 Subhajit Basu, *supra* note 53, at 83.

56 § 43A, Information Technology Amended Act, 1949.

57 § 72A, Information Technology Amended Act, 1949.

Information Technology (Reasonable Security Practices and Procedures and Sensitive Data or Information) Rules, 2011[58] ("IT Rules" herein). If one would refer to rule numbered 3, the author would like to point out that the Ministry of Communications and Information Technology had removed lacunas by defining "Sensitive data or Information". Sensitive data included passwords, financial data, medical records or history, biometric information, sexual orientation, or information relating to the physical, physiological and mental health condition of a person. When this is compared to foreign legislations like Health Insurance Portability and Accountability Act (HIPAA), and the Gramm-Leach Bliley Act or the Payment Card Industry-Data Security standards (PCI-DSS), it can be seen that rule 3 is an important upgrade on data protection laws. Here, the former mandates 'administrative simplification' in the health sector by preserving personal hospital records,[59] whilst the latter acts mandate protection of credit card and financial information of customers.[60] Therefore, many types of personal data can be protected under this set of IT Rules.

Rule 4 of the IT Rules lays down the principle that a body corporate dealing with sensitive data must specify its privacy policy on its website. Rules 5 and 6 predominantly mention that consent of the person must be given utmost importance for the usage, transfer, or disclosure of his/her data. The rules also create an onus on the body corporate to provide knowledge to the person as to what purpose is the data been processed for, and, also create an implied liability for the same. Lastly, rule 8 advises a body corporate in order to escape liability from loss or damage on personal data they must employ "Reasonable Security Practices and Procedures" which is according to particular international standards enlisted in the rule itself.

However, to get a more conclusive overview of the set of principles maneuvered in the IT Rules, we must juxtapose it with a well drafted foreign legislation, for example the Data Protection Act (1998) in the United Kingdom. In the United Kingdom, data and information is governed by the Data Protection Act[61], 1998 (DPA). The cardinal rule of this act is that is applicable only when the use is for business purposes or when personal information is processed by organizations,

58 Information Technology (Reasonable Security Practices and Procedures and Sensitive Data or Information) Rules, 2011.

59 Nimisha Srinivas and Arpita Biswas, *Protecting Patient Information in India: Data Privacy Law and its challenges*, 5 NUJS LAW REV 1, 412 (2016).

60 Vinayak Godse, Vikram Asnani, Rahul Jain, PVS Murthy, and Abhishek Bansal, *Reasonable Securities Practices IT (Amendment) Act - Study Report*, 2008, DCSI, (9 July, 2018, https://www.dsci.in/sites/default/files/Reasonable%20Security%20Practices-%20Under%20IT%20(Amendment)%20Act,%202008.pdf

61 UK Legislation, http://www.legislation.gov.uk/ukpga/1998/29/schedule/1 (last visited on 9 July 2018).

but not when used in personal capacity. The DPA mainly directs its wordings on three categories of persons. First, the 'data controller', is the one who directs the purpose and the manner in which the data is processed. Second, the 'data processor' is in reality a third party which processes the data on behalf of the controller. Third, the 'data subject' is the individual who is the subject of the personal data.

The DPA has 6 principles that are very closely related to in particular, athletic and sports data in schedule 1 of the act[62]. First, '*consent*'; the consent of the data subject (say, athlete) prior to data collection is to be taken into consideration with the help of agreements. Second, '*awareness*'; the data subject must be made aware of the specific purpose of the use of such data and that the application of such data outside the specified purpose is strictly prohibited. Third, '*personal data must be up to date*'; the data must be updated and accurate else likely to lead to liability of the data processor and subject. Fourth, '*time period*'; personal data must not be retained for a time period longer than actually needed. This personal data was collected in the anticipation of a one-off event and therefore it should not extend the necessary time limit. Fifth, '*precautionary measures*', appropriate measures should be taken such as adequate back-ups of the data. The security of the data is important; therefore there should be succinct procedures and penalties for the violation of the same. Last, information in the form of data must not be transferred outside of the UK, unless the recipient country has an adequate level of safeguards for this technology.

If we place both the IT Rules and the Data Protection Act side by side, the author wants to infer that the IT Rules are satisfactory to a good extent. As mentioned before the Supreme Court in its recent decision had sternly recommended the introduction of a new specific legislation for data protection. But, here the author is of the opinion that an adequate amendment to the ITAA act and the IT Rules would be sufficient enough to accommodate safe data protection. There are concisely four discrepancies found in the IT Rules and the act.

First, section 43A applies only to "body corporates" and therefore there is no liability or responsibility of public authorities whilst handling sensitive data.[63] *Second*, the definition of "Personal sensitive data" is not exhaustive enough to cover electronic information such as browsing data (cookies, etc.), chat logs or emails. Therefore, internet service providers are also exempt from this section and its ancillary rules. *Third*, rule 5 of the IT Rules lacks an appropriate consent mechanism because it fails

62 Law In Sport, https://www.lawinsport.com/articles/intellectual-property-law/item/data-protection-and-sport-an-uncertain-partnership (last visited on 9 July, 2018).

63 Stateholder Report Universal Periodic 27th Session: *The Right to Privacy in India*, October 2016, The Centre for Internet and Society (last visited July 9, 2018), https://privacyinternational.org/sites/default/files/UPR27_india.pdf

in ensuring that the consent obtained is given freely or explicitly by the person himself. The words used in rule 6(1) mentions about prior permission from the "provider of such information", which means that even intermediaries could be providers. Hence, the consent mechanism employed is not to the point.[64] Fourth, the liability under section 72A can be conferred only when both the violation was done with 'intent' and that the violation caused a 'wrongful gain or loss'. Therefore, this section should be amended to remove the conjunctive burden of proof on the petitioner in court.

Subhajit Basu, a lecturer in the University of Leeds, had written an interesting article named *'Policy-Making, Technology and Privacy in India',*[65] addressing a similar debate. His well articulated paper opined that India did not need a new legislation on privacy because when compared to US or UK, India had lesser identity theft or credit card fraud cases. The paper's main stance was that historically India was not affected by privacy or identity theft abuses. The paper also contemplated on whether the E.U. Directive should be an ideal model for India's legislative schemes and he strongly suggested the negative. In fact, Criticisms have actually been aimed against the Directive for the fact that they are unnecessarily stringent and covered all types of data of the individual in concern.[66] This extreme standard of data protection has created an intolerable global trading environment thus hampering free trade.

Based on the paper mentioned above, the author disagrees with the reasoning for why India should not have a new legislation. The right of privacy is such that it should be protected irrespective of non-violation of the right. However, the author agrees that India should not follow the Directive model. But this in itself is a paradox, because in order to trade with Europe, India must meet with the "adequate levels" of their data protection safeguards. The European Union Directive has a "high-water mark" standard for privacy protection and expects that same standard to be met in trans-boundary exchanges.[67] Thus, in order to do that India must have a new dedicated legislation. Nonetheless, the author re-emphasizes that only an amendment of the Information Technology Act would be required. Indeed, strong privacy protection is a sentimental pipe dream.[68]

---

64 Privacy In India - Country Report – October 2011, Pg. 15-17, https://cis-india.org/internet-governance/country-report.pdf

65 Subhajit Basu, *supra* note 53, at 66.

66 Lucas Bergkamp, *The Privacy Fallacy: Adverse Effects of Europe's Data Protection Policy in an Information-Driven Economy*, Vol. 18 COMPUTER L. & SECURITY REP. 1, 31 (2002).

67 J. Keela, *Privacy by Deletion: The Need for a Global Data Deletion Principle,* Vol. 16 No. 1 Ind. J. Global Legal Stud. 363, 372 (2009).

68 Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan. L. Rev. 1, 1436 (2000).

V. Conclusion

The recent Puttuswamy judgment settles every debate whether the right to privacy is a fundamental one. Adjudging privacy as a fundamental right was the easier job but what lies ahead is a herculean task left to the judiciary and legislative. Through this article the author has shed light upon the relationship of medical abortion and data protection with privacy, and has intended the need for a crucial change in the Indian laws regulating it. But many broad aspects and alarming questions relating to privacy are untouched, like the issue concerning the AADHAR scheme. The goal of the program is to collect personal information like name, date of birth, biometrics, finger prints and retina scans of 1.2 billion Indians in personal databases, with the intention to eradicate corruption.[69] In the Puttuswamy judgment, the Court has temporarily declared that providing information under the AADHAR scheme is merely "voluntary", until the similar case pending before a triple bench has been decided. Nonetheless, there lies an additional onus on the legislature to address the issue of data protection by either following the European Model of a separate statute or make changes to the non-dedicated statute of ours, just like the United States Model.

In resonance, there are many questions regarding privacy which are yet to be addressed by the judiciary or legislative. Is the right to medically terminate one's own body when in extreme pain, enumerated under the fundamental right to privacy? Is section 377 of the Indian Penal Code or the section criminalizing homosexuality *ultra vires*, due to the reason that it is in contravention of the new fundamental right to privacy? Do states like Maharashtra remove the ban on the consumption of beef because eating any food at home (zonal) or elsewhere (decisional) is a private act? To what extent can parents or guardians keep a constant track on their child's media activities, especially when suicidal games like the 'Blue Whale Challenge' is on the surge? It is true that no right is absolute in nature and has its limitations. But the role of the judiciary to draw this particular demarcating line between the right and its restrictions is immense.

69 Caroline E. McKenna, *India's Challenge: Preserving Privacy Rights While Implementing an Effective National Identification System*, 38 Brook. J. Int'l L. 729, 730 (2015).

Plight of The Workers in Unorganized Sector and Their Rights

***Mr Ashutosh Tiwari**
****Ms Barkha Joshi**

I. Introduction

Labour is the primary factor of production and nations producing capacity is determined by its labour force. India is having the largest labour force in the world. If one goes according to the reports of NSSO in 2009-10 the total employment of the country is 46.5 crore out of which 2.8 crore are employed in the organized sector and 43.7 crore in unorganized sector[1]. This shows the extent to which this force contributes to the overall production of our country. These labourers especially in the unorganized sectors are exploited the most especially the women workers. There are laws for the people in the unorganized sector but are not so effective that could be one of the basic reasons still India is at the level of developing.

It is very much evident from the facts that the informal sector comprises the major part of the economy. Unorganized sectors not only provide profits but also remove the problem of unemployment which is the main problem in developing country like India. The Ministry of Labour, Government of India, has categorized the unorganized labour force under four groups in terms of Occupation, nature of employment, especially distressed categories and service categories[2].

In terms of occupation the unorganized sector includes Small and marginal farmers, landless agricultural labourers, share croppers, fishermen, those engaged in animal husbandry, beedi rolling, labelling and packing, building and construction workers, leather workers, weavers, artisans, salt workers, workers in brick kilns and stone quarries, workers in saw mills, oil mills etc.[3] come under this category Under this category the plight of the beedi rollers in the beedi rolling industry is worst. While making beedis suffer from very chronic diseases and the laws which are formed for safeguarding their rights had gone in vain.

In terms of nature of employment attached agricultural labourers, bonded labourers, migrant workers, contract and casual labourers come under this category.

* Student of B.A. Ll.B. II Year, NLUJA Assam

** Student of B.A. Ll.B. II Year, NLUJA Assam

1 Dr. Muna Kalyani, Informal Sector: An analysis, Vol 4, International Journal of Managerial Studies and Research, Page 77, 78, (2016)

2 Ibid.

3 ibid.

In terms of service sectors Toddy tappers, Scavengers, Carriers of head loads, Drivers of animal driven vehicles, Loaders and un-loaders come under this category[4]. Under this category the plight of the manual scavengers and the ineffective laws which couldn't even give their basic right of right to live with live a healthy life and with dignity are the serious issues which need to addressed.

Under the service sector Midwives, Domestic workers, Fishermen and women, Barbers, Vegetable and fruit vendors, Newspaper vendors etc. belong to this category.

In this research paper we shall be mainly focusing on the labourers of the unorganized in

1. Agricultural labourers
2. Beddi rollers
3. Domestic help
4. Workers in Tea plantation
5. Manual Scavenger

We shall be looking into the problems faced by each of the categories and how they are affected. In the end of this research paper we shall be giving solutions as to how we can improve the situation and condition of unorganized sector.

II. Agricultural Labours

The rural economy of India is dependent mostly on the agriculture to meet its ends. The highest employer in the rural sector is agricultural labour. It provides employment to each and everyone in the rural area. Men, women and children all are part of the agricultural sector. In fact, agricultural sector in India is one of the biggest employers of the labours. It employs more than 50% of the total work force available. Out of this about 46% of the working class male population, 65% of working class female population and 56% of all the children who between ages 7-14 are working are employed in the agricultural sector[5].

The definition of agricultural labour has been changed over time. In the First Agricultural Labour Enquiry, the Agricultural Labour Household was measured on the basis of Employment criteria[6]. In the second Agricultural Enquiry headed by K N Raj, the basis of measurement of

4 Ibid (Note: 80 is the page number from where author had cited the statement).

5 *Employment in agricultural sector*, World Bank, https://data.worldbank.org/indicator/SL.AGR.0714.ZS?Locations=IN, last seen on Oct 13 2017.

6 Daniel Thorner, *The Agricultural Labour Enquiry Reflections on Concepts and Methods*, June 23,1956.

Agricultural Labour Household was changed to Income.[7] As of today according to the National Commission on Labour "an agricultural labourer is one who is basically unskilled and unorganized and has little for its livelihood, other than personal labour." The definition of agricultural labour also includes the workers who work in agricultural or related activities. These labours do not have land and they earn wages by doing work in the fields of land owner. Since agricultural is a seasonal activity they may not be possibly employed for the whole of the year. Some of these workers also work in off season at the houses of the landowner. The other activities or the related activity includes activities like poultry or dairy farming.

Now the agricultural labour can be classified broadly into two different categories:-[8]

1. Landless Agricultural Laborers: - They do not possess land and can be further categorized into
    a. Permanent Laborers attached to cultivating household or "Attached Labor"
    b. Temporary or "Casual Labourers"
2. Small and Marginal Land Owners: There source of income is through their small holdings of land. They can be further divided into three types
    a. Cultivators
    b. Share croppers
    c. Lease Holders

Landless Agricultural Labourers

The labours in the first class were classified into two groups called "Attached" and "Casual". The casual labours are employed only during the agricultural season whereas the Attached labours are there in the field for the whole of the year. The casual labours are employed on daily wage for specific period of time and for performing specific tasks. The attached labours are also employed on the contractual basis for a period of like three six or a year. The contract signed is not a pure legal contract rather it is just an oral agreement between both the parties[9].

---

7 K N Raj, *Second Agricultural Labour Enquiry a Futile and Misleading Investigation,* March 03, 1961.

8 Agricultural labour in India, school of open learning University of Delhi, Dr Anupama Rajput,https://sol.du.ac.in/mod/book/view.php? Id=1735&chapterid=1697, last seen on Oct 14 2017.

9 Ranjan Kumar Som, Agricultural Labour in India, International Labour Review (1962), http://www.epw.in/system/files/pdf/1961_13/8/agricultural_labour_in_india.pdf, last seen on Oct 12 2017.

Small and Marginal Land Owners

According to Agricultural Census, of about 121 million of farmers in India there are around 99 million farmers who are small and marginal land owners. These small and marginal land owners are the backbone of the agricultural sector of India. Therefore, a lot of the future of Indian Agricultural market depends upon the shoulder of these small and marginal land owners. But the average size of the land holding by small and marginal farmers and been declining. It was around 2.3 ha in 1970-71 and now it has declined to 1.37 ha in 2000-01.[10] There has also been significant rise in the total land operated by small and marginal land owners. It has increased from 19% to 44% since 1960-61.

Many researchers have focused on the development of small and marginal land owners. They have related growth and development of small and marginal land owner to the reduction of poverty.[11] The source of agricultural development and poverty reduction has been credited to the efforts of small and marginal land owners .

III. Problems Of Agricultural Labours In India

There are several problems of labourers in the agricultural sector in India. The labourers in agricultural sector constitute the maximum number of labourers of the unorganized sector. They face several problems. Some of them are as follows

1. Increase in population in rural areas:[12] population of India is increasing at very high increasing rates which make more and more people available as workers in our nation. The increase in population of rural area has created more and more problem for the agricultural labors. Now the landowners would have certainly more option and labors to employ. Also since there are ample numbers of labors available in the market to hire upon, laborers now how no choice other than to work at lower wages.

2. Unorganized labor force: The agricultural laborers form the biggest of the unorganized sector. But at the same time they also lack the feeling of being united. The increase in population, especially in rural sector, has left with no other option then to concede to the demands of the landowner. Also sometimes because of huge debt, they simply concede to the demands of the money lender.

10 All India Tables, Agricultural census, http://agcensus.dacnet.nic.in/, last seen on Oct 15 2017.

11 Lipton, M. (2006), "Can Small Farmers Survive, Prosper, or be the Key Channel to cut Mass Poverty", *Journal of Agricultural and Development Economics,* Vol 3, No.1, 2006, pp58-85.

12 2011 Census Data, Office of the Registrar General & Census Commissioner, India, http://www.censusindia.gov.in/2011-Common/censusdata2011.html, last seen on Oct 15 2017.

3. Lack of education: We have seen above that agricultural sector employs the maximum number of children.[13] These means that these children would have very less time to attend school which in turn would make illiterate. They would barely have any idea of English alphabets. This illiteracy is the main cause all of their problems. They are unable to lend money from banks because they do not have any basic idea as how to fill the form. They are not able to avail government schemes and they can be easy fooled. The money lender gives them loan at a very high interest rates which these uneducated laborers are unable to repay, which in turn make them bonded to the money lender.

4. Very low wages:[14] The agricultural laborers are paid very less wage as compared to the amount of work done by them. There may be several reasons for this. One of the prominent reasons is the money they had to repay the money lenders. When the laborers are not able to repay the loan, they are made to work in the fields of the money lender to repay the loan. Other reasons can be availability of huge amount of laborers in the market who are willingly ready to work in the fields at a lower rate. This hence increases the competition in the market hence decreasing the wages.

5. Indebtedness: the agricultural labors and small and marginal land owners do not have sufficient means and ways to get loan from banks or other formal sector[15]. Hence the only option left to them is to get loan from informal sources like money lender and family members. The problem with these sources of loan is that they charge high rates of interest rates from these poor farmers.[16] The farmers take loan for different purposes. The main purpose of taking loan by landless labors is mainly their social commitment towards the society. These are mainly marriages and death of a related. Since, the laborers work on daily basis, they do not have enough cash with them to do these function properly, hence they take loan from the money lenders on a very high rates. The small and marginal farmers take loan form cultivation of their lands, buying of seeds or social commitments. The interest rate of these loans are very high, which make it impossible for them to pay back the amount which render them with no other options to work in the fields of the money lenders at very low wages. In many cases, the interest rates were so high that generation of family members had to work for the money lenders to repay the loan.

---

13 ibid

14 Hemant Pratap Singh, *Problems of Agricultural Labour in India,* Jagran Josh, 06/11/2015.

15 Ibid

16 Ibid

6. Lack of training and skill: the agricultural laborers lack any skill whatsoever other than being physically fit and able to do manual work which require the use of their body. This make them unfit to work in industries. Hence they are tied to being an agricultural labor.

7. Unspecified hours and time of working: The agricultural labors do not have any specific hours of working or time when they have to come to the fields and when they can go home. They have to work in the fields whenever the landowners deem fit or based on the requirement of the crops.

8. Condition of women workers: The agricultural sector employ the biggest amount of women workers. The women work in the fields to increase the income of the family. But their conditions are not as respectful as there cause of working. They are paid low wages, made to work in hostile conditions and are often exploited sexually. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressed) Act, 2013 does not have a mechanism to protect women in the agricultural sector.

IV. Measurers Taken By Government To Improve The Conditions of The Labourers

There are several steps taken by the government to insure that the problems of the working labour class in unorganized can be resolved. Some of the measures taken by the government are as follows.

1. The state and central government has, on many occasion, forgiven the debt taken by small and marginal farmers. Sometimes it is done after a flood or a bad crop and many times this step is taken for political benefit. Whatever may be the reason the few small and marginal farmers are free from paying debt.[17]

2. Abolition of bonded labour: Many labourers who could not pay their debts to the money-lenders due to high rates and had to bond their coming generation to the money-lender were called bonded labour. These bonded labours were freed by the Bonded Labour Abolition Act, 1975. Many government rehabilitation programme helped this bonded labours to come back into the society.

3. Many of the government schemes such as MNERGA have helped the labourers to get the job in off seasons also. Schemes like Pradhan Mantari Awas Yojna, Bima Yojna etc. have given these labourers a place for residence and life insurance. Also in recent times having a bank account is made compulsory for everyone. This has helped many agricultural labourers to take loan from the bank on a lower rate instead of taking them at a very higher rate from money lenders.

17 *Government unveils norms for farm loan waiver scheme,* The Hindu, 05/07/2016.

V. BEEDI WORKERS IN INDIA

Beedi is the indigenous cigarette which is of inferior quality. Beedis are made out of tender leaves in which tobacco is rolled and tied with the cotton thread. These beedi making industries are mainly associated with women and children because this is the most convenient option of making money by sitting back at home. Where there is an advantage there are several disadvantages as well. In these indigenous industries which are part of unorganized sector here the women especially are exploited the most where there working conditions are not good at all. The sheds or the working places are not at all good for human survival there are no toilets provided to them, rest, lunch and paid holidays. If they work at home, then their whole family comes in the contact of nicotine and suffers from respiratory diseases.

In the process of making these beedis the women had to every time pick up the tobacco in order to fill it in the leaves which means they are in constant touch with tobacco.[18] Women suffer from health hazards especially related to respiration like bronchitis, asthma etc. There are many problems to the feeding mothers make use of those hands which are in constant touch with tobacco to feed their children which is very harmful for the infant as well. Apart from this work had to be done by sitting in one posture for a very long period of time like crossed legs or bent legs this leads to strain in the muscles of the legs as well back muscles. The work is of such a kind that workers had to keep their eyes constantly on one thing if they want to reach the target with their growing age this leads to weakening of their eye sides as well.[19]

Conclusively there are many symptoms which are reported in women while working in these industries like the women in these industries suffer from aches and pains because of the work. They also suffer from cough which is due to constant exposure to tobacco women also suffer from nausea as well as lack of breath. Women working in these industries suffer from menstrual disorders as well several problems related to uterus and miscarriages. They also suffer from several other ailments like stomach related issues like burning sensation, cramps. Due to very long working hours these problems get aggravated to a large extend.

In order to solve these problems government had enacted an act called the(Beedi And Cigar Workers Act 1966)[20] this act took measure to regulate the working of these industries like giving them minimum wages as well giving them paid holidays and to improve their the

18 G. Metilda Buanesvari & T. Sridevi, Health Problems of Women Beedi workers, vol2, Cauver Research Journal, 24, 25.

19 Ibid.

20 Ibid.

working conditions [21] but nothing was effectively implemented because there was lack of monitoring.

VI. DOMESTIC WORKERS

Under the ILO Convention 189, a domestic worker is "any person engaged in domestic work within an employment relationship". A domestic worker may work on full-time or part-time basis; may be employed by a single household or by multiple employers; may be residing in the household of the employer (live-in worker) or may be living in his or her own residence (live-out). A domestic worker may be working in a country of which she/he is not a national.[22]

If one goes according to the report of NSSO the 90% of the workers are domestic workers and the ratio of the children employed is more[23]. Maximum numbers of the workers are illiterate so they are employed for washing. Cleaning, babysitting purpose these kinds of works are considered at least in India as very submissive due to which it is given to people who belong to lower caste.

The most important problem which they face is the social stigma they are referred to as servants which gives them a feeling of inferiority. Then they are overexploited and under paid. The domestic workers could be categorized into three categories which are as follows Live-in domestic workers • Part-time / Live-out domestic worker • Migrant Domestic Workers.

The first categories of workers are the live in workers these workers are those works who stay in the house of their employer. They are employed for cleaning, cooking purposes. These type of are the most exploited category of workers they have to upon their employer for each and every thing which means for their basic needs which is from food to clothing. They are provided with meagre food as well as some cases have been reported they are not provided with good clothing and are sometimes made to work beyond their working strength and are paid meagrely.

The second category of workers is part time workers. These are those categories of workers whose worker is very much similar to the work of the live in workers but they do not stay in the houses of their employers they stay with their families and unlike the live in workers they do not completely depend upon their employers for their basic needs. Although they are not that dependent upon their employer they also face the issue of meagre payment by their employer and social stigma.

---

21 Ibid.

22 Domestic Workers Convention, International labour Organization 189, http://www.ilo.org last seen on Oct 10 2017.

23

Then comes the last category of workers which are the migrant workers who face the most of the problems. The migrant workers are those workers who are being trafficked from one city to another. These workers include mainly belonging to the scheduled caste and tribe because there is poverty in their villages so they have to move from rural areas to urban for their livelihood. They face most of the problems the basic problem is with their adaptation they are exposed to a new environment where everything is new from their culture to their language. Since the majority of the workers are women and they are live in workers due to which they are most vulnerable to sexual and physical abuse by their employers. The most basic problem is they are bought to these employers by some suppliers so whatever they earn is also given to the suppliers which means they does not even get the wages for their work as well.

There is another category of migrant workers who are send overseas for working especially women to send back money to their families but they are however subject to exploitations of many kind like meagre payment, In India there are no laws for educating the migrant workers for their rights and in order to travel abroad they borrow large sums of money from people which have a large interest imposed on them to pay the brokers and also there is lack of working contract and also subjected to sexual and physical abuse as well and are also prevented from going back to their home. In many cases women are illiterate so they are made to pay an exorbitant amount by the brokers and provided with false papers due to which when go abroad they are not provided with promised salaries and are subjected to slavery in the foreign countries.

Government had implemented several laws in order to regulate the exploitation for example the domestic workers had been included in the Unorganized Workers Social Act (2008), sexual harassment of women at the workplace. These laws had been only able to benefit people in the organized sector and not people in the unorganized sector because the employer employee relationship in these domestic worker's sector is not public it is private so people are easily able to escape the liability and also because the of the restrictions which are imposed by the definition of workman, employer or establishment.

VII. Women Worker In Tea Plantation

Tea can be named as the national drink of both India and our colonial master Great Britain. This great drink comes from the tea planation of North East India, Darjeeling and Kerala. Due to these tea plantations, India is the second largest tea producer in the world.[24] But what make

24 The World's Top 10 Tea Producing Nations, World atlas, http://www.worldatlas.com/articles/the-worlds-top-10-tea-producing-nations.html last seen on October 15, 2017.

these tea planation produce tea leaves is the women workers in these tea plantations. Women workers are the backbone of tea plantation in India. The entire tea industry is on the shoulders of these women workers who work tirelessly. More than 50% of the total workers employed in these sectors are women. Women workers are an integral part of the tea plantation because their soft hands and nimble fingers are especially suited for plucking of tea leaves and picking of coffee seeds. [25]

What happens when we imagine a tea planation? For most of us it is a smiling and cheerful women worker carrying a basket on her back and plucking leaves from a very beautiful tea planation. It is something which is beautifully captured in through the lens of a photographer. But what is the real condition of these women who work in these tea plantations.

VIII. Problems Of The Women Workers In Tea Plantation

As per a joint investigation of BBC News and Radio 4's File on Four[26] on the workers in the tea plantation in Assam and north-east India it was found that these workers are living in a very deplorable conditions. Several of tea companies of Britain like Tetley's and Twining's have said that they will work in order to improve the living conditions of the estates from where they buy tea.[27] The workers in the tea estates are governed by Plantation Labour Act, 1951. But there can hardly be any evidence that the workers have any knowledge about the provisions of these acts or the act as a whole.

Wages: As per the report, the tea plantation workers especially women are extremely low paid. Their pay is significantly below the minimum wage law in force, whereas the tea estates in which they work earn tones of profit by selling this tea leaves to the big firms like Tetley's. Because of their under payment, they all suffer from malnutrition. Studies have shown that 9 out of every 10 worker in tea plantation industry suffer from malnutrition[28]. Many of the workers employed in the plantation industry do not have any idea about Minimum Wages Act, 1948 or the Equal Remuneration Act 1976. Nor do they have any idea of any labour related law passed by any of the state, central or district administration[29]. These workers are also entitled to paid leave of one day for every twenty days of work for adult and for young workers one day paid leave may be allowed for every fifteen days according to Plantation Labour Act, 1951. But it is hard to believe that these provisions of the act are being followed.

25 Ibid.

26 Justin Rowlatt and Jane Deith, *The bitter story behind the UK's national drink, 08/09/2015.*

27 Ibid.

28 Ibid.

29 *Socio-economic Conditions of Women Workers in Plantation Industry*, 2008-09.

Living conditions: The working conditions of the workers working in the tea plantation are very deplorable. The toilets are overflowing, open defecation no proper housing system. Housing and sanitation hardly get any attention from the plantation owners. Due to lack of sanitation and housing system these workers are frequently sick because of diseases like Cholera. The living conditions of planation workers are wholly contrary to the provisions of the Plantation Labour Act, 1951. There is no care of medical standards and facilities in this planation. This is a clear violation of section 10 of the Plantation Labour Act, 1951 which require each employer to provide medical facilities for the workers and their families.

Working conditions: The working conditions of these workers are under the Plantation Labour Act, 1951. Various provisions of this act have given us direction as to how shall an employer keep his employees. It is necessary for the employer to provide medical, proper housing facilities and education to the children of the workers. But as per the BBC report, these are the thing which comes hardly into the minds of the employer.

IX. Manual Scavengers

Manual scavengers also belong to the unorganized sector where one could see the grossest violation of the human rights. The Indian caste system had started this system of manual scavenging where a particular class of people were employed for cleaning the excreta of the upper caste people. They were forced to carry those excreta on their head.[30] The thing which makes the scenario after making them do such a humiliating work they are tagged as untouchables and their basic right is also snatched away from them. They are not allowed to enter the temples not allowed to draw water from the same well. The scenario was worst that they were made to carry a bowl and broomstick was attached to them so that the place form there they move is cleaned by them.

Apart from facing social stigma there are health issues as well faced by them these health hazards include exposure to harmful gases such as methane and hydrogen sulphide, cardiovascular degeneration, musculoskeletal disorders like osteoarthritic changes and intervertebral disc herniation, infections like hepatitis, leptospirosis and helicobacter, skin problems, respiratory system problems and altered pulmonary function parameters. Some of these diseases, in addition to TB, include: campylobacter infection, cryptosporidiosis, giardiasis, hand, foot and mouth disease, hepatitis A, meningitis (viral), rotavirus infection,

30 Manual Scavengers and Their Health http://www.mfcindia.org, last seen Oct 14 2017.

salmonella infection, shigella infection, thrush, viral gastroenteritis, worms[31].

Today also this manual scavenging exists they are not provided with adequate tools to clean the manholes they clean the manholes with their hands due to the problem of constant touch with excreta the women suffer from skin diseases as well.

X. Manual Scavenging In Manholes

In the manholes also the people had to enter and clear the blockages in the pipelines or anything that sort. In addition to this they are only provide with a bucket and a rope to clean the manholes while working this, they have to face various poisonous gases which are harmful for their health and sometime it causes their life. Due to that, Sewage workers usually have had cuts, injuries, irritation of eyes and suffered from skin rash and related health problems. The existing protective equipment's are neither adequate nor up to the standard quality. Also, most of the sewage workers are not educated to use protective equipment's. Most of sewage workers are recruited on contract basis and on daily wages. A large number of sewer workers die before retirement.[32]

While working on busy road area, there is always feared of accidents from moving vehicles. A case had been reported related to manual scavenging due to which a man Mahendra Pal died he was cleaning the manhole as soon as he entered the manhole he became unconscious and when he was later admitted to the hospital he died[33]. The irony is this that the maximum number of manual scavengers are employed by the Indian railways itself for cleaning the toilets of the coaches.

Government tried to impose many reforms in the by enacting a law for them called the employment of which prohibited "engag[ing] in or employ[ing] for or permit[ing] to be engaged in or employed for any other person for manually carrying human excreta." Additionally, the Act prohibited "construct[ion] or maintain[ance] [of] a dry latrine." Offenders could be subject to imprisonment for up to one year and/or a fine of 2,000 rupees.[34]

The act failed to bring any kind of impact as it did not refer to the work which is done in open gutters, manholes and septic tanks. The act was left on the government to implement it in their states by themselves and the state government did not implement it properly and sometimes

31 Ibid (NOTE: Here 2 Is The Page Number from Where The Author Had Cited The Following Statement.

32 Ibid.

33 Iibid.

34 Sec 3 Manual Scavengers and Construction of Dry Latrines Prohibition Act 1993.

refused to implement it stating manual scavenging is completely being eradicated and the most importunely it did have a deterrent effect as the punishments were very lenient. This act was also had several enforcement problems e.g. If a person is caught making someone do this and if that person claims that he didn't have any knowledge about it then he cannot be prosecuted .Thus it could be easily concluded that this act was a complete failure.[35]

Then again an act was implemented in the year of 2013 where a the definition of the act was of 1993 was a bit narrowed this the act of 1993 stated "anybody involved in collection human excreta"[36] while in the act of 2013 it was held that anybody "who collects excreta without protective gears"[37] and this act imposes an exception for railways which employs the maximum number of manual scavengers. The main flaw in this act its limitation of period a person can file a case only within 3 months of the commission of the act this narrow window poses limitation to the act. It doesn't tell how offenders will be punished it just states that they will be imprisoned for a period of 5 years and some fines would be imposed. If seen the laws which had been enacted for had failed to protect the rights of manual scavenging in all terms.

XI. Conclusion

It can be seen that the labourers in the unorganized sector whether they are in agricultural sector or in a beedi rolling industry they all face similar kinds of problems. They all have to go through similar kinds of problem. These problems are very generic and basic. The increase in population has increased the numbers of workers in the market which in turn has decreased the value of their labour. They are paid very less wages for the work they do. Increase in numbers of labourers has decreased the bargaining power of the workers. They have to work on the conditions of the employer and if they fail to fulfil the demands of the employer then they are thrown out of work. There living conditions are very deplorable. The employer does not pay any heed to the demands of the workers. They live near their workplace like in a make shift tents or rent a house. The houses they rent are not in very good conditions and are crowded. These areas also lack in matters of hygiene.

There exist no medical facilities for the workers. There may be provision stating that the employer need to provide basic amenities to the workers but they are hardly followed anywhere. The workers in the unorganized sector are not educated hence they do not know about their rights

35 Varun K. Arey, born into Bondage, Enforcing Human Rights in India's Manual Scavengers in India, Indonesia Journal of International and Comparative Law, Vol II, 731, 733(2015).

36 Ibid.

37 Ibid.

provided by different legislation. It is because of these reasons they are not able to negotiate and fight for their rights given to them by different legislation.

The lack of skill training leaves them no other option but to work in the kinds of jobs. There is very less possibility of a trade union like structure in the unorganized sector which makes it impossible for the workers of the unorganized sector to group and demand for their rights. Many at times it is the employer who is the root cause of all the problems of the unorganized sector. Many immoral acts of the employer are also the reason as to why the unorganized sector has to suffer. For their own profit the workers make the lives of the labourers miserable.

There possibly could be many steps which can be taken by the government and civil authorities to improve the conditions of the unorganized sectors. Some of them are as follows

1. The government instead of legislating more and more acts they could take measures to improve the working of the current legislation. They can provide more workforces to implement the legislations which have already been passed. There are many acts such as Plantation labour Act 1971 which if implemented properly can be helpful to many workers in the unorganised sector. There should be a strong civil administration which can help the implementations of these provisions.
2. Funding schools: The Government can also build schools and expedite on the education. This would help the children of the workers to get a proper education. They can help their parents to know their rights and fight for them.
3. Social awareness schemes: The government and NGOs can help the labourers to know their rights. They can redress their issues and make them aware of their rights. They can also help them in knowing government schemes which can benefit these workers. They can also learn how to negotiate with the employer and stand united against exploitation.

Apart from above measures the workers in the unorganized sector can also do the following to improve their life conditions.

1. They can create self-help groups. These self-help groups can help these workers in hard times by giving them loan at a negligible rate. This will help them in getting a loan at a very negligible rate.
2. Since the workers in the unorganised sector do not have any social security measures. What they can do is to invest in the government

schemes which provide health insurance and pension at a very minimum investment of 12Rs a year or so. Schemes like Pradhan Mantari Surakha Yojna, Pradhan Mantari Beema Yojna and Atal Pension Yojna are some of the schemes which can help the workers in the unorganised sector. But for this, the workers in the unorganised sector have to be more proactive.

Pocso and The Age of Consensual Sex in India

***Ms Akanksha Yadav**
****Mr Srijan Somal**

I. Introduction

For long, India did not have an exclusive, separate or special law to protect the children from sexual offences. The Indian Penal Code[1] (hereinafter referred to as IPC) had provisions in Section 354, 375 and 377 but these were not quite as effective in the case of children. The biggest problem was that these laws were not gender neutral and talked about women only. And, these failed to recognize the other forms of Sexual abuse which a person, especially a child might face.

According to a study by the Ministry of Women and Child Development in 2007, "about 53% of the children who were interviewed reported some form of sexual abuse ranging from rape to somewhat milder forms such as forcible kissing and inappropriate touching."[2] It comes as a surprise that the persons responsible for of most of these acts were close relatives, family members or teachers.

Then in 2012, Protection of Children from Sexual Offences Act[3] (hereinafter referred to as POCSO Act) was enacted which is the first legislation of the country that deals with the issue of sexual offences against children. POCSO act has improved the situation radically. It has filled major loopholes in the provisions of IPC by being gender neutral and recognizing sexual offences in much wider connotation. This has also shifted the burden of proof towards the accused.

But, this act is not completely protected from the discrepancies. There is a major drawback in its provisions which obstructs it from fulfilling the purpose it was enacted for. Statement of Objects and Reasons of POCSO Act says that, it is aimed at empowering the child and strengthening the legal provisions for their protection from sexual abuse and exploitation. However, it has failed to take into consideration the prevailing societal trend of increasing number of teenagers indulging in sexual activities. The Act does not take into account the consent of the child (who is defined to be a person below 18 years of age). This becomes relevant given the provision for the penalization of any

---

* Student of B.A. Ll.B. II Year, Dr RMNLU, Lucknow.

** Student of B.A. Ll.B. II Year, Dr RMNLU, Lucknow.

1 The Indian Penal Code.

2 Ministry of Women and Child Development, *Study on Child Abuse India 2007* Available at, https://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf, Last visited on 01.06.2018.

3 Protection of Children from Sexual Offenses Act, 2012.

form of consensual penetrative sexual relations and not just "sexual intercourse" between teenagers. Such a provision can very well result in the possible harassment of teenagers by law enforcement agencies. It would give rise to an unwanted situation wherein the provisions which were enacted to strengthen the children and fortify the legal provisions for the protection of children from sexual abuse and exploitation would amount to their unfair harassment. Also, POCSO Act does not take much cognizance of the situations that one might have consensual sexual intercourse with his/her partner in Child Marriage or the possibility that one can misuse these provisions to frame an innocent person.

Earlier, under Section 375 of IPC,[4] Age of Consent for Sexual Activities was given to be 16 years but in 2013 by the Criminal Law amendment Act, 2013,[5] it was increased to 18 years. The reasoning given for it was that the minimum age of marriage in India is given to be 18 years for women and 21 for men so how can the minimum age of consensual sex be lower than that, which is outrageous, at best. According to the current laws, the human body of any person below 18 years of age is the property of state and they cannot have any pleasure associated with their body whatsoever.

II. Problems

Lord Macaulay, who was the father of the criminal law in India set up this benchmark age in IPC back in 1800s when there was no access and exposure to media and opposite sex. And, during framing of POCSO policy drafters also adapted this age in the Act. But now, with all the modernization and development in media, instead of lowering the age of consent, with the Criminal Law (Amendment) Act, 2013, it was increased from 16.

India is strictly following the threshold age as 16 even though UN is also of the opinion that there should be a balance between evolving capacities and protection which States should consider while deciding the consensual age. It was also reported that States should not criminalize factually consensual sex which is nor of exploitative nature.

Hindering the Adolescence Interest

There is no definite age but post puberty, most adolescents are anxious, desirous and curious enough to know more about the physical changes happening to them along with exploring their sexuality. Unlike old times, now due to exposure to media and opposite sex, they are more likely to engage in different sexual activities. Biologically, body is also ready for sex mostly after 14-16. In a Study conducted by NCBI in

4 The Indian Penal Code

5 The Criminal Law Amendment Act, 2013

Indian Schools, the incidence of having sexual contact was 30.08% for boys and 17.18% for girls. 6.31% boys and 1.31% girls reported having had experienced sexual intercourse. Friends constituted the main sexual partners for both boys and girls.

Also, in the case of Sunil Mahadev Patil v. the state of Maharashtra, where a girl of 17 years and 9 months eloped with a man and had consensual sex after marriage. Bombay High Court granted bail considering the sexual maturation and defining it as:

"Today teenagers are exposed to more sex related issues and lot of material is also available to them to know the sexual relationship between a man and a woman. Because of their impressionable age, girls and boys both may tend to get provoked and there can be a curious and very compelling demand of the body to get into such kind of relationship. Sexual urge differs from person to person and there cannot be any mathematical formula in respect of sexual behavioral pattern of teenagers, as biologically whenever the child turns into puberty, the child starts understanding his or her sexual needs. The nature of response depends on the upbringing, peer pressure, how civilized the environment is etc. Sex requires proper physical and emotional preparation, as it results in many physical and emotional consequences. This is all considered as a sexual maturation."[6]

By not considering the relation between adolescence and sexuality, POCSO has criminalized engagement of any person below 18 years in any sexual activity. In 264th report of Rajya Sabha also it was stated that there was spike in POCSO cases after increment of consensual age from 16 to 18 due to conversion of consensual sexual activity into crimes like rape, kidnapping/abduction.[7] Therefore, an act which was regulated with the view to curb all the form of sexual exploitations which a child may face is punishing the innocent people, mainly juveniles for consensual sex rather than controlling the increasing crime rate under POCSO. "As reported by NCRB, there was elevation of 82% in child rapes from 2015."[8]

6 Sunil Mahadev Patil v. the state of Maharashtra, 2015 SCC Online Bom 6204 : 2016 Cri LJ (NOC 36) 14.

7 Rajya Sabha, *Two Hundred Sixty Fourth Report The Juvenile Justice (Care and Protection) Bill,2014* Available at http://www.prsindia.org/uploads/media/Juvenile%20Justice/SC%20report-%20Juvenile%20justice.pdf, Last visited on 01.06.2018.

8 Deeptiman Tiwary, "NCRB data, 2016: Huge spike in rape of children, up by 82% from 2015, UP, MP worst states, TN new entrant" *The Indian Express*, December 1, 2017. Available at http://indianexpress.com/article/explained/ncrb-data-2016-huge-spike-in-rape-of-children-up-by-82-from-2015-up-mp-worst-states-tamil-nadu-new-entrant-4962477/.

In most of the cases, parents initially file a complaint when they get to know about the love affair or marriage of their minor girl to protest. Court strictly following POCSO must punish the accused ignoring the consent, happiness or future of both girl and accused. Not only such action destroys the future of accused but also it affects a girl drastically. She tends to face trauma, stress and other unhealthy mental events in her life. Section 3 of Convention of Child Rights talk about best interest of the child which is violated by the implementation of punishment under POCSO act for consensual sex in cases like where a 16-year-old have sex with another 17 or any major person.

As said in the Independent Thought v. Union of India, if anybody below 18 is under the state's rights then in that case per se girl has also defaulted the law by having consensual sex before 18. But there has never been a case where girl was punished for defaulting the law and indulging into sexual activities before the threshold age. Law punishing only boy as accused is a discrimination based on the gender which goes against the Article 2 of the convention. Other laws dealing with children, like Juvenile Justice Act and Prohibition of Child Marriage Act can accept different definition of child for boy and girl. In a case, a 17 year and 11 months old was treated like an adult for the murder he did basis on his mental assessment.[9] "Also, after the popular controversy on Nirbhaya Case, the age was decreased from 18 to 16 for trying a child as an adult in heinous offence cases."[10]

Similarly, POCSO should also take note of the accused and victim's mental being for the consensual sex instead of strictly following the definition of 'Child'. And, POCSO should also reconsider the age for consensual sex by adapting according to the present scenario of the country as it was tried in Juvenile Justice Act.

Misuse of the Provisions

In India, POCSO has been easily misused over time to time because of loopholes present in the act. According the statistics of crime in 2016, out of 1800 there were 692 false cases of POCSO.[11] The gender-neutral law being too strict but weak has been prone to be used for framing false and frivolous cases for fulfilling family enmity, gaining compensation or punishing boy for eloped marriages. In most of the love affair cases, angered parents file a false complaint of sexual abuse under POCSO

9 Editorial "17-year old held for murder could be first juvenile to be tried as adult under new law" *Firstpost,* February 05,2016. Available at, https://www.firstpost.com/india/17-year-old-held-for-murder-could-be-first-juvenile-to-be-tried-as-adult-under-new-law-2614516.html.

10 The Juvenile Justice (Care and Protection of Children) Act, 2015.

11 Ministry of Home Affairs, *Crime in India 2016,p 243, Available at* file:///C:/Users/user/Downloads/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf .

and Court under Section 2(d) of the act is under obligation to punish the accused.

Moreover, there are other various provisions in the act which are too loose to safeguard the act from misuse. Section 22, 29 and 30 of the act included by lawmakers somewhere endangers the POCSO act. Section 22 which talks about the punishment for the false complaint or false information is weak in itself for saving it from the misuse. The punishment prescribed for the false complaint is negligible if compared with the punishment accused might get if he/she's unable to disprove the allegations charged on him. Besides, a child accounts for no punishment for the false case brought by him/her.

In many cases, child is below 18 years but is aware of all the consequences of his actions. In such cases, the court doesn't count child for his actions again contradicting the IPC provisions. Under Section 82, nothing is offence if done by a child below 7 years and under section 83, nothing is an offence which is done by a child above seven years of age and under 12, who is not of mature intellect. POCSO Act doesn't consider any such filter and disentitles any child from the punishment for false cases.

In State vs. Karnail Singh & another,[12] the learned Judge was only able to punish the plaintiff who brought false case because she was major when she gave false testimony in the court, but no punishment was given for framing false cases as it is not allowed by POCSO act.

Unlike this case, there are not such circumstances in every case enabling the court to punish the wrongdoer child for bringing false allegations under POCSO. Though, the judge in this case was of the opinion that POCSO only saves the child from punishment for false complaint or information.

But most of the cases don't follow this and child is not punished for bringing danger and distrust to someone's life. Also, section 29 and 30 of the Act sets the presumption of the offence and culpable mental state against the accused. The onus of burden of proof shifts to accused in the POCSO, making it more disadvantageous for the accused.

The punishment under POCSO act is very serious and rigorous, such lenient provisions encourages the false and fake cases defeating the very purpose for which law was drafted. As there is no such strict punishment for adult and no punishment for child in the event of bringing false complaint or case, it is dangerous for children itself. Adults can pressurize, convince, abet the child for filing the false complaint and involve him/her in the court proceedings affecting his/

12 *State v. Karnail Singh and another*, District Court, Delhi,SC No.: 194/13, Unique Case Id no.: 02401R0596392013

her innocence. In some cases, child is mature himself/herself to decide right or wrong. In such cases, the child should be punished considering section 82 and 83 of IPC and do justice to the framed accused by compensating him/ her for the loss suffered.

Not in consonance with Child marriage laws

Another drawback of the age of consent of Sex being 18 years is that the law under IPC and POCSO is not in the consonance with some of the other legislations which are effective in India. Section 3 of the Prohibition of Child Marriage Act, 2006 makes Child marriage voidable at the option of either one of the parties. But, it does not make it completely void, i.e.- Child marriage can still be practiced. In fact, it is majorly prevalent in some parts of the country. This leads up to the fact that a minor boy/girl can marry another minor or an adult with their consent. But, they are not allowed to have consensual sex under POCSO.

Even Section 375 Clause 6 says that sexual intercourse with a girl below 18 years of age with or without her consent is rape. Although an exception under Section 375 of IPC contained that sex between a husband and wife is not rape if the wife is not under 15 years of age. But again, this raised conflicts between IPC and POCSO.

In State v. Suman Dass,[13] a 15-year-old girl eloped with a man 7 years older than her. Her mother filed a complaint and alleged that the man had kidnapped and sexually assaulted her. In court, the girl admitted to having gone willingly and to having sexual intercourse. Judge Dharmesh Sharma was of the view that a strict and rigid interpretation of the POCSO Act "would mean that the human body of every individual under 18 years of age is the property of State and no individual below 18 years of age can be allowed to have the pleasures associated with one's body."

"In 2012, one Sandeep Paswan was arrested for kidnapping and raping a minor girl who was his wife and they had consummated with consent. Later, the Court indeed found it to be true that they were married in the Arya Samaj mandir of the village. Sandeep was then acquitted because of the exception-2 of the Section 375 of Indian Penal Code."[14]

In a more recent judgment in October 2017, in the case of Independent Thoughts v. Union of India,[15] the Supreme Court quashed the exception 2 of the Section 375 and said that consensual sex with one's wife if she

13 Decided on 17.8.2013 by Dharmesh Sharma, ASJ01, New Delhi District, Patiala House Courts, New Delhi SC No. 66/13

14 *State* v. *Sandeep Paswan, Dwarka Courts, New Delhi*, SC No. 08/12, Unique Case ID No. 02405R0363092011

15 *Independent Thought v. Union of India,* AIR 2017 SC 3094

is under 18 years of age is also rape. The Court was of the view that most of the Acts and Statutes identify girls below 18 years of age as children and this is the reason the law penalizes sexual intercourse with a girl who is below 18 years of age.

As of now, the law stands that a man can marry a girl who is not 18 years old but cannot consummate such marriage. He can be made liable under both IPC and POCSO if he has sexual intercourse with his wife even if he has taken his wife's consent. Sexual Intercourse is an integral part of any marriage and if the law allows for the child marriage to exist it should be in consonance with all the aspects of it. The authors are in no way supporting Child marriage but since, the laws have not made it completely void, there is a considerable number of people who are doing child marriage and indulging in Sexual activities thereafter. Thus, it shows a loophole in the laws which can make the innocent people prone to harassment by the authorities. The law should be aimed at punishing the people who are really guilty not to harass the innocents.

III. International stand on age of consent

Different Countries have different views towards keeping the minimum age for consensual sex. In some countries, it is 18-19 years while in some others it even goes down to 11-12 years. The most common minimum age found around the world is 16 years. It is widely believed that 16 is a very inquisitive age where the teenagers tend to experiment with and explore their sexuality. Also, the human body, both male and female, is considered to be fit to have sex at this age. Many developed common law countries follow different laws in relation to the minimum age of consensual sex.

In the United States of America, the minimum age varies from 16 to 18 years in various states. But, even there, most of the states have the minimum age as 16 or 17 years. 30 states have the minimum age of consent as 16 years, 8 states as 17 years and 12 states as 18 years. More than 60 percent of the population of the country lives in the states where the minimum age is set to be 16 or 17 years.[16] And, these ages are no modern invention, either. During the 1800s, much of the States had the minimum age of consent to be 10-12 years.[17] Then, in the 1920s they rose to around 16-18 years. Since then, there have been minor changes, Hawaii being the last state to increase the age to 16 years from 14 years in 2001. The Court of Appeals, Wilkinson, Circuit

16 Eugene Volokh, *Statutory rape laws and Ages of consent in the U.S.,* Available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/?noredirect=on&utm_term=.b10089b20e4b.

17 Mary Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States*, 1885-1920.

Judge, held that: statutory rape in Tennessee that established age 18 as age of consent was overly inclusive of generic federal definition of statutory rape that used 16 as age of consent. To prevent disparity in sentencing across nation, gap between age of consent of 16 versus 18 was too consequential to disregard and majority of states adopting former age was too extensive to reject. The general age of consent for purposes of the generic, contemporary meaning of the term "statutory rape" in the "crime of violence" sentencing enhancement was 16 years.[18]

Close-in age exemption is a law that allows a person who is below the age of consent to have sex with an older person if their ages are close. For example, if a law keeps the minimum age of consent to be 18 year with 4 years close-in age exemption, a 30 year old man cannot have sex with a 17 year old girl but a 21 year old man can. This law was introduced to save people from getting tagged a sexual offender if they have sex with their minor partners consensually. They are also called 'Romeo and Juliet laws' based on William Shakespeare's play where Romeo and Juliet were 17 and 14 years old teenage lovers. Close-in Age exemption is applicable in many States of USA. A more practical example can be taken from the State of Delaware where the age of consent is 18 years but there is a close-in age exemption according to which youth aged 16 and 17 can engage sexually with an individual if he/she is below 30 years of age.

In England and Wales, the age of consent to any form of sexual activity is 16 years for both men and women. The Offence of Statutory rape is constituted when a person has sexual intercourse with a person under the age of 16 years with or without their consent. However, Home Office guidance[19] is clear that the intention of the law is not to prosecute teenagers under the age of 16 years if both have consented and are of similar age. It is an offence for a person aged 18 or over to have any sexual activity with a person under the age of 18 if the older person holds a position of trust (for example a teacher or social worker) as such sexual activity is an abuse of the position of trust. Close-in age exemption is not applicable in England.

In Canada, the age of consent for sex is 16 years. It was increased from 14 to 16 in 2008. Canada statutory rape law is violated when an individual has consensual sexual intercourse with a person under age 16. There are two close in age exemptions. According to the first, a minor aged 12 or 13 can consent to sexual intercourse with an individual less than two years older. And according to the other, 14 and 16 year olds can consent to partners less than 5 years older. The age of consent is

18 *U.S. v. Rangel-Castaneda*, 2013 WL 829149 (United States of America)

19 Home Office, Children and Families: Safer from Sexual Crime – The Sexual Offences Act 2003, London: Home Office Communications Directorate, 2004.

raised to 18 when the older party is in a position of trust or authority over the other, the younger party is in a relationship of dependency with the owner, or if the relationship is exploitative. Every act of anal intercourse is criminalized with the exemptions for married couples or 2 people over age 18. The exemptions become invalid if the act does not take place in private.

13 years is the age of consent for sex in Japan. At 13, Japan's base age of consent is the lowest in any developed country. Though, many prefectures have local statutes which in certain circumstances raise the age of consent to 16 or 18, mainly if the minors are not in a sincere romantic relationship. Such sincerity is usually determined by parental consent. For example, the effective age of consent in Tokyo by the local statute is 18. The minimum age of marriage for girls is 16 years and for boys is 18 years with parental permission and, 20 years otherwise (as stated in the Child Welfare Act of Japan).

Despite 16 years or lower being the most common age of Consent around the world, India continues to have 18 years as the age of consent. When this age was raised from 16 to 18 years in 2013, the reasoning given was that, the minimum age of marriage is kept 18 years for girls so, how can the age of consensual sex be lower. What the policy makers failed to consider is that Marriage involves much more responsibility than sex. Ideal age for one to have sex can never be equaled with the ideal age for one to marry. By believing in this ideology, the policy makers are supporting the views of the Countries like Pakistan and Iran where it is mandatory to be married to your partner to have sex with him/her.

Also, the POCSO Act derives the definition of child (a person below 18 years of age)[20] from the CRC and follows it strictly. According to this only, any person below 18 years of age involving in a sexual activity is Statutory Rape. But, what we should look closely is that Indian laws have differed from the strict definition of Child given in CRC time to time, be it for minimum age of boys to marry in Prevention of Child Marriage Act[21] or for the age of consent in Section 90 of the IPC. Also, there is an overwhelming majority of countries which are parties to the CRC but have kept the age of consent for sexual activities below 18.

IV. Conclusion

The main objective of the POCSO Act was to save a child from any kind of sexual exploitation or sexual abuse which was witnessed on a large scale as revealed by the study of Ministry of Women and Child Development. But from the above analysis it can be inferred that

20 The Protection of Children from Sexual Offences Act, 2012

21 The Prohibition of Child Marriage Act, 2006

lawmakers and judiciary has gone in the wrong direction. Instead of providing remedies to the real victims, it's harassing the people who have consensual sex only because either or both are minor. "The news of child rapes is prevalent nowadays and as earlier mentioned stats also show that it's increasing drastically."[22]

The Criminal Amendment Act, 2013 increased the age of consent from 16 to 18 years mainly because of the criticism and opposition it faced. People were of the view that when age for marriage is 18 years then how can be age for sex be lower than that. In that case, age for marriage of a boy is 21 years. Therefore, there is fallacy in this argument and it can't be relied upon.

Moreover, in the draft submitted by National commission for Protection of Child Rights, the age of consensual sex was suggested to be 16 years and not 18. But, the Standing Committee did not give it a pass. The National Commission for Protection of Child Right (NCPCR) had stressed on the need for the law to recognize consensual sexual exploration among adolescents by decriminalizing it when it is between:

I. Children above 12 years when the age-gap was less than two years and,

II. Children above 14 years when the age-gap was less than three years.

Also, Exception 1, Clause 3A of the National Commission for Protection of Child Rights (NCPCR)'s Protection of Children from Sexual Offences Bill, 2010 stated: "(i) Any consensual non-penetrative sexual act penalized by this chapter (except for sections 23, 25, 27 and 31) is not an offence when engaged in between two children who are both over 12 years of age and are either of the same age or whose ages are within 2 years of each other."

It was also asserted that the said definition is in consonance with the provisions of the United Nations Convention on the Rights of Children, 1990, to which India is a party. But the Standing Committee failed to note of the provisions of Article 5 of the CRC which lays stress on the crucial aspect of a child's evolving capacities. This concept demonstrates the need for the law to realize that that growing up is a complex process which is not marked by a single rite of passage but by a series of staged transitions characterized by the acquisition of growing responsibility and self-sufficiency. By not recognizing this recommendation, the POCSO Act has conflated child sexuality with child sexual abuse.

22 Devinka Saha, Why have child rapes soared 15% in 5 years, *The News Minute* ,August 22, 2015, Available at https://www.thenewsminute.com/article/why-have-child-rapes-soared-151-5-years-33577

23 *Independent Thought v. Union of India,* AIR 2017 SC 3094

It has failed to consider nuances of age, age difference, and child development. There is a need to lower the age of consent from 18 to 16 owing to all the changes that can be witnessed in this modern era. Lawmakers should amend the Act following NCPCR recommendations. India can also follow the principle of close age exemption as followed in Canada to avoid any inducement or luring of a minor by an adult.

All these cases where accused, especially the landmark judgement Independent Thought v. Union of India[23] is failing the main objective behind the commencement of POCSO Act by not considering the best interest and wellbeing of the child. Where a child, who is mature enough to understand the consequences of his/ her action should not be punished for the consensual sex he/ she had which is not of exploitative nature. The major objective of POCSO Act was to protect the child and look for the best interest of the child through each stage of the case proceedings but such cases against the child for consensual sex activity, defeats the whole purpose of the act.

There were reported various loopholes in mechanism of judiciary and executive failing the successful implementation of POCSO Act. The government should try to work on all such loopholes and reconsider the consensual age as 18 in India. If all sexual activities under age of 18 will be categorized as illegal, these will create sexual tension within a person encouraging more rapes in the country. From all the above-mentioned facts and collected data it could be inferred that increasing of age from 16 to 18 didn't serve the main objective which was to prevent heinous offence of sexual exploitation and sexual abuse. Consensual age between matured and reasonable persons could not be covered under heinous offence. Thus, should not be covered under POCSO Act and best interests of a child should be taken note of in such cases.

Litmus Testing On The Impact Of Globalization On Legal Profession In Indian Scenario

***Dr Y Papa Rao**
****Mr Ankit Awasthi**

Introduction:

"Globalisation is the ongoing process that is linking people, neighbourhoods, cities, regions and countries much more closely together than they have ever been before"

– UNESCO[1]

India is the largest democratic country in the world. According to International Association of Lawyers, Indian legal profession is one of the largest in the world with over 1.4 million enrolled advocates nationwide.[2] Globalisation is not a new process at all for the world as it evolved during World War - II, but it is comparatively of recent origin in Indian scenario unambiguously from legal-centric point of view. This process has affected near about all the spheres of people. In 1991 India adopted LPG model and according to World Bank after taking 60 years to reach $1 trillion, it took the country just seven years to add the next trillion.[3] Although the process of globalisation has affected legal profession in India but still undoubtedly there are some areas which require attention and improvements.

In this regard, authors are intended to analyse the impact of globalisation on legal profession with especial reference to the historical background of legal profession, legal education with reforms, job creation, outside court settlement, modernisation/digitalisation and the position of women in Indian context. There is no doubt that the legal profession and system improved in multidirectional manner, but it still requires more improvement and specificity. Before we discuss these issues, to describe legal profession in Indian context, I would like to cite a book titled, *"a perceptive analysis of the legal profession and its shortcomings"* published by the Oxford University Press in the year 2000, in which one

1 GLOBALISATION, available at http://www.unesco.org/education/tlsf/mods/theme_c/mod18.html

2 Amal Kumar Ganguli, Co-Director of National and Regional Activities, "Overview of the Legal Profession in India," International Association of Lawyers; available at http://www.uianet.org/en/content/overview-legal-profession-india

3 India is now a $2-trillion economy, The Hindu, NEW DELHI, July 3, 2015; available at http://www.thehindu.com/business/Economy/india-is-now-a-2trillion-economy-says-world-bank-data/article7380442.ece

chapter is *"too much law / too little justice / too much rhetoric / too little reform"* that was liked by renowned jurist Fali S Nariman in his book titled, *"India's Legal System: Can it be saved?"* published by Penguin Books in which he also quoted one Para from abovementioned analysis that, *"an incompetent attorney can delay a trial for years… a competent attorney can delay one even longer…in this, then, the true measure of a competent advocate – that he can delay cases even longer than his colleagues?"* This problem is everywhere and more apparent in Indian scenario that we will analyse but before that historical background of legal profession is required to be covered in short.

Historical Background of Legal Profession:

Many Indian as well as foreign writers and historians have accepted this fact that, the legal profession was in existence in ancient India, it was in medieval India and it was during initial phase of Britisher's but in the form as it exists today. In modern sense from uniformity point of view, the history of the legal profession in India can be traced back with the event of the establishment of First British Court in Bombay in 1672 by Governor *Aungier.*[4] It is pertinent to mention here that, prior to the establishment of the Mayor's Courts in 1726 in Madras and Calcutta; there were no legal practitioners (in actual sense). So, from legal centric point of view letter-patent grant in the year 1726 till Advocates Act, 1961[5];

4 **Legal Profession in India, available at** http://www.barcouncilofindia.org/about/about-the-legal-profession/history-of-the-legal-profession/**; Under this head one point that is important to mention here that profession or some aspects of profession were in existence like rules about causes of action pleadings, plaints, written statements, burden of proof, trial rules and process and procedure of judgment, etc. But class of "legal practitioners" as a profession was not established because for that few things are required like: institutionalisation of a formal training programme, educational and professional qualifications including course which is supposed to be covered, regulation of education system as well as process for entering into profession, regulation of code of conduct and professional etiquettes etc. For details see Madras L.J. 201 (1909)**

5 Series of developments is as follows:

- Before Independence:
  - King George I granted letter patent to East India Company for establishing Mayor's Court in 1726 and later in 1753
  - Supreme Court of judicature established by a Royal Charter at Calcutta, Madras and Bombay (1774-1823)
  - Bengal Regulation VII of 1793
  - The Legal Practitioners Act of 1846
  - Supreme Court of 1774 was replaced by the High Court at the apex at Calcutta, Madras and Bombay in 1862
  - The Legal Practitioners Act of 1879
  - The Legal Practitioners (Women) Act, 1923
  - The Practitioners (Fees) Act, 1926
  - Indian Bar Committee or Sir Edwards Chamier Committee constituted in 1923 & submitted report in 1924; on the basis of which Indian Bar Council Act, 1926 came into existence

and afterwards legal practitioners and profession went through a series of changes.[6]

Major transformation took place by the process of globalisation which is still going and that is discussed hereunder:

Globalisation and Legal Education:

After independence, for the sake of clarity we can divide the legal education in India into following two parts:

- Before the inception of National Law School Model (1960–1985)
- After the inception of National Law School Model (1986 onwards)

Before the commencement of the Advocates Act, 1961 there were different categories of practitioners and to regulate them there were several regulators with ambiguity and uncertainty in rules but it brings some drastic changes in the legal education and professional as a whole by entrusting Bar Council of India few powers to regulate and improve this stream.[7] Through the Advocates Act, 1961 legal profession was integrated throughout the country under uniform standards set by the Bar Council of India, duly elected bar councils were created at the state and central levels with the authority to regulate the profession including standards of legal education (in consultation with UGC and autonomous universities) and all old categories of practitioners were merged into a single category called *"advocates"*[8]. Due to this after independence according to N.R. Madhava Menon following reforms (i.e. also known as first generation reform) took place in legal education[9]:

- LL.B. became a post-graduate programme of three year's duration[10];
- Rapid expansion of law teaching institutions, mainly in the private sector, many of them operating as part-time[11] institutions and the bulk of teachers coming from the practicing profession, giving lectures before or after court work;
- Development of core curriculum consisting of certain mandatory subjects; and

---

- After Independence:
  - All India bar committee constituted in 1951 & submitted report in 1953; 14th Law Commission of India Report, 1958 on the basis of which Bill was introduced in 1959 and finally the Advocates Act, 1961 came into existence.

6 Supra no. 05

7 Section 49 of the Advocates Act, 1961: General power of the Bar Council of India to make rules.

8 Id

9 N.R. Madhava Menon, The Transformation of Indian Legal Education: A Blue Paper, Harvard Law School, pg. no. 5; available at https://clp.law.harvard.edu/assets/Menon_Blue_Paper.pdf

10 After a basic degree in Arts, Science, Commerce or Humanities

11 A few hours in the morning or evening on the premises of regular colleges

- Establishment of a compulsory one year post-LL.B. apprenticeship with a senior advocate required for eligibility for license to practice (this was later dispensed with).

This system worked more than two decades but the quality was not as it was supposed to be. So for improving the standard and fulfilling the aspirations of public at large before globalisation the Bar Council of India developed a strategy of sponsoring a Model Law School with university status to act as a pace-setter for legal education reforms envisaged by its five-year integrated LL.B. curriculum and this initiative led to the birth of the first National Law School at Bangalore in 1986 which was supposed to become *"the Harvard of the East"* according to its sponsors.[12] According to Prof. (Dr.) N.R. Madhava Menon, *"the success of the National Law School experiment was indeed a turning point in Indian legal education, particularly in respect to academic excellence, social relevance and professional competence. It soon assumed the dimensions of a movement with every state in India seeking to establish a National Law School on the Bangalore model."*[13] After the conclusion of Uruguay round of negotiations Marrakesh agreement was signed due to the effect of which WTO came into existence on 1st January, 1995. India was the contracting party of GATT and it is also a member of WTO nevertheless we have accepted and applied LPG model in the year 1991 itself (mainly because of IMF's SAP). Due to these changing dimensions worldwide various new subjects came on paper like International Trade

12 N.R. Madhava Menon , at pg. no. 6

13 Id; list of NLUs under CLAT 2018:

1. National Law School of India University (NLSIU), Bengaluru
2. National Academy of Legal Study and Research (NALSAR), University of Law, Hyderabad
3. National Law Institute University (NLIU), Bhopal
4. The West Bengal National University of Juridical Sciences (NUJS), Kolkata
5. National Law University (NLU), Jodhpur
6. Hidayatullah National Law University (HNLU), Raipur
7. Gujarat National Law University (GNLU), Gandhinagar
8. Dr. Ram Manohar Lohiya National Law University (RMLNLU), Lucknow
9. Rajiv Gandhi National University of Law (RGNUL), Punjab
10. Chanakya National Law University (CNLU), Patna
11. The National University of Advanced Legal Studies (NUALS), Kochi
12. National Law University Odisha (NLUO), Cuttack
13. National University of Study and Research in Law (NUSRL), Ranchi
14. National Law University and Judicial Academy (NLUJA), Assam
15. Damodaram Sanjivayya National Law University (DSNLU), Visakhapatnam
16. Tamil Nadu National Law School (TNNLS), Tiruchirappalli
17. Maharashtra National Law University (MNLU), Mumbai
18. Maharashtra National Law University (MNLU), Nagpur
19. Maharashtra National Law University (MNLU), Aurangabad

Law, Investment and Competition Law, Intellectual Property Protection Law, Corporate Taxation, Infra-Structure Contract Law, Corporate Governance, Environment Regulations etc. and undoubtly National Law Schools have played significant role in the development and expansion of the these subjects because of their autonomous status, five year integrated law programme, intensive legal education and resources etc.

Above-mentioned improvements are noteworthy but one thing i.e. important to discuss here is the role of BCI in this respect. Because NLUs are just 19 under the Common Law Admission Test-2018 which produce nearly 2,000 law graduates every year. But rest 58,000 (approx.) are the production of other universities where law is not taken in its exclusivity. BCI[14] has to play crucial role but data reflects different story. According to the Government of India, Ministry of Law And Justice, Annual Report 2014-2015, *"The Bar Council of India generally meets once in three months. From 01.4.2014 to 31.12.2014 Bar Council of India held its General Council 10 meeting...During this period Legal Education Committee*[15] *held 6 meeting and BCI based on inspection report and recommendation of the Legal Education Committee grants approval of affiliation, extension and show cause notices in case of deficiencies."*[16] In such a short span of time too much work by limited number of people[17] how we can be assured by the quality of the system? This is a question for debate.

Job creation through the transformation of legal education:

When you just for the sake of curiosity try to know the total no. of enrolled advocates in India on Google then you will get about 1,25,00,000 (1 Crore 25 Lakhs) results (in just 0.33 seconds) but there is not a single source which I can recommend to get a complete picture about the same.[18] For the same you have to refer numerous diversified sources that we can deem as loophole in our system as a whole because on one hand the whole purpose of roll was to identify the professionals for clarity and uniformity in conduct point of view, but in reality it is difficult to get it. In this respect the Bar Council of India's *Vision Statement*

14 The Bar Council of India was constituted under the Advocates Act, 1961 and it has been empowered among other things to lay down standards of professional conduct and etiquette for lawyers and to lay down, maintain and improve the standards of legal education in the country.

15 The Legal Education Committee consists of 10 Members, out of which 5 members are members of the Bar Council of India and 5 Members are co-opted from outside under Section 10(2)(b) of the Advocates Act, 1961

16 Government of India, Ministry of Law And Justice, Annual Report 2014-2015; Pg. no. 33 available at http://lawmin.nic.in/ld/Final%20Annual%20Report%202014-15.pdf; BCI accredited one new law school every 3 days, as 92 new colleges mushroomed in 2014 (in just nine months)

17 Supra no. 16

18 https://www.google.co.in/#q=total+no+of+enrolled+advocates++in++india

2011-2013 would be helpful; as mentioned therein that during said period, *"The Indian legal profession today consists of approximately 12 lakh registered advocates, around 950 law schools and approximately 4-5 lakh law students across the country. Every year, approximately 60,000 – 70,000 law graduates join the legal profession in India… The practice of law has however changed drastically in the past few decades – and the major reason for the same has been the liberalisation and growth of the Indian economy. Therefore, we now see a rapidly growing (and international quality) corporate legal sector in India as well as the beginning of an outsourced legal process services sector. Further, the growth of the Indian economy has inevitably led to complex laws and regulations and it is important that lawyers across India have access to necessary tools to keep up with the pace of change."*[19]

In this background law professionals are supposed to get job by providing legal services but in Indian scenario not even a single source of law has defined or identified the contours of legal services. In the WTO's *"Services Sectoral Classification List"* (document MTN.GNS/W/120), *"legal services"* are listed as a sub-sector of *"business services"* and *"professional services"*.[20] In the United Nations Provisional Central Product Classification (UNCPC) the entry *"legal services"* is sub-divided into following heads[21]:

- Legal advisory and representation services concerning criminal law

  ③ Advice, representation and related services (defence, search for evidence, witnesses, experts, etc.) concerning criminal law.

- Legal advisory and representation services concerning other fields of law

  ③ Advice, representation and other related legal services in judicial and quasi-judicial procedures concerning civil law, administrative law, constitutional law, international law, military law and other fields of law, except criminal law

- Legal documentation and certification services, and

  ③ Drafting and certification of documents and other related legal services concerning patents, copyrights and other intellectual property rights.

19 VISION STATEMENT 2011-2013; available at http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/vision-statement-2011-13/

20 Dr. N. L. Mitra, Report on TRADE IN LEGAL SERVICES, Executed by Indian Council for Research on International Economic Relations, pg. no. 3 available at http://www.icrier.org/pdf/NLMitra.PDF

21 Department of Economic and Social Affairs, Statistics Division, Central Product Classification (CPC) Version 2.1, United Nations, New York, 2015, UNITED NATIONS PUBLICATION, available at https://unstats.un.org/unsd/classifications/unsdclassifications/cpcv21.pdf

- ③ Drafting and certification of documents and other related legal services concerning other legal documents, such as wills, marriage contracts, commercial contracts, business charters, etc.

- Other legal Services:
  - ③ Arbitration and conciliation services.

Therefore in abovementioned streams law graduates can engage themselves as legal professionals. From practical application point of view, according to Prof. (Dr.) N. L. Mitra, *"the way in which one can divide the legal services in India is between adversarial practice, which focuses on the more "traditional" aspects of the legal profession such as litigation and dispute resolution, and transactional practise, which focuses on transaction-related activities, such as documentation, general advise, negotiation, etc. Competition between Indian and foreign law firms is likely to initially arise in the area of transactional practise rather than adversarial work."*[22] So, as per Section 30 and 33 of the Advocates Act, 1961 foreigners cannot do practice in Indian courts, but they can do other activities (except the application of the principle of rule of reciprocity in terms of recognition). There are various law firms in India which provide good jobs to law graduates having expertise in drafting and corporate practices. At this juncture it is pertinent to mention that, *"before 1991 there were not more than 7-8 leading law firms… but after 1991 employment of senior and junior advocates in the law firms have increased by more than 800 times… About a hundred new law firms have come into existence in Calcutta, Delhi, Bombay, Madras, Bangalore and Hy1derabad. It naturally means that the need for professional services in the corporate sector have tremendously increased ever since 1991."*[23]

Apart from firms and LPOs globalisation also extended the doors of academics for post graduate students in India but still the problem with solo practice which is the major area of engagement for Indian lawyers graduating from non-NLUs is a great matter of concern and worry. In this respect former CJI Hon'ble Justice Thakur observed that, *"we now have lawyers coming straight to Supreme Court. They don't know what burden of proof is or how to conduct themselves in court. Many of them do not even know the basics. We already have two million lawyers. 60,000 new one enter the profession every year. Out of that around 2000 are from National Law Universities. What about the remaining 58,000? Any further addition should be based on merit and talent. Just because you have a law degree should not mean you have become a lawyer."*[24] The area which deeply affected and transformed by globalisation is out of court settlement method and models.

---

22 Id at pg. no. 14

23 Id at pg.no. 9

24 See, http://www.livelaw.in/just-because-you-have-a-law-degree-should-not-mean-you-have-become-a-lawyer-sc/.

Globalisation and Out of Court settlement:

As observed earlier that after the implementation of LPG model our economy improved tremendously. In such environment specifically with respect to business or commerce related activities to settle dispute expeditiously Arbitration Act, 1940 has been repealed to give way to the Arbitration and Conciliation Act, 1996. Government of India also took initiatives in this respect like: The International Centre for Alternative Dispute Resolution (ICADR) has been established to promote, popularise and propagate alternative dispute resolution methods to facilitate early resolution of disputes and to indirectly reduce the burden of arrears in Courts.[25] The ICADR has Cooperation Agreements with various Foreign Organisations.[26] ICADR has also entered into a Memorandum of cooperation (MOC)[27] and Memorandum of Understanding (MOU)[28] with various organisations.

25 Government of India, Ministry of Law And Justice, Annual Report 2014-2015; Pg. no. 30 available at http://lawmin.nic.in/ld/Final%20Annual%20Report%202014-15.pdf; Rules and Bye-laws framed and adopted by ICADR are as follows:

- The ICADR Arbitration rules, 1996 (including provisions for Fast Track Arbitration)
- The ICADR Conciliation Rules, 1996; and
- The ICADR Mini Trial Rules, 1996 etc.

26 Government of India, Ministry of Law And Justice, Annual Report 2014-2015; Pg. no. 31; available at http://lawmin.nic.in/ld/Final%20Annual%20Report%202014-15.pdf; Agreements with following foreign organisations:

- The Arbitration and Mediation Centre of the World Intellectual Property Organisation of Geneva
- The Thai Arbitration Institute Bangkok
- The Korean Commercial Arbitration Board, Seoul, (Korea)
- The Chartered Institute of Arbitrators, London and
- The Association of Arbitration Courts of Uzbekistan

27 Government of India, Ministry of Law And Justice, Annual Report 2014-2015; Pg. no. 31; available at http://lawmin.nic.in/ld/Final%20Annual%20Report%202014-15.pdf; ICADR has also entered into a Memorandum of cooperation(MOC) with the following organisations:

- International Council of Consultants (ICC) and construction Industry Development Council (CIDC) to jointly work in collaboration with Singapore International Arbitration Centre towards strengthening the ADR movement.
- India CIS chamber of Commerce and Industry, New Delhi mainly to popularize arbitration and mediation as means of settling disputes arising out of international and domestic commercial transactions.

28 Government of India, Ministry of Law And Justice, Annual Report 2014-2015; Pg. no. 31-32' available at http://lawmin.nic.in/ld/Final%20Annual%20Report%202014-15.pdf; ICADR has also entered into a Memorandum of Understanding(MOU) with the following organisations:

- Alternative Dispute resolution Centre, Kochi, Kerala for promoting ADR in Kerala and jointly organizing training Programmes/Seminars/Conferences on Mediation and Arbitration and also undertaking Research Studies in the field of ADR.
- National Law University, Delhi to jointly conduct P.G. Diploma Courses in Alternative Dispute Resolution, Family Dispute Resolution both on regular basis and through proximate education and for conducting Training Programmes in

Apart from it Code of Civil Procedure, 1908 also amended to deal with ADR. Section 89 of CPC, 1908 came into being in its current form[29] on account of the enforcement of the CPC (Amendment) Act, 1999 with effect from 1st July, 2002 to expedite the cases and make the environment easy after globalisation.[30] To cope up with the changing situations and to make well drafted enactments in the wake of globalisation in January, 1989 (with a view to increase the availability of trained Legislative Counsel in the country) the Institute of Legislative Drafting and Research (ILDR) was established as a Wing of the Legislative Department, Ministry of Law and Justice with this the Ministry of Law and Justice made clear the objects as follows in context of globalisation[31]:

Arbitration and Mediation.

- Damodaram Sanjivayya National Law University (DSNLU, Visakhapatnam. Under this MOU, DSNLU will be conducting PG Diploma in ADR (Regular Cou8rse for 6 months) at Vishakhapatnam in collaboration with ICADR.
- ICADR has also entered into a Memorandum of Understanding with Jindal Global Law School, O.P. Jindal Global University, Sonipat, Haryana, India to jointly promote the learning and teaching of ADR methods and research therein by developing new Courses and organizing various Workshops, Seminars, Conferences, and Training Programmes etc. in the field of ADR.

29 Section 89 of CPC, 1908; Settlement of disputes outside the Court:

(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

a) Arbitration;

b) Conciliation

c) Judicial settlement including settlement through Lok Adalat; or

d) Mediation.

(2) Where a dispute had been referred-

a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

30 GOVERNMENT OF INDIA, LAW COMMISSION OF INDIA, Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions, Report No. 238; available at http://lawcommissionofindia.nic.in/reports/report238.pdf

31 Ministry of Law and Justice comprises of the Legislative Department and the Department of Legal Affairs. The Department of Legal Affairs is concerned with advising the various Ministries of the Central Government while the Legislative Department

- To reform the Indian Legal service to make it efficient, responsive and globally competitive
- To develop a comprehensive e-governance solution for Central Agency Section and IT enabled transformation of the Department of Legal Affairs.
- To reduce litigation and encourage settlement of disputes by Alternative Dispute Resolution (ADR) Methods
- To promote excellence in the Legal Profession and to develop a frame work to usher a new era in the field of legal education
- To bring Legal reforms
- To effectively administer the Acts under the purview of this Department viz., the Advocates Act, 1961, the Notaries Act, 1952, the Legal Services Authorities Act, 1987 and the Advocates Welfare Fund Act, 2001

Abovementioned objects are seemed to be achieved through data presented in the Annual Report 2014-2015 by Ministry of Law And Justice; like if we talk about *Gram Nayayalayas* So far 10 States have notified 194 Gram Nyayalayas, out of which 159 are operational. During the period from 01.04.2014 to 30.11.2014 more than 19.72 lakhs persons have been benefited through legal aid services in the country.[32] The Lok Adalat benches from the Supreme Court to the Taluk Courts had successful sittings and many pending cases were disposed of bringing pendency down by about 9 % on an average throughout the country.[33]

One more point under present head is important to mention that in partnership with the United Nations Development Programme (UNDP), the Department of Justice (DOJ), Ministry of Law and Justice, is implementing a decade long programme on Access to Justice for Marginalised People (2008-2017). The project extends to the eight

---

is concerned with drafting of principal legislation for the Central Government. See, Composition and objects of The Ministry of Law and Justice, Annual Report 2014-2015, pg. no. III; Government of India, Ministry of Law and Justice, Annual Report 2014-2015; available at http://lawmin.nic.in/ld/Final%20Annual%20Report%202014-15.pdf

32 Article 39A of the Constitution of India provides for free legal aid to the poor and weaker sections of the society and ensures justice for all. Articles 14 and 22(1) of the Constitution also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on the basis of equal opportunity to all. The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to monitor and evaluate implementation of legal aid programmes and to lay down policies and principles for making legal services available under the Act.

33 Government of India, Ministry of Law and Justice, Annual Report 2014-2015; available at http://lawmin.nic.in/ld/Final%20Annual%20Report%202014-15.pdf

United Nations Development Action Framework (UNDAF) states of Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Rajasthan, Uttar Pradesh, Maharashtra and Odisha. This project focuses on strengthening access to justice for marginalised people by developing strategies that address barriers to accessing justice in legal, social and economic domains. The first phase expanding from 2008 to 2012 made significant contributions.[34] The second phase of the project extends over five years from 2013 to 2017. After out of court settlement it is high time to throw some light on the impact of globalisation on Information and Technology i.e. known as digitalisation and GOI's initiatives in this respect.

Globalisation and Modernisation/Digitalisation:

Although globalisation played crucial role in the facilitation of modernisation, digitalisation and computerisation since the first wave of LPG (1991) but GOI through National Mission for Justice Delivery and Legal Reforms [35] **(**set up in August, 2011) intended to achieve twin objectives viz.[36]

- Increasing access by reducing delays and arrears in the system, and

34 Achievements of phase I:

- Legal literacy initiatives reaching over 2 million people from marginalized communities on awareness of their legal rights. Inclusion of legal literacy in the adult literacy programme under the National Literacy Mission Scheme (Sakshar Bharat).
- Training of over 7,000 paralegals from various backgrounds.
- A first-ever study conducted in India on legal aid clinics run by law schools and needs assessments of several State Legal Services Authorities to enable a better understanding of the barriers faced by marginalized communities in accessing justice.

35 Government of India, Ministry of Law And Justice, Annual Report 2014-2015; pg. no. 75; available at http://lawmin.nic.in/ld/Final%20Annual%20Report%202014-15.pdf Action Plan of the National Mission:

- Policy and legislative changes – Formulation and Implementation of State Litigation Policies to reduce Government Litigation, Judicial Impact Assessment, Amendments to the Negotiable Instruments Act, Motor Vehicle Act and Arbitration & Conciliation Act, Legal Education Reforms.
- Re-engineering of court procedures, promotion of Alternative Methods of Dispute Resolution, identification of bottlenecks and automation of court processes through use of ICT tools.
- Improving manpower and infrastructural facilities for judiciary.
- Focus on Human Resource Development – Strengthening State Judicial Academies and National Judicial Academy, Training of Court functionaries and appointment of Court Managers.
- Action Research and Studies on Judicial Reforms.

36 The Mission has been pursuing a co-ordinated approach for phased liquidation of arrears and pendency in judicial administration, which, inter-alia, involves better infrastructure for courts including computerisation, increase in strength of subordinate judiciary, policy and legislative measures in the areas prone to excessive litigation, re-engineering of court procedure for quick disposal of cases and emphasis on human resource development.

- Enhancing accountability through structural changes and by setting performance standards and capacities.

The e-Courts Integrated Mission Mode Project has been conceptualized based on the *"National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary-2005"* by the e-Committee of the Supreme Court of India. The Government approved the computerization of 14,249 district & subordinate Courts under the project by March 2014 with a total budget of Rs. 935 Crore.[37] In addition to above, ICT infrastructure of the Supreme Court and High Court has also been upgraded. Government of India, Ministry of Law and Justice in its Annual Report mentioned the progress on other activities of the project like Unified national core application software, Judicial Service Centre (JSC), National Judicial Data Grid (NJDG) and the national e-Courts portal (http://www.ecourts.gov.in) for e-services to litigants.[38] Recently live streaming of court proceedings observed as the "*need of the hour*" by the hon'ble Supreme Court of India.[39]

Globalisation and role of women in the administration of justice:

After discussing the changes that took place after globalisation now this part of the paper deals with area which is considerably unaffected by the wave of globalisation i.e. role of women in the administration of justice. Martin Luther King, Jr. said that, *"Injustice anywhere is a threat to justice everywhere."*[40]

On 6th March, 2016 Prime Minister Narendra Modi addressed the National Conference of Women Legislators where he talked about women empowerment but their participation in judicial administration system is a matter of concern. On one side we are talking about 33% reservation in one organ of state i.e. legislature and on other side it's less than 1% (comparatively). Right from the post of Chief Justice of India till the chairpersons in various commissions their presence is substantially very less and can be deemed as not affected by the wave of globalisation (in negative sense) even in the acceptance of the background of the advantages of diversity. In this respect some points are as follows:

37 The objective of the e-Courts project is to provide designated services to litigants, lawyers and the judiciary by universal computerization of district and subordinate courts in the country and enhancement of information and communications technology (ICT) enablement of the justice system.

38 Supra no. 36

39 The Indian Express, Monday, July 30, 2018, available at https://indianexpress.com/article/india/live-streaming-of-court-proceedings-can-be-undertaken-centre-tells-supreme-court-5252507/

40 See, https://philosiblog.com/2013/05/24/injustice-anywhere-is-a-threat-to-justice-everywhere/

1. Till date not even a single female has been appointed as Chief Justice of India and currently also there are only two female judges in the Hon'ble Supreme Court of India.[41] **[1950-2016] [All Males]** [representation is less than 1%]. Their representation in High Courts is also not satisfactory. According to a survey[42] Females are just 12% in comparison with 88% males in High Courts. High Court of Delhi[43] There are some High Courts having not even one female judge [Chhattisgarh,[44] Himachal Pradesh,[45] Jammu & Kashmir,[46] Jharkhand,[47] etc.]
2. Till date not even a single female has been appointed as Chairperson of Law Commission of India. **[1955-2016] [All Males]**[48]
3. Till date not even a single female has been appointed as Chairperson of Bar council of India. **[1962-2016] [All Males]**[49]
4. Till date not even a single female has been appointed as Chairperson of National Human Rights Commission of India. **[1993-2016] [All Males]**[50]
5. Till date not even a single female has been appointed as Chairperson of National Green Tribunal **[2010-2016] [All Males]**[51]

Conclusion:

In this background we cannot deny the overall positive impact of globalisation in legal profession from Indian scenario, as far as the improvement of law education as an independent subject is

41 See, http://www.supremecourtofindia.nic.in/judges/judges.htm; Hon'ble Mr. Justice Dipak Misra (Current), Till date not even a single female has been appointed on the post of CJI [Justice M. Fathima Beevi was the first female judge to be appointed to the Supreme Court of India (**1989**) and the first Muslim woman to be appointed to any higher judiciary. She is the first woman judge of a Supreme Court of a nation in India and Asia]

42 See Dainik Bhaskar, 21st February, 2016 titled, "nyaypalika me mahilaon ke sath anyay/ injustice to women in judiciary"

43 http://delhihighcourt.nic.in/cjsittingjudges.asp

44 http://highcourt.cg.gov.in/sittingjudges/sitting.html

45 http://hphighcourt.nic.in/

46 http://jkhighcourt.nic.in/judges.html

47 http://jharkhandhighcourt.nic.in/Sitting_Judges.html; Hon'ble Chief Justice Gyan Sudha Mishra and Hon'ble Chief Justice R. Banumathi (Elevated as Judge of Supreme Court of India)

48 See, http://www.lawcommissionofindia.nic.in/main.htm

49 See, http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/former-chairmen/; Manan Kumar Mishra (Current)

50 See, https://en.wikipedia.org/wiki/National_Human_Rights_Commission_of_India; Hon'ble Mr. Justice H.L. Dattu (Current)

51 See, http://www.greentribunal.gov.in/chairperson.aspx; Hon'ble Mr. Justice Adarsh Kumar Goel (Current)

concerned. Due to which job creation and opportunities increased and digitalisation further assisted the Indian legal system to come in line with international standards. However, the position of women in this profession requires considerable attention as evident from abovementioned data. In this context, after a significant increase in the percentage of gender diversity in this profession, we would be in a position to assess the aggregate impact of globalisation in true sense.

Poverty : A Threat to Holistic Development of Individuals and Nations

***Mr Mrinal Singh**

I. Introduction

There is no denying the fact that beside the existence of various threats to human livelihood in the recent decades, one significant aspect of poverty has shaken the mankind like no other thing in the recent past. In a lifestyle and living, where majority claims to be well equipped with modern technologies, inventions, advancements and a well to do standard of living, there is a story of a dark world, suffering and trying to survive every day with hope of a proper one time meal through whatsoever means possible. We cannot deny the very fact that a major chunk of our respective societies, which is suffering through poverty and trying to cope up with their daily requirements for survival can also play a significant contribution towards the overall development of the society and nation in order to take the nation towards a situation, which has minimum people below poverty line. According to United Nation's Multidimensional Poverty Index[1], about 1.5 billion people in the 102 developing countries are currently covered by the MPI, of which about 29 percent of their respective population lives in multidimensional poverty, that is, with at least 33 percent of the indicators reflecting acute deprivation in health, education and standard of living. Additionally, close to 900 million people are at risk to fall into poverty if financial, natural or other setbacks occur. So, it becomes a very serious, crucial and burning question of the hour to discuss and find out ways to tackle and eliminate poverty from our respective societies in order to ensure the survival of maximum possible on the planet in the 21st century.

II. Defining Poverty

Poverty, being a multi-dimensional and multi-cultural phenomenon, there exists no dispute to the fact that a universally accepted definition or universally accepted notions of differentiating the poor from non-poor is not possible. In regards of Aluko perception of poverty as "a lack of command over basic consumption needs"[2], being a situation of in availability of consumption needs leading to insufficiency of food,

---

* Student, BBA, LL.B(Vth Semester) Lovely Professional University,

1 United Nations Development Programme, *Human Development Reports*, Geneva, *available at,* http://hdr.undp.org/en/content/multidimensional-poverty-index-mpi (Last Modified April 28, 2018)

2 BENJAMIN TERYIMA ASHAVE, *Poverty, Inequality and Underdevelopment in Third World Countries: Bad State Policies or Bad Global Rules?* India, *available at,* http://www.iosrjournals.org/iosr-jhss/papers/Vol15-issue6/F01563338.pdf?id=7752 (Last Modified May 3, 2018)

clothing or shelter, and perpetuating in capabilities to feel one's ability to participate and stand in a dignified society. According to World Health Organization, "Poverty is associated with the undermining of a range of key human attributes, including health. The poor are presented to more prominent individual and ecological wellbeing dangers, are less very much sustained, have fewer data and are less ready to get to social insurance; they along these lines have a higher danger of ailment and inability. Conversely, illness can reduce household savings, lower learning ability, reduce productivity, and lead to a diminished quality of life, thereby perpetuating or even increasing poverty."[3] Various economists often seek to identify poverty as the families whose economic position falls below some minimally acceptance level. The international standard of extreme poverty is set to the failure of being able to possess 2 $ in a single day as per the benchmark set up by World Bank to measure and calculate Poverty.[4] Every now and again, destitution is comprehended in relative or outright terms. Outright neediness estimates destitution in connection to the measure of cash important to address fundamental issues, for example, nourishment, apparel, and safe house. Relative destitution then again characterizes neediness in connection to the monetary status of different individuals from the general public: individuals are poor in the event that they fall beneath winning ways of life in a given societal setting/social situation.

III. Major Causes

In order to understand major causes leading to the poverty, ultimately resulting in underdevelopment of nations, the poverty itself needs to be understood from various prospective and notions. Various social facts like overpopulation, the portion of population involved in various sectors of the economy, high population density, inappropriate availability and distribution of resources, illiteracy in the society etc. play a significant role as to existence or non-existence of poverty in a particular society or a nation. Beside these traditional causes and factors, some other factors like poor governance, organizational setup and inappropriate plans to tackle poverty on the part of the government, wide spread unemployment, unfair and illegal trade practices, natural calamities/ disasters or historical factors like colonialism and imperialism also act as a deciding element of presence of poor or non poor in a particular society and a social setup.

IV. Related Issues

Poverty is not a single problem in itself which requires attention and possible solutions to make the situation better, but the problem even

3 http://www.who.int/topics/poverty/en/

4 MARTINN RAVALLION, SHAOHUA CHEN, PREM SANGRAULA, *Dollar, a day revisited*, India, *available at*http://documents.worldbank.org/curated/en/350401468157768465/pdf/wps4620.pdf (Last Modified May 5, 2018)

gets magnified and multiplied when poverty eventually results into malnourishment, unemployment, population explosion, trafficking, prostitution, psychological problems, and loss of lives/deaths in gross numbers. Poverty, in most of the societies and social setups in Asian and African countries is not acting just as an end, but rather means to further social, economical, psychological, developmental and humanitarian problems, issues and challenges as stated above. The biggest challenge which poverty has to offer is the malnourishment of the children, eventually leading to discontinuation of education, poor physical/ mental and psychological conditions and eventual casualties across various social setups and socities. The families falling prone to poverty have high chances of their children being malnourished and suffering various diseases, in absence of proper diet and nutritional food. According to UNICEF, In 2016, 22.9 per cent, or just under one in four children under age 5 worldwide had stunted growth. In 2016, about two out of every four stunted children lived in South Asia and one in three in sub-Saharan Africa is malnourished.[5] Despite malnourishment and unfortunate deaths of children due to lack of proper food and diet bearing a direct consequence of poverty, unemployment continues to be a shaking part of economic story of every underdeveloped and developing country. Unemployment too has a direct relation with poverty. In fact, unemployment and poverty share a cause-effect relationship, both of which prove fatal and disastrous for the overall development of any nation. So, failure to place a check upon the unemployment levels of the country will eventually result into increased number of total persons living their lives below poverty line. The conventional principle which is still applicable in the rural parts of various countries including India is that more people means more work and thus more income. People from rural backgrounds, having limited educational qualifications and a limited access to various resources, as an extension to the stated implication, contributes towards having more children. Thus, poverty also has a direct implication upon the overpopulation in a particular country. Lastly, poverty has acted as a catalyst to various anti-social and illegal activities in the society including prostitution, trafficking, child labor etc. Females, on an average sharing almost an equitable proportion of total population in a particular country are often forced into prostitution and other such illegal activities, who care not capable of supporting their families economically by other legal means of earning livelihood and survival. Even trafficking and illegal trade of females and children has grown significantly in previous times, just as a consequence to incapability of the respective individuals of the society to support themselves and their

5 *Undernutrition contributes to nearly half of all deaths in children under 5 and is widespread in Asia and Africa, available at,* https://data.unicef.org/topic/nutrition/malnutrition/ty (Last Modified May 5, 2018)

families economically.In Southeast Asia human trafficking is widely regarded as interregional with laborers being collected from countries within the region and ultimately working within the region. Victims from Southeast Asia have also been found in many other countries around the globe. According to United Nation's GLOBAL REPORT ON TRAFFICKING IN PERSONS, 2012, In Southeast Asia human trafficking consists of forced sexual labor and forced labor which leads to mixed forms of human trafficking. In Thailand and Malaysia trafficking mainly takes the form of sexual exploitation, while in Indonesia forced labor is more prevalent, but both forms of sexual and forced labor can be found. According to the report, it is estimated that around 10,000 laborers are deceived or captured into forced labor annually in the southeast and south asian region.[6] Thus, the bearing and consequences of poverty are really alarming and shocking is proving a major setback to the overall development of the countries. In the presence of poverty as a major challenge to growth of developing and underdeveloped nations, it becomes very important to place a check on the related issues to bearing direct consequences of poverty or sharing a cause-effect relationship with poverty.

V. The Present Scenario

Due to historical reasons like colonialism and imperialism and absence of equitable distribution of economic resources, the underdeveloped and developing countries of Asian and African regions are more prone to poverty and in fact are struggling to eradicate the challenge of poverty from their respective societies and social setups in a more hazardous manner as compared to other countries of American or European regions. As per the report of World Bank Report, throughout the previous quite a few years, three locales, East Asia and Pacific, South Asia, and Sub-Saharan Africa, have represented somewhere in the range of 95 percent of worldwide destitution. However, the structure of neediness over these three districts has moved significantly. In 1990, East Asia represented portion of the worldwide poor, though nearly 15 percent lived in Sub-Saharan Africa, by 2015 conjectures, this is actually switched. Sub-Saharan Africa represents half of the worldwide poor, with somewhere in the range of 12 percent living in East Asia. The developing centralization of worldwide destitution in Sub-Saharan Africa is of extraordinary concern. While some African nations have seen huge achievements in decreasing neediness, the district all in all slacks the remainder of the world in the pace of reducing destitution.

6 United Nation's - *GLOBAL REPORT ON TRAFFICKING IN PERSONS, 2012,* Geneva, *available at,*http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf (Last Modified May 5, 2018)

Sub-Saharan destitution tumbled from an expected 56 percent in 1990 to an anticipated 35 percent in 2015.[7] Thus, an estimated study of the statistics brings any person to the conclusion or perception that above everything, the poverty needs to be checked and eliminated from the sub-saharan Africa at priority for the betterment of the lives of the individuals of the said region.

VI. Possible Solutions, Suggestions And Recommendations To Curb Poverty At Global Level

In the light of various consequences which poverty brings and the related issues which emerge as challenges in the modern era, rooted in poverty, it becomes very important and rather of utmost importance to bring into effect such a framework which is capable of curbing and tackling poverty. Some of the measures which could be adopted at economic level of any country is to increase minimum wages of the employees, increasing social security schemes, formulating poverty curbing mechanisms and policies and increasing number of jobs and employment opportunities. Despite from the contribution of the government, egalitarian and vigilant citizens of the society and non-governmental organizations can come up with innovative methods and techniques to curb the spread of the problem of poverty. Micro-financing and small scale industries can also help in a great way to finance small startups and help in generating employment for the rural population. Additionally, a proper mechanism should be adopted as to ensuring proper nutrition and eliminating any possible chances of malnourishment in the children of respective social set ups of the countries. People living in poverty and vulnerable groups must be empowered through participation in all aspects of their lives. It is essential to expand opportunities to enable those living in poverty in order to enhance their overall capacities and improve their economic and social conditions. An equal access to all the poor and vulnerable sections of the society towards basic requirements of livelihood needs to be ensured in order to curb and eliminate poverty from the very grass root level.

V. Conclusion

There has been a discussion upon the major regions across the world, which are most prone to poverty and where poverty exists in abundance. The definition of poverty has different notions and aspects and has no universally accepted definition, but incapacity to have access to shelter, food, clothing and other such minimum requirements of livelihood

7 *World Bank Forecasts Global Poverty to Fall Below 10% for First Time; Major Hurdles Remain in Goal to End Poverty by 2030, available at,* http://www.worldbank.org/en/news/press-release/2015/10/04/world-bank-forecasts-global-poverty-to-fall-below-10-for-first-time-major-hurdles-remain-in-goal-to-end-poverty-by-2030 (Last Modified May 6, 2018).

amounts to state of poverty in general parlance. Poverty in itself is not the only problem, but the related aspects and issues which share a cause and effect relationship with poverty also enlarges/ widens the problem of poverty as a whole. The Asian and African countries are home to most poverty inflicted population. Various mechanisms and innovative methods needs to be adopted on the part of government, vigilant/ egalitarian individuals and other bodies like NGOs etc. in order to eradicate poverty from the respective societies and social set-ups of different countries. Generation of more jobs, ensuring social security and bringing into effect more poverty centric and poverty alleviation schemes can help in curbing the problem of poverty, so that a holistic development of respective nations could become possible and the world should become a better and safer place to live, where in every individual despite of his caste, color, gender, creed, nationality, ethnicity, age etc. have an access to minimum requirements of livelihood like food, shelter, clothing etc. as a matter of dignified living.

A Critical & Comparative Analysis Of Shariah Compliant Banking: With Special Reference To Its Scope In Indian Banking Sector

***Mr Ghulam Yazdhani**
****Mr Abhishek Gupta**

I. Introduction

Since the dawn of human civilization, financial intermediation has formed the bedrock of economic development. In this globalized world, a growing economy requires two things: firstly, a progressive rate of public savings, and secondly, adequate institutional and regulatory framework required for mobilizing and allocating those savings into the economic system.[1] In a country's economic system, financial institutions (banks, financial markets, Non-Banking Finance Companies etc.) play a pivotal role in channelizing funds from the depositors to the entrepreneurs. These financial institutions mobilize public savings, and allocate them into viable investments to ensure high yielding returns for the savers. The money generated in the process not only strengthens the economic system but also serves as a source of funds for the government to steer the public administration and social welfare.

Today access to banking services is a necessity. With the interlinking of crucial government social welfare programs with banking system has made banking institutions an important stakeholder in the public delivery system. Moreover, banks are no more repositories of public savings, but also undertakes complex financial transactions such as investment banking, financial intermediation between consumers and business enterprises etc.

Even though banking is an economic concept governed by conventional rules of *Lex-Mercatoria*. Nonetheless it has been influenced by moral and ethical undertones prescribed by religious texts and scriptures. One such example has now become an alternative banking model known as Islamic/Interest-free banking. Interest-free banking refers to the banking practices which involves absence of interest based transactions. Interest-free banking is usually associated with the religious belief of Muslim community which prohibits dealing in

* Associate Professor, Faculty of Law, Jamia Milia Islamia, New Delhi

** Research Scholar, Faculty of Law, Jamia Milia Islamia, New Delhi

1 Zafar Eqbal, "Relevance of Islamic Banking System in the Present Economic Scenario" 53 (2) *JILI* 356 (2011).

interest or usury. Interest-free banking has been adopted by several banks and other financial institutions which offer '*Shariah* compliant' financial products and services. Islamic banking system which is interest free, permits financing only through profit-sharing model, where risk is shared between the bank and borrower. Such prohibition on interest emerges from the Islamic understanding that an unjustified increase in capital without any labour or effort is of no moral value. Unlike conventional banking, *Shariah* compliant financial institutions operate under the Islamic code of commercial morality, which is based on divine revelations, transcends the man-made factors of commercial transactions. Hence, the Islamic perspective puts onus on the Islamic financial institutions to counterbalance their profit-making objectives with social needs. Therefore, interest free/Islamic banking has been called as banking with 'conscience' or 'ethical' banking.

The concept of Shariah-compliant banking is a new and noteworthy development in the history of money-lending. Interest free or Islamic banks operate in most of the Muslim-majority countries like Saudi Arabia, Bangladesh, Kuwait, Pakistan, and South East Asian countries such as Malaysia, Indonesia. Apart from Muslim majority countries, *Shariah* compliant banking has emerged as an alternative banking system in Western liberal countries such as U.K, U.S.A, Australia and Germany etc.

Despite an emerging global consensus on interest-free banking, it is yet to find favor in the India. Though several preliminary initiatives were taken by the RBI and Government of India, Interest-free banking as an alternate of the conventional banking in India is still a distant dream. The advocates of interest-free banking in India have been trying materialize this concept in India, so far there is no full-fledged commercial Islamic bank, or a conventional bank with Islamic window presently operating working in India. The present statutory and regulatory regime governing the Indian banking sector has proved to be hostile for the growth and success of *Shariah* compliant banking. In India where a large section of population is engaged in the primary sector of economy and lives on less than $2/day, interest-free banking could be a viable alternative to micro-financing needs of the poverty stricken population. With right implementation and government support, interest-free banking has the potential to serve as an effective tool of financial inclusion and poverty alleviation in India.

II. Principles of Islamic banking

According to Erol and El-Bdour, the Islamic banking may be broadly defined "as an organized institutional framework designed to spread the application of the interest-free banking concept by establishing banks and investment organizations throughout the world, operating

in accordance with Islamic economic doctrines".[2] The OIC defined an Islamic Bank as "a financial institution whose statutes, rules and procedures expressly state its commitment to the principles of Islamic *Shariah* and to the banning of the receipt and payment of interest on any of its operations."[3] Some of the major principles of Islamic banking and finance are as follows:

Prohibition of riba (Interest)

Interest-free banking is the most significant and distinguishing feature of Islamic banking which sets it apart from the conventional banking. The *Al-Qur'an* prohibits interest, the collection and payment of interest, also commonly called *riba*.[4] Usury/*riba*, in simple terms, means any excess, unjust increase or augmentation in the course of an economic transaction. *Riba* includes unjustified increase in borrowing or lending money paid in kind or in money above the amount of loan, as a condition imposed by the lender or voluntarily by the borrower, *fiqh riba al-duyun* (debt usury);[5] unjustified increment gained by the seller or the buyer if they exchanged goods of the same kind in different quantities. This is called *riba al-fadl* or *riba-al-buyu* (trade usury).[6] One of the major economic rationales for prohibiting interest/usury *riba* is that in Islamic economic jurisprudence money is merely a medium of exchange which determines the value of a thing, it has no intrinsic value independent of the thing whose value it represents.[7] Therefore, money should not give rise to more money in the form of interest.[8] Moreover, *riba* has been called to be an exploitative, unfair, and a sign of oppression.[9]

Profit sharing and risk sharing partnership

Since interest free/Islamic banking prohibit banks from charging or dealing in interest, the banking operation and financial health of such

2 Cengiz Erol and Radi El-Bdour, "Attitudes, Behaviour and Patronage Factors of Bank Customers Towards Islamic Banks" 7 (6) *IJBM* 31 (1989).

3 As cited by: Abhishek Gupta "Embracing Islamic Banking in India: Impediments & Solutions" 2 *JLJ* 48 (2017).

4 *Al-Quran (*2:275) "Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity." That is because they say, "Trade is [just] like interest. But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein."

5 Abdel-Rahman Yousri Ahmad, *Riba, Its Economic Rationale and Implications*, Available at: http://www.islamic-banking.com/iarticles_8.aspx, Last visited on 29.4.2018.

6 *Ibid*.

7 Abdul Azim Islahi, *History of Islamic Economic Thought: Contributions of Muslim Scholars to Economic Thought & Analysis*, Edward Elgar, Cheltenham (2014) p. 44-45.

8 See, John T. Noonan Jr. "Tokos and Atokion: An Examination of Natural Law Reasoning against Usury and against Contraception" *NLF* 216-217(1965).

9 See, *Al-Quran* (2:279-283).

banks might suffer. For a healthy and efficient monetary system, banks need funds which can be invested into the economy. Therefore, Islamic banking and finance takes care of such needs by allowing banks to invest its capital in the loan accounts and other profitable economic activities.[10] Even though Islam prohibits *riba* (usury), it doesn't prohibit *ribh* (trade profit).[11] The only caveat in Islam with regard to profit making is risk sharing between the contracting parties i.e. the bank and the customer. The Islamic banking insistence on profit sharing rather than interest based returns stems from its belief that money in itself has no intrinsic value but rather a medium of exchange.

Therefore, Islamic finance is asset backed or equity based, where profits are generated through sale and purchase of a real, tangible asset with intrinsic value. Another important feature of Islamic finance is that capital is considered to be a part of entrepreneurship – by contributing capital in an investment account/venture, investor assumes risk and is entitled to commensurate share in the profits.

Prohibition of haram investments

Islamic banking offers an ethical model of investment banking which prohibits investments in *haram* businesses. These *haram* business generally include activities which are prohibited under the Islamic law such as dealing or trade in alcohol[12] or pork;[13] pornography or media.[14] A perusal of the prohibitions under Islamic laws are closely related to public policy considerations in conventional banking business. As a matter of principle, Islamic banks strictly adhere to the mandate of *Shariah*, and prohibit any transaction which is a *haram* according to Islamic law. *Shariah* Supervisory Boards under Islamic banks are responsible for doing compliance relating to such prohibitions.

Prohibition on Speculative (Maisir) and uncertain (Gharar) transactions

Contractual uncertainty (*Gharar*) and speculative investments (*Maisir*) are strictly prohibited under Islamic commercial law. Therefore, *Shariah* compliance makes it incumbent upon the Islamic financial institutions desist from engaging in *gharar* sale or *maisir*transactions. *Gharar* means risk or uncertainty. It's an ignorance of the subject matter or material characteristics of the transaction which is the source of excessive risk, and detriment to one party over the other.

10 Muhammad Nejatullah Siddiqui, *Banking Without Interest*, Ishaat-e-Islam Publication Ltd., Delhi, (1983), p.49.

11 *Supra* note 4.

12 *Al-Qur'an* (2:219, 5:90).

13 *Al-Qur'an* (2:173).

14 Muhammad Yusuf Saleem, *Islamic Commercial Law*, John Wiley & Sons Ltd., Singapore (2013), p.5.

In commercial sense, it's nothing but "trading in risk".[15] According to Umar F. Moghul and Arshad A. Ahmed:[16]

"Gharar may be best understood as ignorance of the material attributes of a transaction, such as the availability or existence of the subject matter, its qualities, quantity, deliverability, and the amount, terms, and timing of payment."

Similarly, principle of *maisir* entails prohibition on gambling and other speculative activities. Such prohibition is primarily reasoned on the lack of labour and hard work involved in the process of asset creation. In otherwords, an easy means of earning by way speculation is against the values of Islam, which preaches entrepreneurship as a legitimate means of earning profits. It is owing to the principle of *maisir*, Islamic financial institutions are forbidden from entering derivatives markets.

II. Islamic banking in a globalized world: With special reference to Malaysia & United Kingdom

Despite having its genesis in 7*th* century A.D., the emergence of modern IFIs is relatively new. Starting with small scale micro-finance institutions in Pakistan (1950) and Malaysia (1962), the first set of modern Islamic financial institutions emerged in the 1960s and 1970s. However, the 1973 oil crisis reignited the Arab world to usher the Islamic economic which gave a major boost to Islamic banking and finance. Consequently, a large number of financial institutions based on the principles of Islam were established in Gulf countries such as Abu Dhabi, Saudi Arabia, and Bahrain. Starting from traditional retail and commercial banking activities such as house mortgages, trade finance etc., Islamic banking and finance entered into new areas such Insurance (*takaful*), Bond market (*Sukuk*) and developed Shariah-compliant financial products and services. By 1980s, countries like Islamic Republic of Iran, Sudan and Pakistan had completely transformed their economies Shariah-compliant by embracing Islamic banking system. Although mandatory implementation in Pakistan has been postponed owing to Pakistan's Supreme Court judgement in 2002.[17] However, in most of the GCC countries and other jurisdictions there are dual banking systems available for the customers, and the conventional banking and the Islamic banking coexist either in same legal framework or in parallel legal framework.

15 Mahmoud A. El-Gamal, *An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence,* p. 1, Available at: www.ruf.rice.edu/~elgamal/files/gharar.pdf, Last visited on 01.04.2018.

16 Umar F. Moghul, Arshad A. Ahmed, "Contractual Forms in Islamic Finance Law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N.V. & Ors: A First Impression of Islamic Finance" 27 (1) *FILJ* 171 (2003).

17 See, *United Bank Ltd. v. M/S Farooq Brothers* etc., Civil Shariat Review Petition No. 1 of 2000 (Pakistan).

The current global economy which is still recovering from the 2008 global meltdown, Islamic financial institutions are gradually becoming an important stakeholders of the global financial system, with Gulf and South East Asian economies being the major centres of Islamic financial institutions. However in the recent years developed countries like Germany,[18] UK,[19] USA,[20] and France[21] have incorporated Islamic Banking in their mainstream banking sector. It is estimated that there are more than 600 *Shariah*-compliant financial institutions functioning in atleast 75 countries in one form or the other. As of 2014, *Shariah* compliant financial institutions represented approximately 1% of total world assets[22] and as of 2013 total assets worth 1.8 trillion were *Shariah* compliant.[23] Ernest & Young in its 2013 report stated that Islamic banking assets grew at an annual rate of 17.6% between 2009 and 2013, and will grow by an average of 19.7% from 2013-18.[24] It is also estimated that global Islamic banking asset is likely to amount $3.7 trillion by 2019.[25]

Among South East Asian countries, Malaysia is the leader of Islamic banking and finance. Malaysia's engagement with *Shariah* banking began in September 1963 when Perbadanan Wang Simpanan Bakal-Bakal Haji (PWSBH) was established. PWSBH was established as a Hajj management fund for Muslims to save for their Hajj (pilgrimage to Mecca) expenses. In 1969, PWSBH merged with Pejabat Urusan Haji to form Lembaga Urusan dan Tabung Haji (Tabung Haji). Thereafter, on 30 July 1981, a 20-member National Steering Committee of Islamic Banks was established. The committee submitted its report on 5 July 1982

18 In 2010, Kuveyt Turk (KT) opened an office in Mannheim, Baden-Wuerttemberg. In 2012 it appealed to the German authorities for a full banking license. KT Bank AG was opened on July 1, 2015 as the first *Shariah* Compliant bank in Germany. See, Germany's first interest-free Islamic bank opens in Frankfurt, Available at: http://rt.com/business/271105-germany-opens-islamic-bank/, Last visited on 10.04.2018.

19 Islamic Bank of Britain (IBB), the European Islamic Investment Bank (EIIB) – first Islamic investment bank from Europe, the Bank of London & the Middle East (BLME), Securities House (UK), the European Finance House (EFH). (Note- list is not exhaustive).

20 Broadway Bank of Chicago, Lincoln State Bank, University Bank, Devon Bank, are some of the examples of Islamic banks currently operative in U.S.A. (List is not exhaustive).

21 National Bank of Kuwait (NBK), Tejerat Bank (TB), Qatar National Bank (QNB). (List is not exhaustive).

22 Naveed, The Size of the Islamic Finance Market, Available at: http://www.islamicfinance.com/2014/12/size-islamic-finance-market-vs-conventional-finance/, Last visited on 12.04.2018.

23 International Monetary Fund (IMF), Islamic Banking and the Role of the IMF, Available at: http://www.imf.org/external/themes/islamicfinance/, Last visited on 12.04.2018.

24 Ernest & Young, *Report on World Islamic Banking Competitiveness* (2013) p.6.

25 Thomas Reuters, *Report on the State of Global Islamic Economy* (2014-15), p.6.

and recommended the introduction of Islamic banks under *Shariah* principles. It also recommended a religious supervisory council for ensuring *Shariah* compliance. Following these recommendations, the Islamic Banking Act (IBA) 1983 was enacted which paved way for the establishment of first modern IFI - Bank Islam Malaysia Berhad (BIMB) in 1983. After the establishment of BIMB, the Malaysian government started the Islamic Banking Scheme which allowed and encouraged commercial banks to provide *Shariah* compliant banking products and services. The scheme was introduced with a purpose to provide alternative to conventional banking but eventually it became a complementary banking system.

Malaysia has a very unique legislative framework consisting of mixed jurisdictions and mixed legal systems namely common law and the *Shariah*. BNM is the chief regulator and supervisor of the Malaysian banking and financial sector. Malaysia has two models of banking (interest-based conventional banking and interest-free Islamic banking), mutually co-exiting with each other.[26] However, both the models are governed by the same regulator i.e. BNM. Malaysia's conventional banking is governed by the recent Financial Services Act, 2013[27] and interest-free/Islamic banking is governed by the recent Islamic Financial Services Act, 2013 (IFSA).[28] The IFSA which came into force on June 30, 2013 lays down the regulatory and supervisory framework for IFIs with an objective to promote financial stability and *Shariah* compliance in the Islamic financial industry. It is because proactive government support as of 2016 nearly 23% of Malaysian banking asset are *Shariah* compliant.[29]

U.K is a multicultural secular country. With its rich legal heritage, it was one of the country which has immensely contributed towards the development of *Lex Mercatoria*. With a population of 2.7 million, Muslims are the second largest religious group in U.K, constituting 4.8% of the total U.K population.[30] With a considerable population of Muslims, the U.K was one of the first non-Islamic country to recognize

26 Duality of financial system has been established by virtue of a statutory provision. The Central Banking Act, 2009 (Malaysia), s. 27, provides that Malaysian financial system shall consist of conventional and Islamic financial system.

27 The Act 758 of 2013 repealed the Banking and Financial Institutions Act, 1989 (Malaysia) which governed conventional banking business in Malaysia.

28 The Act 759 of 2013 repealed the previous Islamic Banking Act of 1983 (Malaysia) and the Takaful Act of 1984 (Malaysia) and consolidated the law of all Islamic financial services into one single code.

29 Islamic Financial Services Board (IFSB), *Islamic Financial Services Industry Stability Report* (2017), Available at: http://www.ifsb.org/docs/IFSB%20 IFSI%20 Stability%20Report%202017.pdf, Last visited on 1.05.2018.

30 U.K. 2011 Census, Available at: http://www.ons.gov.uk/peoplepopulationandcommunity/ culturalidentity/ religion/articles/religioninenglandandwales2011/2012-12-11, Last visited on 25.4.2018.

the potential of *Shariah* compliant banking and finance.

Islamic banking entered British markets in 1980s with the launch of *Al-Barakara* International in 1982. Initially these banks were not successful in attracting customers and a credible investment opportunity. To identify the problem and suggest practical solutions, in 2000, a working group was constituted by the British government under the chairmanship of Lord Buxton. The major impediments were located in the tax and stamp duty treatment to *Shariah* compliant transactions. It was observed by the committee that financial products offered by Islamic financial institutions were at disadvantage vis-à-vis conventional banks due to presence of 'profit' based returns offered by the former. The profit based returns attracted tax liabilities whereas interest based returns offered by conventional banks enjoyed tax/ stamp duty rebates.

Through series of legislative and policy amendments in the Financial Services & Market Act, 2000, interest-free/Islamic financing has been brought at par with the conventional financial products. For example, in order to accommodate peculiar form of financing under *murabaha* and *musharakah*, rules have been amended to give equal tax treatment to theses alternative finance arrangements at par with their conventional finance equivalents.[31] The UK's approach towards Islamic banking is pillared on two main points – a level playing field which entails no discrimination between conventional banks and IFIs;[32] second is the absence of any special concessions to conventional as well as Shariah compliant financial institutions at the cost of other.[33] Another striking feature of UK model lies in its non-interference in the religious matters of Islamic banking.[34] The central bank of Britain i.e. Bank of England has refrained from giving guidelines on *Shariah* compliance, keeping the secular nature of its functioning intact. The UK has left the element of *Shariah* compliance of the transactions a matter of 'internal' regulation for IFIs.

IV. Prospects of Islamic banking in India

In India, financial exclusion of poor and backward classes has been a major cause of concern. Despite several efforts, nearly half of the population has no access to banking services. The problem of exclusion is more severe among the Muslim population. In this context the role of interest-free banking as a measure of financial inclusion and poverty

31 The Corporation Act, 2009 (United Kingdom), ss. 503, deals with Purchase and resale arrangement; 504 deals with diminishing *musharakah* arrangements; 506 deals with profit sharing arrangements; 507 provides for investment bonds in Islamic banking).

32 *Supra* note 3 at 60.

33 *Ibid.*

34 *Id.*at 59.

alleviation becomes relevant. The potential of interest-free/Islamic banking can be evaluated from the fact that India is home to 172 million Muslims[35] and accounts over 11% of the global Muslim population.[36] Despite the potential of Islamic banking in tapping financial resources from a significant population, it is still a distant dream.

The Indian banking system is highly regulated and centralized sector, where the government exercises vast powers of rule-making in relation to banking business. However, the economic crisis of 1991 paved way for extensive financial sector reforms which brought deregulation, competition, liberalized banking and monetary policies etc. Post liberalization some initiatives towards interest free financing through micro-financing or NBFCs were made by some states and institutions. But, by and large the introduction of commercial *Shariah* compliant banking has not materialized. However, in the recent past some groups have been trying their best to promote the idea of Islamic Banking as an alternative means of banking for the unbanked.

The first step towards introducing Islamic banking in India was mooted way back in early 2000s, when the RBI appointed a Working Group under the chairmanship of Mr. Anand Sinha. The Anand Sinha Committee was constituted to look into the question of commercial feasibility of *Shariah* compliant banking in India. However, in 2003 the committee opined that Islamic banking couldn't be introduced owing to the statutory and regulatory constraints in present legal framework governing the banking sector.

Another issue which reinforced the demand for *Shariah* compliant banking was in 2005, when Sachar Committee pointed out massive financial exclusion of Muslims in India. According to the Sachar Committee report,[37] the access of Muslims to bank credit was low and inadequate.[38] Committee further noted that some banks were also reluctant to extend banking and credit facilities to certain 'negative geographical zones' with high concentration of Muslims.[39] The committee went on to state that:[40]

"the financial exclusion of Muslims has far-reaching implications for their socio-economic and educational upliftment...steps should be

35 Registrar General and Census Commissioner, *Census of India* 2011 (2011), Available at: http://www.censusindia.gov.in/2011census/C-01.html, Last visited on 22.4.2018.

36 Pew Research, *Study on Global Muslim Population*, (Jan. 27, 2011), Available at: http://www.pewforum.org/2011/01/27/the-future-of-the-global-muslim-population/, Last visited on 25.4.2018.

37 Rajendra Sachar, *Report of the Committee on Social, Economic and Educational Status of the Muslim Community of India* (2006).

38 *Id.* at 136.

39 *Ibid.*

40 *Id.* at 136-137.

introduced to specifically direct credit to Muslims, create awareness of various credit schemes and bring transparency in reporting of information."

Moreover, socio-religious demographics have also affected the lending patterns of micro-financing institutions. For instance, the Sachar committee in its report has observed that a great disparity based on religion exists in micro financing and credit facilities by the specialized banking institutions like NABARD, SIDBI. According to Sachar committee the percentage share of Muslims in number of loans, amount sanctioned and amount disbursed by SIDBI was merely 1.5%, 0.6% and 0.5% respectively.[41] Sachar committee has also observed that an estimated 3.2% of production credit and 3.9% of investment credit, amounting to Rs.291 crores and Rs.333 crores, respectively, was provided to Muslim community on an average annually during the two years – 2004-05 and 2005-06.[42]

The demand for opening up of Islamic banking institutions in India gained impetus when the Congress-led UPA came to power after 2004 *Lok Sabha* elections. UPA Government under the Prime ministership of Dr. Manmohan Singh adopted a positive approach towards the objective of inclusive growth advocated in favor of establishing Islamic banks in India. The PM's 15 Point Programme advocated for a certain share of priority sector lending for minorities. The amount disbursed to minorities under priority sector lending was Rs. 58,663 crores in 2007-08, which increased to Rs.1,64,748 crores in 2011-12, almost 3 times increase in 4 years. The achievement in targets has been above 85% in all the financial years at the all-India level.

However, the share of credit lent to minorities under priority sector lending has ranged between 7.5% in 2006-07 to 11.3% in 2012-13.[43] This is much lower than the percentage of minority population in the country. Muslims are not the major beneficiaries of priority sector lending since both the target and achievements in Muslim concentrated states have been very low. For Instance, the targeted amounts and utilized amounts are both very low in Uttar Pradesh (where Muslims are concentrated), even less than those of Punjab. The achievements in Assam, Bihar, west Bengal, and Maharashtra have been relatively lower (less than the target). Ministry of Minority Affairs had reported that the share of priority sector lending (PSL) to minorities has increased to

41 *Id.* at 134.

42 *Id.* at 135. (Except in West Bengal, Kerala, Uttar Pradesh, Rajasthan and Tamil Nadu, the share of Muslims in re-finance has been limited; Muslims have also received a good share of investment credit refinance in Assam and Jammu and Kashmir).

43 Amitabh Kundu, *Report of the Committee to Evaluate the Process of implementation of the Report of Sachar Committee* (2014), p.140, Available at: http://iosworld.org/download/Post_Sachar_Evaluation_Committee.pdf. Last visited on 30.04.2018.

16.09% in 2013-14 of total PSL by banks in the country.[44] However, Muslims could get only 44.31%, while Sikh had 24.58%, Christian 21.87%, Buddhists 2.06%, Parsis 2.23% and Jains 4.96% in total PSL to minorities in the same year.[45] This shows that except Muslims and Buddhists, the two most deprived minorities, other minorities are able to corner larger share in PSL.[46]"

In 2007, a high level committee on financial sector reforms was appointed by the Planning Commission, under the chairmanship of Dr. Raghuram Rajan (Former RBI Governor). The committee highlighted the need for financial inclusion of the disadvantaged groups of society. The committee observed that faith based prohibitions, such as prohibition of interest in Islam, was one of the major impediments towards securing the objective of financial inclusion and universal access of banking products and services. In this regard the committee observed: [47]

"Another area that falls broadly in the ambit of financial infrastructure for inclusion is the provision of interest-free banking. Certain faiths prohibit the use of financial instruments that pay interest. The non-availability of interest-free banking products … results in some Indians, including those in the economically disadvantaged strata of society, not being able to access banking products and services due to reasons of faith. This non-availability also denies India access to substantial sources of savings from other countries in the region."

The committee recommended that interest-free banking should be allowed with appropriate regulatory safeguards as a measure of financial inclusion. The committee observed: [48]

"While interest-free banking is provided in a limited manner through NBFCs and cooperatives, the Committee recommends that measures be taken to permit the delivery of interest-free finance on a larger scale, including through the banking system. This is in consonance with the objectives of inclusion and growth through innovation. The Committee believes that it would be possible, through appropriate measures, to create a framework for such products without any adverse systemic risk impact."

Against this background, the RBI maintained a lukewarm response towards introducing Islamic banking in India. The extent of reluctance on the part of RBI was such that in under the governorship Dr. D.

---

44 Ministry of Minority Affairs, *Report on Evaluation of Prime Minister's New 15 Point Programme for Welfare of Minorities* (2016) p. 120.

45 *Supra* note 43 at 163.

46 *Ibid.*

47 Raghuram Rajan, *Report of the Committee on Financial Sector Reforms* (2009) p.72.

48 *Ibid.*

Subbarao, RBI maintained that Islamic banking/interest-free banking under the present statutory and regulatory framework was not possible since interest was a major component of banking in India.[49] Even though, Govt. of India while dealing with the issue of Islamic banking has been cautious but sometimes it has taken a proactive stand and dissented with the RBI on the issue. For example, despite RBI's reluctance towards the Islamic banking, in 2010, Prime Minister Dr. Manmohan Singh asked RBI to look into the Malaysian model of Islamic banking.[50] However, by and large Government of India has acknowledged the statutory and regulatory constraints in the introduction of interest free/Islamic banking in India and avoided any serious confrontation with the RBI on the issue of Islamic banking.[51]

A renewed impetus to the cause of interest-free banking of India was on December 28, 2015, when a RBI appointed panel under the chairmanship of Deepak Mohanty (Executive Director, RBI) recommended the opening of interest-free banking windows within the conventional banks.[52] The committee primarily appointed to inquire into the issues in financial inclusion, dedicated an entire chapter on interest-free banking. The committee largely reiterated the observations made by Raghuram Rajan committee, that one of the primary reasons for financial exclusion was in fact the absence of interest-free banking services in India. The committee in its report gave an empirical study which indicated that a significant section Muslims in India were less inclined to access formal finance (conventional banking) on religious grounds, thus leading to their financial exclusion from the formal financial sector.[53] Interestingly, the recommendations and observations made by the committee also sets the context of interest-free banking in India. Firstly, it underlines the policy objective of financial inclusion behind the introduction of interest-free banking in India. Secondly, it proposes progressive development of interest-free banking in India with the prior introduction of simple/limited *Shariah* compliant banking products. However, the report didn't recommend any particular model or regulatory regime for introducing interest-free banking. In the light of legal issues and regulatory challenges faced by interest-free banks, it would have been more desirable that appropriate model

49 See, *Edited Transcript of RBI Governor's Post-Policy Conference Call for Media held on Oct. 30, 2012,* Available at: https://www.rbi.org.in/Scripts/bs_viewcontent.aspx?Id=2602, Last visited on 01.05.2018.

50 See, *PM asks RBI to look into Malaysian Islamic banking model,* Available at: http://articles. economictimes.indiatimes.com/2010-10-27/news/27568806_1_islamic-banking-interest-free-banking-trillion, Last visited on 3.5.2018.

51 For elaborate discussion, *supra* note 3 at 62-65.

52 Reserve Bank of India, *Report of the Committee on Medium Term Path on Financial Inclusion* (2015).

53 *Id.* at 43.

for introduction was also provided along with the report. Moreover, the RBI in its annual report for the year 2015-16 acknowledged the problem of voluntary faith based financial exclusion and proposed to explore modalities for introducing interest-free banking in consultation with the Government of India.[54]

But the greatest challenge in introducing *Shariah* compliant banking in India has been the political challenges that lies in introducing a faith based banking system in a secular country. The issue of *Shariah* Compliance has always been seen with much suspicion in India, particularly by right-wing political regime. In a country where Muslims are seen as a consolidated vote bank, any attempt to introduce Islamic banking could send ripples across the political spectrum. In recent years opening of *Shariah* compliant NBFCs has in fact led to a lot of opposition, and a subject matter of litigation from various political activists. In Kerala, establishment of *Shariah* compliant finance company by KSIIDC was challenged in Kerala HC by Dr. Subhramanium Swamy.[55] It was argued that the establishment of a *Shariah* compliant company by the Govt. of Kerala was against the principles of secularism. The court upheld the Kerala govt.'s decision to setup a *Shariah* compliant financial company. The court further said that although the institution was based on religious principles, its aim was not to spread religion and the state's participation in it was based on purely commercial reasoning.[56]

In India where communal tension remains high and demand for a uniform civil code has been a subject matter of aggressive and contentious debate, any initiative at the government's behest to introduce a faith based banking is likely to provoke the secularism vis-à-vis minority rights debate. In November 2014, SBI announced to launch an open ended equity scheme in compliance with the Islamic laws, '*Shariah* Equity Fund' by December 2014.[57] However, within one month of such declaration SBI, on November 30, 2014, deferred the launch without citing any specific reason.[58] Further recently, the

54 See, Reserve Bank of India, *Report of the Central Board of Directors on the working of the Reserve Bank of India* (2016) p. 71.

55 See, *Dr. Subrahmanium Swamy v. State of Kerela,* (2011) SCC Online Ker. 3692.

56 *Ibid.* Justice Chelameshwar in his judgment observed:
"The payment of money from the exchequer is proposed to be made with a view to achieve a commercial benefit. Such payment would be made to a corporate body which proposes to carry on the business in compliance with certain principles based on the religious text of a particular religion, but not to propagate religion. In our view such a payment would not have the primary and direct effect of supporting or maintaining the religion. The main and primary is commerce but not propagation of religion."

57 See, State Bank of India, *SBI Shariah Equity Fund*, Available at: www.sebi.gov.in/ sebi_data/attachdocs/ 1401101950592.pdf, Last visited on 24.4.2018.

58 State Bank of India, *Defer the launch of New Fund Offer of SBI Shariah Equity Fund*,

prospects of introducing Islamic banking received severe jolt when the RBI while replying to an RTI query categorically ruled out the introduction of *Shariah* compliant banking citing "the wider and equal opportunities" considerations available to all citizens to access banking and financial services.[59]

With the initiation of several measures like Jan Dhan Yojana, Mudra Yojana etc., financial inclusion has captured the centre stage of policy making in India. However, the financial inclusion regime in India has revolved around conventional banking model which is interest based. The issue of voluntary financial exclusion arising out of faith based prohibitions on interest has come into light in recent years. According to a study conducted by the World Bank in 2012, nearly 7% of people in India cited religious reasons for not having a bank account orusing products and services of financial institutions.[60]

Moreover, the consequences of exclusion were aggravated with the announcement of demonetisation, when NDA govt. demonetised 500 Rs. and 1000 Rs. notes from the economy. The absence of bank accounts made several Muslims suffer while depositing old notes into banks. Several accounts of difficulties faced by Muslims across countries were reported in mainstream media and online portals.[61] Another blow was suffered when Govt. stopped the notes exchange policy, citing heavy rush in banks. This further forced Muslims to either open interest bearing bank accounts or use another's account to deposit their savings.[62]

There has been a consistent demand from the representatives of the Muslim community for introducing *shariah* compliant banking in India. With its impressive double digit growth, the 2 trillion Dollar industry has outperformed conventional banking in Gulf countries, and South East Asian economies like Malaysia; but is now rapidly expanding its footprints via 'Islamic windows' in various other countries. Global financial centres like Hong Kong, Luxembourg, and London have also emerged as a preferred destination for advance Islamic bond (*Sukuk*) markets.

(Oct. 7, 2016), Available at: www.sbimf.com/docs/default-source/general/sbimf-notice-ad-30-11-2014_final-revised.pdf?sfvrsn=2., Last visited on 24.4.2018.

59 See, Editorial, "RBI no to Islamic banking", *Telegraph*, Nov. 13, 2017.

60 See, World Bank, Global Findex Database Report, 2017, Available at: https:// globalfindex.worldbank.org/, Last visited on 25.4.2018.

61 See, Pointing out No ATMs in Muslim Areas Is Not Communal, *available at:* https:// www.ndtv.com/opinion/ my-attacking-notes-ban-is-not-communal-1637847, Last visited on 26.4.2018.

62 See, Safwat Zargar, "How Are Muslims, Who Don't Have Bank Accounts for Religious Reasons, Handling Note Ban?" *Scoop Whoop*, Nov 23, 2016, Available at: https:// www.scoopwhoop.com/How-Demonetization-Is-Affecting-Muslims-Who-Dont-Have-Bank-Accounts-Due-To-Religious-Reasons/#.ux5n19pno, Last visited on 30.4.2018.

However, it is unfortunate to see that a banking system which has proven its track records in other countries including secular counties like – U.K., USA etc. is struggling because of political challenges. Eminent Indian economists such as Former RBI Governor Dr. Raghuram Rajan, and Former Prime Minister and Finance Minister Dr. Manmohan Singh have supported the idea of interest-free banking as an effective approach towards tackling the problem of faith based financial exclusion.

V. Conclusion

The influence of Islam on the banking law has been two fold – first, to offer an alternative banking paradigm which is free from the vagaries of interest/usury; second, to offer alternative financial instruments on risk sharing PLS basis. However, the scope of Islamic banking is not confined to these two alone, it has introduced a new dimension of ethical economics for financial growth and economic welfare. Although the general principles of conventional banking cannot be replaced in the coming years, despite economic meltdown of 2007-08, yet banking on the principles of Islamic law has shown a new approach to the banking business in the globalized world. From its modest start as pilgrim fund management, IFIs have transformed themselves as modern institutions of banking and finance. The developed as well as the developing economies have realized the untapped potential of *Shariah* compliant banking and finance. From U.S.A to Australia, from U.K. to China, Islamic banking is an emerging trend in their economic landscape. Whether it is the need for attracting investments from Gulf or adopting an alternative financial inclusion paradigm or realizing the potential of Islamic banking micro financing potential, the Islamic banking has practical solutions today. One can only hope that a country like India will sooner or later realize the potential of *Shariah* compliant banking and incorporate it in its banking structure as an alternative mechanism to spur inclusive growth and social welfare.

Get Connected to the outreach platforms of HNLU

1. Sui Generis

"Sui Generis" is the faculty seminar series at HNLU for the faculty presented online. The platform to be expanded for connecting with the legal fraternity at large in the coming phases will have research topics currently dealt by faculty and also their contributions in various conferences. The format to have 35 minutes of presentation by the faculty led by a discussant followed by interaction with the participants. A total of 31 Sui Generis seminars were conducted between April to September of 2020 and were recorded. The second phase of the programme will also have select invited speakers and will be open to other registered participants.

Email id: digital@hnlu.ac.in

2. Lex Osmose (Non CGPA Credit Courses @ HNLU)

The five-year law programme introduced three decades back has over the years facing the challenge of balancing the mandatory courses of the regulatory bodies with that of the specialized domains of knowledge. To enable the students with emerging areas of new developments. The Lex Osmose programme is designed as customized single/ double credit courses offered by external faculty comprising of Academics, Advocates, Policy wonks and Civil Society enthusiasts. These courses to be offered online /off line to interested applicants to be evaluated for the learning outcome and will be part of the certification outside CGPA.

Email id: lexosmose@hnlu.ac.in

3. Ex Arca

EX ARCA is the outreach platform of Hidayatullah University to connect with the student community at the University and to the legal fraternity at large. EX ARCA means 'out of the box' is a blended platform of Online and Off line dissemination of the interface of Arts & Humanities, Social Sciences, Science & Technology and management with law. The programme will invite academicians, lawyers, Judges, Civil Servants and NGOs. The conceptual thrust behind EX ARCA is to provide exposure on nuanced professional – 'The Future Lawyer'.

Email id: exarca@hnlu.ac.in

4. ALMA Matters…

The future autobiography of many a 'thought leaders' had their preface inked in a class room, cafeteria, cultural fest or a college dorm. Teachers and class mates are often the inspiration for the future screen play of the alumni in their life and career.

The 'Alma Matters…' webinar platform designed at HNLU aims to invite, honour and get inspired from the Alumni of their turbulence and triumphs, ambivalence and achievements for an intergenerational motivation.

Yes, Alma Mater Matters…

Email id: alma@hnlu.ac.in

HNLU JOURNAL OF LAW & SOCIAL SCIENCES (HNLU JLSS)

Volume: IV **January – December, 2018**

Mode of Citation: *HNLU JLSS 2018 (IV) <Page No.>*

HIDAYATULLAH NATIONAL LAW UNIVERSITY

Atal Nagar, Raipur, Chhattisgarh – 492002

Phone: 0771-3057604 Email: jlss@hnlu.ac.in

Website: www.hnlu.ac.in

ISSN 2347-839X