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Message from the Patron

It is a matter of proud privilege and immense pleasure for me to introduce Vol.3 Number 1 of the NLUA Law and Policy Review to the knowledge loving readers. This law journal is the expression of the quality research in the field of law and policy relevant to the need of society in the present day scenario.In the present day of developed technology and consequent Knowledge explosion it becomes imperative to acquire as much knowledge as one can and disseminate it along with one`s own experimentation among the members of the society . The world is moving very fast, the problems are cropping up very swiftly demanding handling of situations with proper solutions. The law is the vehicle and policy is the means of achieving the social goal. More and more researchers are required to know the minutest detail of the problems, the laws to tackle them and the policy to render effective services to the society. National Law University Assam like any other National Law University in the country attaches great importance and gives due weightage to research based teaching and learning. The students are being trained to indulge in searching social problems, critically evaluate the laws on the point and suggest effective solutions through workable policies, so as to make the legal education socially relevant and inspiring.NLUA Law and Policy Review is the harbinger of promotion of quality research. It has evinced wide appreciation and high commendation in the legal circle and has made its presence felt in the most reputed libraries throughout the country.

The present issue is in continuation of the earlier issues of this bi-annual faculty run peer reviewed journal expressing multi-disciplinaryas well as inter disciplinary approaches justifying the testimony that law is the lawyer's extroversion. It covers most timely and socially relevant articles with a number of positive suggestions. It contains the contribution of articles from academia as well as the students on social issues in general and the issue of north east tribal communities in particular.

The journal is the outcome of constant vigil, untiring efforts, imaginative vision and great zeal and mission of the Editorial Board and Facultyadvisors for which they all deserve congratulations.

Prof. (Dr.) J.S. Patil
Vice-Chancellor
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Editorial

The NLUA Law & Policy Review, a referred journal listed by University Grants Commission (Sr.No. 37023) inits First issue of Third Volume comes with a consolidation of carefully selected intellectually erudite compilation of research papers encompassing an array of new ideas in the domain of IPR, agriculture, Food Security, Mediation & Arbitration, Tribal Customary Laws, Cyber Crime, Demonetization, Children's protection, Police accountability, Traditional Knowledge, new Environmental jurisprudential concepts, Sustainable Development, Refugee law and Inter-State River Water Disputes, including a case comment. All these research articles deal with issues of far-reaching socio-legal implications.

The article "*Impact Assessment of Legal Regime on Imported Food Articles in India*" by Tarun Arora and Neelu Mehra delves in to the legal status of imported food articles under the Food Safety and Standards Act, 2006 (FSSA), the rules, and regulations in an analytical fashion. The short piece also discusses the judicial approach towards the regulatory regime on imported food items. In generic sense, the procedure of impact assessment has been dealt in environmental and social angle vis-à-vis any proposed project. However, this impact assessment touches upon the safety and standards of food. This scholastic contribution has portrayed six cardinal case laws from the facets of three major stakeholders, namely: importers, exporters and Food Safety and Standards Authority of India.

The article titled "*Violence through Online Fake News and Need for Better Legal Regulation*" by Mohammad Umar is an attempt to emphasize on implications of fake news and search for practical legal solutions to it, given the fact that information in cyber space has its own peculiar behaviour and cannot be equated with traditional print or television media. The contribution further identifies the problem of violence paved by fake news and tries to make a case for regulation of the virtual availability of such news items to the readers. In addition, the scholastic piece also assess the legal and jurisprudential matrix related to the same by referring to the relevant provisions of the Indian Penal

Code, 1860 (IPC) and the Information Technology Act, 2000 (IT Act) along with the constitutional scheme in the light of decided court cases. Thereafter, the article looks into the issues regarding cybercrimes cells of police and liability affixation.

Girish Deepak article titled "*From Maestro to Ayyasamy - The Journey of Arbitrability of Fraud"* touches upon precedential evolution of arbitration in India. The critical evaluation of the article reflects the change in judicial approach towards arbitration from Maestro's case to Ayyasamy's case. Arbitration in India has gained popularity since the incorporation of the UNCITRAL Model Law, 1985 by means of the Arbitration and Conciliation Act, 1996. The Arbitration Act of 1996, which is the governing statute of arbitration in India, provides minimal guidance in the issue of arbitrability. The author says, the chain of cases began with Maestro Engineers v. N. Radhakrishnan , in which the Apex Court took an authoritative stand and declared fraud to be an inarbitrable subject due to its complex nature, requiring the same to be adjudicated by Courts. This decision received harsh criticism and was held to be per incuriam by the subsequent decision of Swiss Timing v. Organising Committee, Commonwealth Games. This led to confusion once again as to the nature of fraud and its arbitrability. When things stood so, the Supreme Court was led to create a distinction between fraud simpliciter and serious allegations of fraud, in an attempt to resolve this conundrum, in the case of Ayyasamy v. Paramasivam. The approach adopted by *Ayyasamy case* was indeed laudable as they upheld the right of parties to adjudicate on simple issues or mere allegations of fraud even by means of arbitration, reserving only the serious cases for Court adjudication.

Naimitya Sharma in the article titled, "*Seeking Possibilities of Distinction between Negative and Positive Rights",* highlights that there seems to be a clear category of negative rights, and a clear demarcation between the positive duty within the negative liberty space and a positive duty pertaining to a positive liberty space. The article concludes with its findings that one can perhaps look beyond the claims that all rights are positive or all rights have both positive and negative duties.

Eluckiaa A. in the article titled, "*Policing the Police: Police Accountability in India",* writes about the importance of strengtheningthe three pillars of the Criminal Justice System i.e., the police, the prisons, and the Criminal Courts for the better protection of human rights in India. The paper stresses on the need for reinforcing police accountability to the public by means of establishing an independent authority to enquire into the complaints against the police.

In the work by Arbina Dey & Priyambada Dattatitled, "*Concept of assigning legal identity to natural elements: Tracking recent trends and its implications",* the author dwells upon how the rising social consciousness regarding the need to move towards sustainable development and to preserve the environment has brought about a stimulating development in the field of Environmental Law. The author further writes that several jurisdictions across the world have started to extend legal personhood to the environment and its elements taking cognizance of the deplorable state of the environment at the hands of man.

Bheema S. Mulage in "*Impact of IPR on Indian Agriculture and Farmer: An Empirical study of Gulbarga District"*beautifully opines that seed is the ultimate gift of God andis considered as first link in the food chain. Seed, for the farmer, is not merely a source of future plants/food; it is the storage place of culture. Free exchange of seed among farmers has been the basis of maintaining biodiversity as well as food security. This exchange is based on cooperation and reciprocity. Seed not only plays an important role in the rituals and rites of communities, it also represents the accumulation over centuries of peoples' knowledge. It is well known fact that seeds developed through conventional/traditional breeding techniques do not cause any major threat to environmental safety compared to the varieties produced through genetic engineering. The author argues that this process is being hastened by the new IPR regimes which are being universalized through TRIPS. This results in the seed itself becoming extinct, as the existence of the seed is tied intimately with its holistic knowledge.The author in this study has made a try to collect information through empirical study, which reveal

the fact that how new technologies, like the technologies of the green-revolution and biotechnologies have eroded the culture of traditional/conventional cropping method and variety.

Ishrat Husain in the paper titled "*Impact of demonetization on the workers of Moradabad brass industry"* has critically analyzed the impact of demonetization. Brass industry makes Moradabad one of the largest handicrafts exporters in India. The major part of the brass industry's export goes to the European countries, USA and Australia. The market has always been running on cash. The author's findings demonstrate that demonetization hugely affected this sector. It made difficult to pay wages to the artisans. The impact of drop in sales had been severe on the large number of artisans and craftsmen in and around Moradabad. In an estimate, this city gets over $1 billion every year from brassware exports alone. This city in Uttar Pradesh is estimated to have well over 200,000 artisans employed in the sector. A number of artisans are employed full-time in large export oriented units and get paid in their bank accounts. However, majority of the workers or artisans who cater to small scale traders and manufacturers selling locally are always paid in cash. There were many migrants engaged in this industry but most of them left the city after demonetization.

Thangzakhup Tombing in the work titled "*Reading Principles of Tribal Customary Laws of Marriage in Private International Law: a critical Analysis"* has illustrated how the impact of globalization in the last decade had brought about drastic changes in the life of tribal people inhabiting the North Eastern region of the country. The earlier narrative of tribal people as shy and recluse and staying only in a close knit community had been somewhat put to rest. The economic liberalization and the benefits of better trade, connectivity and consumerism has ushered in era of mobility, exchange of ideas and cultures, as such the tribal community has emerge to be more heterogeneous and complex. Easy access to internet and smart phones has brought about paradigm shift in the way human interact. The impact is felt as there are more recorded cases of inter-cultural and inter-country marriages. Among the tribal communities of the Paite tribe

of Manipur, the Mizos of Mizoram and the matrilineal community of the Khasi tribe the concept of private International Law is alien. Also, the author argues that the Indian Constitution's mandate of Constitution within Constitution for the preservation of tribal culture and customary laws has created a plurality of legal systems which need to be explored and examined in the light of the established principle, concepts and science of Private International Law.

Swagata Changmai writes in "*Protection of Traditional Knowledge of India within the existing framework of Intellectual Property Rights with special reference to the North Eastern states of India"*, the North East region of India represents as one of the hotspots of bio diversity being rich inflora and faunas and is known for its valuable heritage of herbal medicinal knowledge. Traditional Knowledge is the cultural and spiritual identity for the tribal communities living in the North Eastern states of India. The tribes of these areas have a deep understanding of traditional medicinal uses. The present legal regime in the field of Traditional Knowledge is inadequate and incomplete. The author argues that thetribal people are placed in the disadvantaged position and they are not in a position to enjoy benefit derived from their Traditional Knowledge. As many of the Traditional Knowledge like medicinal plants, folk dance, handicrafts, their music , ceremonies and cultures are not documented , there is scope for pirating of these by others including multinational companies .These companies are making money by fully utilizing their knowledge without sharing the benefit to them. Therefore, measures to protect the Traditional Knowledge system of all forms should be taken immediately. The author strongly advocates for the creation of a comprehensive *sui generis* system to deal with the issues of bio piracy, benefit sharing and sustainable use of natural resources and Traditional Knowledge.

Bharti in the "*Momentum to Mediation - Additional Thrust by Locating Mediation Clinics in Law Schools"* beautifully highlighted the significance of the emergence of law schools as a potential forum for mediation. The author is of the view that there is a favorable compendium of factors that supports the rationale.

Certain kinds of mediation as Peer mediation, Neighborhood mediation, online e-commerce mediation may be relatively more amenable to the speedy, economical, participative, consensual, confidential and mutually beneficial (to opposing parties) process of dispute resolution through Mediation Clinics at law schools.

Kumari Nitu in the research paper titled *"Sustainable Developmental Goal and Eradication of Poverty: Issues and Challenges"* has emphasized that poverty affects human right to life and eradication of poverty is imperative realization of the Sustainable Development Goals. The author has addressed the need for strengthening the anti-poverty measures and suggested for the adoptionof a universal international legal instrument for achieving sustainable development through poverty alleviation and eradication.

Ashwin Upreti in the article entitled *"The Tale of Refugee Jigsaw Puzzle and its Missing Link: Perusing the Right of Compensation for Host States under Refugee Law"* has drawn analysis that refugee flow crisis results in economic burden of the host states and hamper their development and it is eminent that the host states receive financial assistance and compensation from those stateswhose citizens have fled fearing persecution. The author has observed that the refugee legal regime fails in addressing the issue of non-participation of the state of origin in protecting its citizenry and that the rehabilitation and protection of refugees necessities the creation of a compensatory mechanisms for enforcing liability on the state of origin and this pertinent issue is to resurrected by all the stakeholders.The issue fulfils our goal of engaging scholarly exchange of ideas and views for furthering the cause of contributing to the existing body of research in academia and all the research papers are based on the studies and analysis of contributors in which they have made definite recommendations.

We extend our gratitude to the authors for their well-researched articles and acknowledge their contribution towards realizing the goal of bringing about legal and judicial reforms through their engaging scholarship.

Editorial Board

Impact assessment of judicial approach towards law on imported food articles in India

*Tarun Arora
**NeeluMehra

Introduction

In the contemporary times, the Food Safety and Standards Act, 2006 (FSSA) can be rated as one of the most progressive legislations for it contains in-built safety valve against the misuse of law, recognizing the relationship between law, science and technology, ascending order of penalties and so on. Hitherto food sector in India was unorganized due to mega scale diversities in cultures, life styles, and habits. In the age of global village, it became indispensable for India to shape its legal framework in tune with developments in international law. Food safety and management have not remained unaffected with this inevitable global phenomenon. The rise in the cross cultural interactions turned food safety and prevention of adulteration as a worldwide concern. The increase in the numbers of food borne diseases and unprecedented scientific development compelled the governments around the globe to ensure food safety by re-designing food governance mechanism. The efforts made by World Health Organization (WHO), Food and Agricultural Organization (FAO), Codex Alimentarius Commission (CAC), World Trade Organization (WTO) in the form of various international agreements such as Application of Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) served as the guiding forces of food governance for legal frameworks in transition.[1] Being a member of WTO and CAC, though India also made attempts to plug concerns related to food safety and standards yet Indian

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1 Reports of the Standing Committee on Priorities and Strategies, (SCOPUS), A Status on Food Safety,availableat http://www.sciencecouncil.cgiar.org/sites/default/files/ISPC_StatusNote_FoodSafety.pdf last seen on June 17,2017.

products are being looked with suspicion of being unhygienic and unhealthy severely affecting international trade perspectives of India. Taking strict cognizance of this fact, the FSSA provides a comprehensive framework to control almost every phase of food industry ranging from production, manufacturing, processing, import, distribution, storage and sale. Being a progressive legislation, it is worth mentioning here that the definition clause of this Act is the most comprehensive definition clause on the Indian legal landscape. It contains definitions of total 52 expressions, which can be classified into three categories of definitions such as 21 referrals, 16 exhaustive and 18 inclusive. Two expressions 'food' and 'misbranded food' have been covered in each category. Besides, the definition of food under the Act is couched in very wider perspectives as it covers any substance intended to be used for human consumption including any substance used into the food during its manufacture, preparation, and treatment. Of course, the Act is rich in its deeds. Nonetheless, the survey conducted under Integrated Disease Surveillance Programme (IDSP) shows a rise in the food-borne outbreaks. The fact cannot be ignored that food borne illnesses reported in surveillance programme represents only the tip of the iceberg. A large number of food borne disease goes unreported.[2] Mere the incidents with high morbidity especially in urban area are reported. Therefore, it raises concern towards impact assessment. The empirical survey reveals that most of the food business operator, petty, middle or top level are registered or licensed but the increase in the number of food borne disease is certainly distinctive in India and compelled the researchers for undertaking the study on impact assessment of FSSA. The study has been made analytically based on juridical exposition of provisions of FSSA with special reference to imported food items.

The study has been carried out into four parts. First part introduces with the background. In the second part, the legal status of imported food articles under the FSSA,the rules, and the regulations concerning import of food article have been covered. The third part contains judicial approach towards the regulatory regime on

2 Director General, Health Service, Government of India.

imported food items. Next part carries an attempt to evaluate the impact followed by last part containing conclusions of the study.

Food safety and standards Act, 2006

The Act envisions regulating the import of food articles through its Section 25.[3]It prohibits import of any food article in violation of the provisions of the Act, Rules and Regulations as well. The language used in the heading of the Section is adequately broad and extensively brings each food article in its scope- vegetarian, non-vegetarian, liquid, solid or any other form as well. The use of expression 'person' in Sub-Section (1) who has been placed under obligation in the language of the section, of course, implies a natural as well as a legal person within its scope. Crafted in light of concern over foodborne disease outbreaks due to imported items, the section bars import of any food article which is unsafe or misbranded or sub-standard or containing external matter. The use of word 'or' implies that if any food article is suffering from any of these defects, it is prohibited for the purpose of import. Clause (ii) of Sub-Section (1) speaks about the requirement of license not only under the Act or rules framed thereunder but also the regulations and conditions given in the license as well. Visualizing the broad spectrum of food sector and with an attempt to ensure outreach of the Act to the maximum altitude, clause (iii) dictates that food article shall not be imported in contravention of: (a) this provision;

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3 Section 25: All imports of articles of food to be subject to this Act.

(1) No person shall import into India –

(i) any unsafe or misbranded or sub-standard food or food containing extraneous matter;

(ii) any article of food for the import of which a license is required under any Act or rules or regulations, except in accordance with the conditions of the license; and

(iii) Any article of food in contravention of any other provision of this Act or of any rule or regulation made thereunder or any other Act.

(2) The Central Government shall, while prohibiting, restricting or otherwise regulating import of article of food under the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), follow the standards laid down by the Food Authority under the provisions of this Act and the Rules and regulations made thereunder.

(b) other provisions of this Act; (c) any other rule; or (d) regulation made under this Act; or (e) rule or regulation made under any other Act.

Legislative drafting of this specific section reveals the lessons learnt from the mistakes in the past confining the scope of law to limited extent resulting into escape routes existing in the regulatory framework in many other Acts in India[4]Above referred points derived from the demystification of clause (iii) certainly marks an improvement in the drafting of the FSSA.

In addition to the FSSA, various Rules and Regulations framed by the Central Government and FSSAI by exercising the powers conferred under Section 91, clause (o) of sub-section (2) of Section 92 respectively also contain significant provisions regulating the import of food articles.[5]In pursuance of the objectives to strengthen surveillance system, risk assessment, enhancing the use of scientific techniques in risk identification, risk communication, advocacy, international and national cooperation, capacity building and developing a strict regimen for fixing the liability, a comprehensive regulatory framework has been designed.[6] These regulations provide guidelines for stating the name of the manufacturer, importer, date of manufacturing, date of best before use, language, style, size and space of packaging reflecting rare left out or escape clause for the offenders.[7]The implementing mechanism has

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4 The Water (Prevention and Control of Pollution) Act, 1974; the Air (Prevention and Control of Pollution) Act, 1974; the Environment (Protection) Act, 1986 etc.

5 Food Safety and Standards (Food Product Standards and Food Additives) Regulation, 2011.

6 Primarily relevant among these in context of imported food items are Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011; Food Safety and Standards (Packaging and Labelling) Regulations, 2011; Food Safety and Standards (Licensing and Registration of Food Business regulations, 2011; Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011.

7 Food Safety and Standards (Packaging and Labelling) Regulations, 2011**: S.** 6 (iii)Where an article of food is imported into India, the package of food shall also carry the name and complete address of the importer in India.Provided further that where any food article manufactured outside India is packed or bottled in India, the package containing such food article shall also bear on the label, the name of the country of origin of the food article and the name and complete address of the importer and the premises of packing or bottling in India.

been adequatelyequipped with the power to detain any imported package in case of doubt or suspicion that a consignment contains prohibited food article.[8]The Act incorporates a systematic approach for notifyingthe laboratories and minutely detailed guidelines for testing properly and expeditiously.[9]

Judicial approach towards imported food articles

Law has always been viewed to shape and development its content both in letter and spirit with changing dimensions of socio-economic and political factors prevailing in the society with the grace to preserve its sanctity. Its sacrosanctity can be maintained with the consistency and fruitfulness. The task of interpretation of statutes and finding out the *ratio decidendi*out of the judgments has always been challenging one. The central idea of this part is to highlight the judicial approach towards food safety by analyzing the judgments on the issue of import of food articles. As stated earlier, a comprehensive legal regime governing import of food articles into India prohibiting unsafe, misbranded, sub-standard food is in existence, but it has not put to the best possible use.[10]The forthcoming discussion uncovers the judicial techniques for resolving the paradoxes and dilemmas generated due to wide spectrums of food operations and legislative vacuum thereon. The contribution of judiciary in strengthening the

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S. 2.2.2: II Country of origin for imported food**:**(i) The country of origin of the food shall be declared on the label of food imported into India.(ii) When a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labelling.S. 2.4.2.Itprovides that where a refined edible or vegetable oil is imported, it should carry "Imported" as prefix.

8 Food Safety and Standards Rules, 2011. 2.1.3. Food Safety Officer has been empower to detain imported packages suspected to contain articles of food, the import or sale of which is prohibited.

9 The Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011- Chapter 2 of these Regulations provide that there shall be four laboratories for imported items, these shall situate at Kolkata, Ghaziabad, Mysore and Pune. The jurisdiction of these laboratories has been demarcated on geographical bases and vicinity to all the nearest Seaports/airports/container Depots in the U.Ts. / States and International Borders attached to the States.

10 M.R.J. Trading v. Union of India and Ors. Manu/KE/1945/2015.

food safety regime and its impact can be discussed under two heads:

I. Filling up the Legislative Vacuum: Since FSSAI was brought into existence with the framing of major regulations (delegated legislations) in 2011 and the loopholes of these legislations are certainly to creep in with the passage of time which may result in hardship to the stakeholders. In such a situation, the role of courts should be to avoid hardship with its interpretive skills provided the public interest is not suffered adversely. Such an issue of legislative vacuum came up for consideration in Authorized Officer, Cochin Sea Port and Ors. v. Mondelez India Food Ltd.andOrs.[11] In this matter, the respondents were the writ petitioner who imported Cocoa Beans from Indonesia via Cochin Port. The Regulations framed under the FSSA did not contain specific entry prescribing a standard for cocoa beans. The question was whether the Food Safety Officer is still under an obligation to ensure that the goods imported as food item is not substandard or unsafe. The court suggested as under:

> Where no specific standard is prescribed for a particular imported item, still the Food Safety Officer has to certify that the food item is not substandard or unsafe. If the goods are found to be substandard or unsafe in appropriate test conducted by the Food Safety Officer, appropriate steps shall be taken in accordance with law. Such a procedure shall be adopted after giving notice to the petitioner.

The matter again cropped up for consideration in M.R.J. Trading v. Union of India and Ors[12] *w*here the petitioners were the importers of raw areca nut commonly known as betel nuts in ungarbled form. They imported the material from Sri Lanka through Cochin Port. The Commissioner of Customs imposed a condition that the consignment should be released only on receipt of clearance from FSSAI or Port Health Officer. The Single Bench of the High Court upheld the legitimacy of the condition. Aggrieved by this, the petitioners contended that the Act did not prescribe any standards for betel nuts. Therefore, he challenged the order of the Single Bench of the High Court by which the direction regarding the test of the

11 Manu/KE/0524/2015.

12 Supra 7.

consignment under the FSSA was issued on the ground of unreasonable. The petitioner prayed for issuing a declaration that raw ungarbled betel nuts imported by him do not attract the provisions of the FSSA, the rules and regulations framed thereunder. He further sought remedy in the form of direction to quash the direction for conducting the tests under FSSA and release the consignment after conducting the Plant Quarantine Test under the Plant Quarantine (Regulation of Import into India) Order, 2003 as a standard practice. The facts in issue framed by the Court were:

(i) Whether betel nuts are covered within the meaning of farm produce worth exemption from the provisions of FSS Act?

(ii) Whether there is any difference between 'food' and 'article of food', and if so, whether the standards for 'article of food' apply for betel nuts?

(iii) Whether betel nuts fall under the category of 'dry fruits and nuts' as described in clause 2.3.47(5) of Standards Regulations.?

(iv) Whether betel nuts imported by the petitioners should satisfy the aflatoxin test as provided under clause 2.2.1 of Contaminants Regulations?

(v) Whether betel nuts can be imported after verifying and certification of plant quarantine test alone?

In order to determine the above issues, the Court looked into the object of Sections 18, 19, 21 and 25 of FSSA. The first issue was decided against the petitioner as Section 18 *prima facie* appeared like exempting the application of the Act to any farmer, fishermen, farming operations, crops, livestock, aquaculture, supplies used or produced in farming or products of crops produced at farm level or fishermen in his operations. Looking minutely at the microscopic level to find out the sense underlying the words, the Court observed that this exemption is applicable only in respect of the crops or supplies used or produced in farming products of crops produced 'at farm level'. The words 'at farm level' clearly indicate that such an exemption may not apply to a procurer of the produce of crops at a

different level especially for the purpose of trading. In other words, the Act becomes applicable when the product or food product or farm product leaves the farm. Taking further cues from the definition of 'primary food' given under Section 3 (zk) and Section 3(j) of FSSA[13], the court rejected the argument of the petitioner by holding that betel nuts are not exempted from the provisions of FSS Act.

Regarding second and other issues, the court held that treating food differently from an article of food cannot give any benefit to the petitioner as any article capable of human consumption need compliance with the provisions of the statute. However, in the third issue, the court inclined partially in thefavour of the petitioner by holding though the betel nuts in the form in which the appellants imported the same would not satisfy the standards given under Item A. 29.04. Therefore, the test for the standards prescribed under item A.29.04 cannot be conducted. Nonetheless, the court in view of the public interest involved in the import of betel nuts directed that it shall be the responsibility of the respondents to ensure that this item is not adulterated in the sense mentioned in Section 2(b), (e) and (f) so as to see that the food article do not cause injury to the health of the ultimate consumer. Therefore, the court finally resolved that the betel nut is a primary food which requires testing the content of aflatoxin and approval by the FSSA under the Contaminants Regulations, 2011.

Therefore, the Court opined that imported food items should not be release if it is not sure that imported food items are fit for human consumption, or these contain other ingredients, which have not been declared on the label attached to the cover, wrapper or container, containing such items. In such a situation, withholding of the consignment till the clearance from FSSAI or any other authority designated by FSSAI for this purpose is not ultra-virus.

II. Adjudicating the permissibility of Rectification:The question of jurisdiction and powers of the High Court under Article 226 of the Constitution to permit rectification of labelling was also considered

13 (zk) "primary food" means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman.

from time to time. The High Courts have difference of opinions on the issue. In *M/s.* Foodlever India Pvt. Ltd. v. Senior Inspecting Officer and Anr.[14]the Court permitted rectification of certain labelling deficiencies under the supervisions of the appropriate authorities followed by proper testing- whether fit for human consumption, then release of goods imported. In contrast to it, the High Court of Calcutta, in FSSAI v. Heartland Trading Co. P. Ltd.[15] did not accept the claim of respondent to rectify the deficiencies in labelling. Besides, any previous illegal grant of NoC to any importer does not bind the court to commit the repetition of illegality. The controversy due to difference of opinion was put to rest by the court by observing that rectification of a labelling deficiency not permissible under any law, therefore, it cannot be ordered by the High Court in exercise of power given under Article 226. The High Court is not empowered to order for perpetuation of an illegality by virtue of Article 226.

This confusion has been recently put to rest by framing the new regulations known as The Food Safety and Standards (Import) Regulations, 2017. The power to permit rectification has been conferred upon the Authorized Officer under the Rules.[16]

III. Distinction between Food, Food Article and Food Additive: The Act contains specific provisions on food additives. It regulates the import of food additives into India and imposes an obligation on the persons or agencies engaged in import of food to comply with the provisions of the FSS Act or any Rules,and Regulations.The issue of test and analysis of imported additive arose in Danisco (India) Pvt. Ltd. v. Union of India.[17] The petitioners in this matter were primarily engaged in the business of import, distribution and sale of wide range products used by the manufacturers of food and beverages, dietary supplements and pet food. They imported DaniscoFrane SAS "YO MIX 305 LYO 50 DCU" (hereinafter referred as said food articles) – a blend of strains of lactic acid bacteria used for direct vat inoculation of milk for preparation of yogurt and fermented milk products. The Addition Drug Controller was notified by the petitioner that the food articles in question were permissible

14 Manu/TN/2669/2012.

15 Manu/WB/1446/2014.

16 S. 6 (5), Food Safety and Standards (Import) Regulations, 2017.

17 Manu/DE/2731/2014.

food additives under the Food Additives Regulations. The customs authorities referred the said goods to FSSAI for the issuance of NoC. The petitioner requested FSSAI for release of consignment and described the nature of goods. But the authority of FSSAI refused to issue NoC through a letter addressed to the Deputy Commissioner and cited the ground that the analysis of the said food article can be conducted only if label would have 'list of ingredients'. Since the mandatory labelling requirement prescribed under the Labelling Regulations and guidelines issue by FSSAI have been found in contravention of the Regulations, therefore, no analysis can be done. The petitioner, in his reply, submitted that the goods were for industrial use. These goods have not been imported for retail sale. He further contended that these goods do not fall within the definition of 'pre-packed food'. Therefore, it was not required to disclose the list of ingredients as specified under the Labelling Regulations. The petitioner, aggrieved by this order, filed an appeal before the FSSAI which was dismissed on the ground that the petitioner has failed to comply with mandatory labelling requirement and a non-conforming certificate was issued. Consequently, the appeal has been filed before the High Court of Delhi to decide-

(a) Applicability of Labelling Regulations on the imported goods;

(b) Compliance of labelling of said goods.

To find out the solution of above issues raised, the court after analyzing the language of Section 23 explained that the requirement of Section 23 is mandatory.[18]It was also clarified that the said

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18 "23. Packaging and labelling of foods.-- (1) No person shall manufacture, distribute, sell or expose for sale or dispatch or deliver to any agent or broker for the purpose of sale, any packaged food products which are not marked and labelled in the manner as may be specified by regulations:

Provided that the labels shall not contain any statement, claim, design or device which is false or misleading in any particular concerning the food products contained in the package or concerning the quantity or the nutritive value implying medicinal or therapeutic claims or in relation to the place of origin of the said food products.

(2) Every food business operator shall ensure that the labelling and presentation of food, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged and the setting

food article does not fit within the meaning of 'food', but it is food additive within the meaning of Section 3(1) (k).[19]The Court observed that food additive is a substance which is not normally consumed as food or used as a typical ingredient of food but is a substance which is added to food for the purpose of manufacturing, processing, preparation, treatment etc. and which is reasonably expected to result in it either becoming a component of the food or otherwise affecting its characteristic. Therefore, the goods imported by the petitioner were also covered under the clause 3 (1) (k). In context of applicability of Labelling Regulations, the court decided that these regulations are meant for food which is ready for sale to persons while the goods in question were imported for industrial use. These regulations are not applicable since the goods imported by petitioner are not pre-packaged or pre-packed foods. On the second issue, the Court decided that even the regulations are not applicable, but the labelling of goods in question provides sufficient information regarding ingredients and manufacturers. The petitioner has also furnished the composition, properties, physical/chemical specification as well as micro-biological specifications. Taking note of these facts, the Court opined that this information was sufficient for the FSSAI to test whether the goods in question conform to its description. Therefore, the impugned order of refusal of NoC by FSSAI was set aside and FSSAI was directed to examine the goods in question.

Analysis of this judgment makes it clear that the imported food articles should conform to the labelling requirements, in case of failure, the FSSAI authorities may refuse to give NoC or drawing the sample for testing.[20]If the goods were to be found in conformity,

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in which they are displayed, and the information which is made available about them through whatever medium, does not mislead consumers."

19 "(k) Food Additive means any substance not normally consumed as a food by itself or used as a typical ingredient of the food, whether or not it has nutritive value, the intentional addition of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly) , in it or its byproducts becoming a component of or otherwise affecting the characteristics of such food but does not include "contaminants" or substances added to food for maintaining or improving nutritional qualities;"

20 Gandour India Food Processing Pvt. Ltd. v. Union of India and ors. Manu/

NoC may be released.

Subsequently in another matter of FSSAI v. Danisco (India) Pvt. Ltd. and Ors[21] the issue of applicability of Section 23 on food and food additive was discussed at length. The Court expounded that a food additive as defined in the FSSA is distinct from food which has also been defined in the same Act. The Act and Regulations framed thereunder deal with food and food additive separately. A minute observation was made by the court to remove the doubts regarding application of FSSA that some of the provisions of the FSSA are with respect to food only and others are with respect to food additive only, yet in context of some other provisions, food additive are included in foods. Regarding Section 23 titled 'Packaging and Labelling of Foods', it was held that this section is with respect to food only and not with respect to food additive. If the appellate authority wants to stretch the arms over the food additive also, it is empowered to make regulations under Sections 16 and 19. A cautionary was also issued by the court that if the authorities go for applying Packaging and Labelling Regulations meant for foods, to food additive, it would produce anomalous results.

The matter on the issue of contravention under Section 25(1)(iii) came up for consideration before the High Court of Madras in M.Mohd.Hanifa v. Union of India and Ors.[22]The facts of this matter can be summarized as under:

a. The Petitioner imported MILO products from Turkey vide consignment ID No. ICA 2016 0500 021167 bearing product Code No. 1901 9010.
b. The FSSAI officials took its sample.
c. On examination, these samples were found in contravention of the FSS (Packaging and Labelling) Regulations, 2011.
d. Due to non-mentioning of followings, the samples were rejected:
    (a) date of manufacturing.
    (b) Name and address of manufacturer.

TN/0744/2015.

21 Manu/DE/1223/2015.

22 Manu/TN/2624/2016.

e. Aggrieved by this, the petitioner filed a writ petition of Mandamus to direct the FSSAI officials to issue NoC for the same product for local consumption.

The issues for adjudication before the court were as under:

(1) Where a date of manufacturing or packing, name and complete address of manufacturer is not mentioned on the product as specified under the Regulations, creating a problem in determining the shelf life of the product, does the authority act legitimately in rejecting the imported food without examination of the samples?

(2) Does non-compliance to labelling specifications given in Regulations turn the food as unfit for consumption?

(3) Can the petitioner be given the relief of one time relaxation from the Regulatory requirements?

Judgment:

The Court after took into consideration various aspects and delivered its judgment as under:

(1) If the FSSAI officials have reached to the conclusion as to the failure in compliance of labelling requirements and observed that one time relaxation cannot be given at their level –it should not be meant that the petitioner is remediless.

(2) Director (Imports), FSSAI is a superior authority under the Act and competent to examine if one time relaxation can be given.

(3) The petitioner may move to the Director (Imports) with all details and supporting documents to present his view for releasing NoC.

(4) The Director (Imports) was though not a party to the writ petition, therefore, the High Court *suomotu*impleaded him as a party and inducted as 3rd respondent in the writ petition.

(5) It was specified in the Decision itself that the Director (Imports) will furnish an opportunity to the petitioner for being heard within a period of four weeks or early.

In the light of above discussion, it can be submitted that

the High Court of Madras restricted itself from interfering in the domain of Executive and respect the constitutional doctrine of separation of powers. On the urge of the petitioner for sending the samples for examination of food item before rejection, the Court observed that the matter was technical and it is worth examination by an expert agency. Referring to its earlier approach laid down in Kantilal N. Shah v. The Authorized Officer, FSSAI, Chennai and Others[23] that the technical matters have to be considered by the competent authority under the FSSA, 2006.Therefore, it also impleaded the Director (Imports) as a party and attempted to give a relief to the petitioner that the decision of rejection by FSSAI official cannot be taken as final and non-appealable even where statutory provision are silent.

Impact assessment

To carry out impact analysis, the researchers first identified the impact constituencies (IC). According to UpendraBaxi, impact constituencies are the section whose behavior is sought to be influenced in a certain manner.[24] The opinion of the Court expressed in the judgments in above cases would certainly affect the stakeholders. In context of above discussion on judicial approach towards food safety, following ICs have been identified:

I. Importer II. Consumer III. FSSAI

The impact of the above referred judgments can be explained in

23 W.P. No. 40168/2015. Order issued on 03.06.2017.

24 UpendraBaxi, Who Bothers About the Supreme Court: The Problem of Impact of Judicial Decisions, 4 JILI 848, 859 (1982).

tabular form as under:

SN	Title of judgment	Importer	Consumer	FSSAI	Effect on Aim and Object of the Act
1	Authorized Officer, Cochin Sea Port and Ors. v. Mondelez India Food Ltd.andOrs.	Bound to get the safety of food article tested .	Access to safe food.	Under an obligation to conduct the test and ensure the food is *safe.* Absence of standards cannot be taken as a ground to detain the material and refuse NoC.	Positive
2	M.R.J. Trading v. Union of India and Ors	Bound to get the content of aflatoxin in food article tested under Contaminants Regulations, 2011	Access to safe food.	In case of absence of Standards to test a particular item, the standards applicable on other items cannot be applied. But bound to ensure safety aspects so as not to cause injury to the health of ultimate consumer.	Positive
3	M/s. Foodlever India Pvt. Ltd. v. Senior Inspecting Officer and Anr.	Permitted for rectification. Benefited with the flexible approach but not at the cost of food safety and public health.	Access to safe food.	Under an obligation to conduct the test and ensure the food is *safe.*	Though the instant effect of this decision is positive but if this approach is continued, it can set a precedent and the importers will claim the right to rectification in labelling and packaging as a matter of right.

4	FSSAI v. Heartland Trading Co. P. Ltd	Adverse effect on the interest of importer. Lesson to follow law strictly.	Access to safe food	Correct in its approach.	Deterrent effect on the persons taking law for granted.
5	Danisco (India) Pvt. Ltd. v. Union of India & FSSAI v. Danisco (India) Pvt. Ltd. and Ors	Bound to get it tested that the food is not unsafe.	Access to safe food	Was found adamant, therefore directed by the High Court to release after ensuring that food is safe. Lesson to FSSAI, not to harass the stakeholders by sticking undue with literal interpretation of regulations.	The spirit of law should also be given weight in case of ambiguity.
6	M.Mohd.Hanifa v. Union of India and Ors	Even if one time exemption is given, it should not be at the cost of public health and safety.	Access to safe food	Was instructed to consider if packaging requirements are not followed, it does not turn the food unsafe.	Positive

Conclusion

Above information reveals that most of the decisions go in favour of FSSAI as the Courts recognized its expertise in ensuring food safety and very sensibly maintained the equilibrium. The Courts showed their temperament in functioning within the boundaries and restrained themselves from interfering in the domain of FSSAI to contribute in the pursuance of the aim and objectives of the Act. It cannot be ignored that the Courts admitted that they lack of expertise and possess limited knowledge, therefore, totally unwise for the Courts to encroach upon the domain of executive mechanism. The courts recognized due amount of freedom to the FSSAI – a professionally managed statutory body having expertise in the field of food safety management and compliance with standards which is vital for public health and safety. In the above referred matters, the Courts found themselves not at all equipped to decide upon the safety of food and wherever directed to issue NoC, it directed subject to the condition of testing the nature and quality of food.

The upshot of aforesaid discussion is that the purpose of the Act is to ensure safety and standard of food by laying down the science based standards for food articles, and to regulate their manufacture, storage, distribution, sale and import for human consumption. The approach of the judiciary has been to further the object of the Act instead of occupying the armchair. The impact of above judgments had remained positive as recently the new rules namely The Food Safety and Standards (Import) Regulations, 2017 have been introduced to cure the defects existing in the regulatory regime. The aims and objectives of these rules underscore positive impact of judgments of various courts strengthening the governance and accommodates progress in the legislative sphere.

Momentum to Mediation- Additional Thrust by Locating Mediation Clinics in Law Schools

Bharti*

Introduction

Mediation has become a global clarion call for an efficacious and expeditious method of dispute resolution. It is based on mutuality of – thought and action – towards resolving a dispute thereby providing much needed succour to disputants from the time and cost travails of the formal litigation system. There is thusthe advantage of positive reinforcement of constructive outcomes within legal framework. Access to justice does not remain a constitutional hyperbole but becomes a workable mandate accomplished with 'mediative' ease.

Mediation is a constructive mind-set that enables parties to the dispute (amenable to mediation) to reach an amicable solution. It is a facilitative process to achieving a common platform for recalcitrant parties, to slowly but surely help them arrive at a common plane, to deliberate upon eventualities and to finally accept the course of action most appropriate, viz., the most winsome (win-win) one. Mediation is in fact facilitated negotiation and a very significant aspect of mediation is the direct participation of parties themselves that translates into a healthy, collaborative visionary exercisethat renders ultimately sustainable solutions.

Mediation is inevitably engaged in, with the lead of a neutral third party – the mediator, the peacemaker- who 'breaks the ice' between the parties and initiates dialogue between them. The role of the mediator is extremely fundamental as he steers the interaction on course. He is instrumental in overcoming collisions, soothing ruffled tempers and providing psychologicalde-stress through patient listening. He becomes the anchor pacifist without being an aggressor interventionist.

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Mediation Process – General Blueprint of Action

Request for mediation (to the mediation coordinator or through the helpline) -Consider appropriateness of mediation to the case on hand - Contact with both parties to confirm participation in mediation – Consent of the parties to be taken - Allocation of mediator to the case (check that no conflict of interest exists between parties and mediator) - Acquaintance of parties with the process of mediation - Logistics as to date, time and venue to be decided in consultation with the parties - Initial joint meeting of the parties with the mediator - Private caucus (separate meeting) of each party with mediator - Joint meeting of parties with mediator (2-3 meetings) - Settlement agreement written and signed by both parties and authenticated by mediator.

Basic characteristics of Mediation:

- Mediation is primarily a non- adjudicatory, voluntary, participative, party-centric, structured negotiation process that primarily dwells on willingness of parties towards resolution of disputes and the specialized communication and mediation skills of a neutral mediator to help the parties reach an amicable settlement agreement
- Mediation may be statutory (legislation requiring mediation e.g. labour disputes, domestic disputes etc.), court annexed (as part of judicial process), contractual (appending mediation clause in an agreement) or voluntary (mainly pre-litigative and in cases also of pending litigation)
- Mediation exhibits the advantages of a speedy, efficient, economical (reduced legal fees- advocate fee, court fee etc.) means of dispute resolution
- It involves a simple, informal, flexible process
- It seeks to preserve long term interests of parties by creatively moulding a mutually beneficial solution that may even cover in its gamut settlement of connected/related cases

- Right to go to court is preserved in case mediation is unsuccessful implying in turn confidentiality of mediation
- Signature of parties to the settlement agreement is the *sine qua non* of a valid mediation agreement.

Mediation Clinics in Law Schools

Law schools across are potential viable centres of mediation for several reasons, primary amongst them being –

- **Geographical Locale** – Law Schools are located throughout the country and the spatial spread may be effectively utilized in locating a centre of mediation without the extra effort, time and cost of building anew.
- **Infrastructural Facilities** – The infrastructural facilities existing in law schools are generally complete and updated including rooms, library and internet facility etc. that are helpful in conducting mediation sessions.
- **Attractive features of Mediation** – A relatively simple procedure, few sessions and party oriented dispute resolution method has a lot of innate attractiveness to it. The role of the mediator is intrinsic to the final outcome of the case as he without a direct influence, manages the case or parties in a manner that they act wise in a win for themselves.
- **Trained Faculty** – A dedicated pool of faculty and other staff members having particular interest in and having the knowledge and experience as regards mediation is a significant factor present in law schools. The voluntariness in the conduct of the meditation without fees can be easily identified with the teaching community wherein the nobility attached to the teaching profession relates better to the no-charge for the mediation. Moreover, alternate dispute resolution including mediation is a subject taught in classrooms too as part of the legal curriculum which can be conveniently extended as a legal aid tool for the practical implementation of classroom teaching and simulations.

- **Motivated Students** – In the background of Alternate Dispute Resolution (ADR) as a core subject of the curriculum as well as other Clinic Courses as Legal Aid being extended in Law Colleges, the subset of motivated students emerging from textual rigours and early exposure to socially relevant domains is an asset par excellence for the purpose of understanding, training and conducting actual mediation. In fact, the setting up of Mediation Clinics is a significant component of Clinical legal education that seeks to provide avenues (also, beneficial to society) to students at an early point in time a practical exposure to application of class room knowledge in pursuit of acquiring basic skill sets and requisite mindset. The involvement of students in the organization and the conduct of mediation helps to inculcate in them conflict resolution skills as well as certain behavioural and ethical characteristics. It enables them to put into practice what is learnt in theory to realise that the best way of redressal of grievance is not through the torturous route of courts and complicated procedure, that interpersonal communication is the key to effective and lasting resolution and that creative outcomes are possible to the satisfaction of the parties.
- **Natural Adjuncts for Legal matters** – Law schools are naturally suited as centres for mediation clinics due to affinity of the subject to the course curriculum taught as well as its extension through National and International Mediation Competitions, Moots, Workshops, Seminars, Conferences on the theme etc.
- Also, there is an easy connect with advocates and courts which is helpful in accessing advocates on the panel of mediators as well as securing assistance from the legal service authorities connected to the court or otherwise.
- **Future vision of less reliance on Courts-** The early exposure to alternative means of dispute resolution secures thefuture of a diverse portfolio for future legal professionals (i.e. law students) having lesser reliance on courts and who

are ready to explore the wide canvas of alternative means including mediation. It bodes well in a translation to lesser pendency in courts and faster and cost- effective resolution to the satisfaction of parties.

There is thus an abundance of a complement of factors that augurs success for the location of the mediation centre in law schools.

Advantage to Students

As beginners in legal learning and reasoning and as prospective lawyers, students inducted in the mediation clinic in law school learn a plethora of problem solving and conflict resolution skills. They develop a keen perceptive acumen that helps them to distinguish cases most appropriate for mediation, to understand the role of lawyer/mediator in mediation and various innovative ways through which meaningful solutions can be achieved.

They realize the significance of keeping aside feelings and opinions in attempting to help parties to reach an understanding. At the same time, they also understand that the background, the personal communication styles and the ethical principles especially of neutrality of the mediator infuses a qualitative difference to the outcome of a case. It becomes a learning experience at ground level to put law into practice at an early stage itself. Even an unsuccessful mediation is able to convey a lot as to the drawbacks and pitfalls of say, the appropriateness of mediation to a particular set of circumstances.

Advantage to Parties

Undoubtedly, the parties stand to gain immensely from mediation conducted in law school. Each case is pursued zealously by associated students and other experts including teachers who work to ensure success of mediation in an unselfish manner. The parties would usually be satisfied if they achieve success of result oriented mediation or even in case of non-success, that they exhausted the possibility of resolution of dispute, in the best enabling environment.

Advantage to the justice system

An important offshoot of situating Mediation Clinics in Law Schools is that the students shall inculcate early enough the philosophy, mindset, skills and aptitude towards resolving disputes through alternative means, as mediation, without resorting to courts.

It would also be a huge palliative to the overburdened judiciary bursting at its seams with 3.14 crore pending cases1,if mediation is resorted to increasingly by students, experts and advocates. An advantage of mediation is that it lends itself to a diverse range of cases, except within the fold of non- compoundable offences and certain others which rightly must be dealt by courts proper. The simplicity and sufficient flexibility of procedure together with the mandate vesting in the parties themselves to resolve in a time bound manner or otherwise, queue to a complicated and protracted litigation, adds considerable appeal to mediation as a method of justice dispensation.

Important Ingredients of a Mediation Law Clinic in Law School

- **Nature of Subject Matter to be dealt by Mediation Clinic** – Mediationcan be extended across a range of disputes including property disputes, matrimonial disputes, corporate disputes etc. as well as compoundable criminal offences. However, every law school may develop the mediation clinics in accordance with the needs of the local populace. For example, a law school located in an area dominated by factories/ industries is likely to have employer-employee issues being referred to it recurrently. Therefore, it makes better sense for the mediation centre to tailor itself according to the requisites of the neighbourhood reality. It may also deal with issues that are generic in nature having a wider coverage. For example, online mediation for the purpose of resolution of disputes with regard to e - commerce
- **Diverse Pool of Mediators** – It is important to have a

1 Estimated pending cases across all courts in India- trial courts, High courts, Supreme court. Quoted in 2016 by former Chief Justice of India, Thakur, C. J.

diverse mix of mediators including faculty members, experts, advocates and students. The vast repository of faculty members and mainly final year students as well as post graduate students specialising in this area can indeed be utilized for the purpose of conducting mediation. Students may act as observers (with permission of parties and consent of mediator) to mediation sessions or trained to be mediators. However, it is to be emphasised that this must be preceded by classroom teaching and indoctrination to professional ethics along with certain hours of training. Further, certain hours of attendance as observers in mediation sessions would inculcate in them the grammar of an adept mediator or reject the ineptness of a slack mediator. Student mediators must be supervised by a faculty coordinator who is a part of the Supervisory Panel in the Mediation Clinic. It would be a tremendous learning experience for the students that will introduce them to the finer nuances of mediation. There must a reporting system by students to their supervisor that ultimately becomes the channel for feedback and guidance.

- **Training of Mediators** – The training of all mediators on the panel is a crucial imperative since the entire success of mediation in a particular case depends upon the skills and understanding of the mediator. Foundational training of a definite 40 hours2 by experts drawn from the bar, bench and others must be conducted for beginners, including students. Further, advanced training by experts drawn even from countries abroad may be engaged for the purpose of improving quality of mediation services provided.
- **Making the Parties aware of the Essentials of Mediation** – It becomes extremely relevant that parties to dispute submitting their case for mediation must be given the outline and the sequence of steps of mediation and must be informed of the necessity of their consent throughout.

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2 Recommended under Mediation Training Manual of India, Mediation and Conciliation Project Committee, Supreme Court of India

- **Time Schedule to be indicated** – A mediation must necessarily confine itself to a time limit within which the points in dispute, points of view of parties, the possible suggestions for conflict resolution and inking a mutually acceptable agreement must be completed or even if unsuccessful, the mediation be concluded.
- **Role of Advocate must be clarified to the parties** – The advocates usually assist the parties in putting across their viewpoints clearly. But a party can easily step in to explain his position of the issue at hand. It must be kept in mind that mediation is an informal process that seeks to bring opposing parties in direct contact with one another with the mediator as the fulcrum.
- **No Fees** – The mediation conducted in law school as part of a clinic should provide free service to all parties that seek its help. It is a non- gratis situation- a characteristic hallmark of mediation at Law Schools.

Mediation Clinic Experience in Law Schools in Other Countries

- **Columbia Law School**[3]: This clinic is designed to give students the opportunity to develop their problem-solving and conflict-resolution skills; to examine the circumstances in which mediation is an appropriate form of dispute resolution; and to explore the role of the lawyer in mediation, either as mediator or as counsel to a client considering or participating in mediation. Students will undertake mediation of cases e.g. on victim services. In preparation for their work as mediators, students participate in an extensive program of simulations designed to build their skills as mediators and their capacity to critique and learn from their own work. Students receive individual feedback on both actual and simulated mediations

3 http://web.law.columbia.edu/alternative-dispute-resolution/mediation-clinic visited on 9th January, 2017

- **Cornell University**[4]: A unique mediation training program that includes detailed discussions, workshops, group exercises and simulations by expert trainers from around the country extended to students across campus including the Law School, Hotel School, College of Arts and Sciences and others. The aim is to inculcate practical skills including tone and body language skills that may be used professionally to resolve real-life conflicts like campus conflicts, workplace terminations etc.
- **University of Cambridge**[5]: Has an interesting internal mediation program which is in the nature of co-mediation that involves allocation of two mediators per case. Mediators are members of staff who are volunteers who receive training in mediation skills and are instrumental in reaching solutions by providing a safe and supportive environment to the parties. They however, cannot solve the problem for parties, act as an intermediary between parties and institutions or make any judgement about the case.
- **King's College**[6]: Mediation clinic is a recent addition to Pro Bono society of students that aims to provide them with training by an independent mediation training provider following which the students will be prepared to undertake case work through practical application of acquired legal and life skills in negotiation, mediation and diplomacy.

Locale of Mediation Clinic in Law Schools in India

The mediation experience of Law Schools in India is not too extensive or varied. There have been few law schools that have actually experimented with having a mediation clinic. The following conflict prone subject matters may be more conducive to student initiated mediation clinics in the pre litigative contexts.

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4 https://www.ilr.cornell.edu/scheinman-institute/courses-and-programs/student-mediator-training-program last seen on January 9, 2017.

5 http://www.admin.cam.ac.uk/offices/hr/policy/mediation/ last seen on January 9, 2017.

6 http://www.studentprobono.net/public/PublicActivityDetails.php?activityid=10070555 visited on January 9, 2017.

Peer Mediation Clinic— Peer Mediation may be one of thrust areas of the clinic especially in view of increased problems across campuses in schools and colleges. Initiation of new students and related issues as hostel, room-mates, sports, moots, debating and other activities and to lesser degree relationship issues, socio-political issues etc. are relevant for the purpose of peer mediation eventually signalling a cooperative, cordial and constructive approach to conflict resolution. This form of mediation assumes significance for children are apt to be more receptive to their peers as mediators. Peer mediation translates into improved self-esteem, listening and critical thinking skills, reduced disciplinary actions etc. The success of peer mediation can be traced to the fact that peer mediators can connect in ways that adults may not; that they can frame disputes in language that may be more understandable to peers and that they are ultimately respected7. It results in student empowerment positioning peer mediators to be peace makers8 and to assume future roles as responsible citizens.

There is some hesitancy as to bias that may arise in view of the close-knit community of students that usually exists. The solution however is also located in this paradox itself since a better appreciation of a problemmay also be possible by the students themselves and with proper training of Peer mediators who imbibe the 'mediative spirit' the solutions may be more effective than those by outsiders. Of course, crucial disciplinary matters shall remain within the purview of the appropriate authorities.

Neighbourhood Mediation Clinic- is a very apt scenario of workable solutions within the mediation mould. There are neighbourhood issues in housing colonies adjacent and in the vicinity of law schools that occur with routine repetition as noise from music systems, car parking issues, boundary disputes etc. that have the potential of wrecking cordial relations amongst the next door fellow brethren. Initial disagreements may soon escalate into

7 Peer Mediation Model – Schrumpf Fred, Crawford Donna, Richard J. Bodine at users.metu.edu.tr/e133376/project/The%20Peer%20 Mediation%Model.htm.

8 Johnson D. W. and Johnson R.T.,1991Teaching Students to be Peacemakers, Edina, Minn.. Interaction Book Company.

disputes that may become stressful and damaging to neighbourly co-existence. In the case, Cameron v. Boggiano9– a protracted neighbour dispute about ownership of a thin strip of land – Lord Justice Mummery warned of the dangers of litigation between neighbours, commenting that, "six days in court is a long time to spend on evidence and argument about who owns a gravel strip of small size and little money value". The Court advised that, "one side 'wins' at trial, and/or on appeal, but overall, both sides lose if, for example, litigation blight has damaged the prospects of selling up and moving elsewhere.". Also in Bradley v. Heslin10, Justice Norris observed, "Rather to my surprise I find myself trying a case about a pair of gates in Formby: surprise on at least two counts. First, that anyone should pursue a neighbour dispute to trial, where even the victor is not a winner (given the blight which a contested case casts over the future of neighbourly relations and upon the price achievable in any future sale of the property). Second, that the case should have been pursued in the High Court over 3 days. It is not that such cases are somehow beneath the consideration of the Court. They often raise points of novelty and difficulty and are undoubtedly important to the parties and ultimately legal rights (if insisted upon) must be determined. But at what financial and community cost?". He also stated, "This entrenchment of positions is a regrettable characteristic of neighbour disputes. I add my voice to that of many other judges who urge that, even when proceedings have been issued to preserve the position, the engagement of a trained mediator is more likely to lead to an outcome satisfactory to both parties in terms of speed, cost, resolution and future relationships than the pursuit of litigation to trial."

Through, mediation there is thus a huge possibility of settlement without being prescriptive of right and wrong. The law students through their mediation efforts may enable several potent disputes (neighbourly) to overcome the initial hesitancy or even the aggression, to enter into facilitated dialogue that may pave the way to lasting solutions.

9 [2012] EWCA Civ 157.

10 [2014] EWHC 3267 (Ch).

Community mediation may be the natural derivative in such a scenario whence resident welfare associations etc. may become the natural allies with mediation clinic for disbursal of effective resolutions.

Online Mediation Clinic for e- commerce- There has been an e- Commerce boom worth multi-billionsof Dollars across the World. In India, the e-commerce business was to the tune of $32.4 billion in 2016 and is expected to reach $100 billion in 2020.11 The Indian market is expanding at an exponential rate for e-commerce especially with a potent demographic age group of 15-34 years that represents 75% of internet users and the increased accessibility and affordability to diverse devices as smartphones, computers, tablets etc.The advent of e-commerce companies like Flipkart, Snapdeal in India have spurred retail activity which has indeed become a booming market with the entry of international companies like Amazon, Alibaba etc.Around 70% of India's e-commerce market is travel related with electronics and apparel as the other large categories in sale. Household products and books are also subject matters of e-commerce. With the enactment of Information Technology Act, 2000, e-commerce and e-governance have been given formal and legal recognition.

Several issues may arise pertaining to quality of products, predatory pricing, anti-competitive practices, security of transactions, hidden charges in cost of delivery, delivery delays etc.Online Dispute Resolution is an effective mechanism for dispute settlement in view of its advantages of cost saving, convenience, greater flexibility,variety of modes of payment,quicker decisions and avoidance of complicated jurisdictional issues. The oft quoted disadvantage of impersonal interaction is partially overcome through video conferencing and similar communication modes.

In view of the bourgeoning Indian market for internet based commerce, consumer disputes may arise with alarming alacrity to reach catastrophic proportions. Online mediation serves as an obvious redressal that obviates the need to litigation as a course of action. Law students may set uponline mediation platform for consumer disputes and facilitate their resolution by setting up

11 Goldman Sachs 2015, e commerce market in India.

toll free help-lines for addressing concerns relating to cyber space commerce and directing them to the appropriate online redressal forum.

Mediation Experience in India

The Indian Panchayat tradition of mediative solution (village council) has been reinvented in contemporary times and adapted to the modern cannons of justice and procedure, reflecting a credible status in the legal paraphernalia of emerging creative solutions. The post- independence ADR system in Indiafor a long time did not, however, adequately reflect the reinvented version of mediation. It was only with the amendment to the Civil Procedure Code in 1999 that Section 89 approved of alternative means, including mediation, to resolve cases. The Supreme Court[12] requested Law Commission to prepare Draft Model Rules for Alternate Dispute Resolution and also frame Draft Model Rules for Mediation under Section 89(2)(d) of CPC 1908. The Law Commission framed Draft Mediation Rules 2003 and thereafter High Courts of various states enacted rules for Mediation. The Delhi High Court in exercise of its rule making power under part X of CPC and Section 89(2)(d) of CPC framed Mediation and Conciliation rules 2004 which came into effect from August, 2005.

Mandatory mediation13 has gained recognition through court annexed mediation now enabled by legal sanction under Section 89 CPC.

In K. Srinivas Rao v. D.A. Deepa14 the Supreme Court has highlighted the use of mediation as a pre-litigative measure in the resolution of matrimonial disputes. It has observed that help desks must be set up and utilized for spreading awareness of mediation as a mechanism for dispute settlement.

In Delhi, the High Court has an active Mediation Centre with lawyers on its panel that is engaged in mediation for cases directed by court. District courts have mediation cell having Judges and lawyers as

12 Salem Advocate Bar Association v. Union of India, AIR 2005 SC 3353.

13 Quek Dorcas, "Mandatory Mediation: An Oxymoron? Examining the feasibility of implementing a court mandated mediation program", Cardozo Journal of Conflict Resolution, Vol 11: 479.

14 2013 (5) SCC 226.

mediators for consideration of cases directed by courts here. They also conduct pre-litigative mediation under the nomenclature of Conciliation/Mediation wherein the settlement agreement is treated as a conciliation settlement agreement having the same status as an arbitral award under Section 74of the Arbitration and Conciliation Act, 1996. This is a workable backdoor entry for mediation to the Arbitration and Conciliation Act. This model is generally replicated in other States of India.

Private Mediation involves pre-litigation disputes in which the parties on their own accord approach a mediator in order to reach an amicable settlement. The following mechanisms may be focused upon15whence the enforceability of a private mediated settlement is ensured **a.)** as a contract – the Mediation Training Manual of India published by the Supreme Court16 recognizes the enforceability and binding nature of a settlement reached at a pre-litigation stage as contract. In case of breach, the remedy of execution is not available and the party alleging breach will have to initiate appropriate legal proceedings in accordance with law for seeking enforcement of settlement in the form of an agreement. **b.)** the mediated settlement agreement may be treated as conciliation agreement17and shall be governed by Section 7318 and Section 7419 of Arbitration and Conciliation Act, 1996 whereby it acquires stature of the decree of Civil Court which is final and binding. **c.)** The parties to a mediated settlement agreement may file a suit and subsequently make an application under Order 23, Rule 3 CPC20

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15 Manorahan Gerald and Kishore Tanvi, "Enforceability of a mediated settlement" at www.campmediation.in/enforceability, J. Sagar and Associates, Bangalore.

16 Mediation and Conciliation Project Committee, Para 1.10.

17 Mediation Training Manual of India, Mediation and Conciliation Project Committee, Supreme Court of India, Chap. VII, Para B (ii).

18 Section 73(3)- When the parties sign the settlement agreement, it shall be final and binding on parties and persons claiming under them respectively.

Section 73(4)- The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

19 Section 74- The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30.

20 Order XXIII Rule 3- Compromise of suit.- Where it is proved to the

in order to have a compromise decree passed by court which is final and binding on parties therein.21

The Legal Services Authorities Act 1987 is the framework law for legal aid in India. The National Legal Services Authority, State Legal Services Authority, District Legal Services Authority are the formal structures in place that lead the Legal aid movement in the country.

General Suggestions towards the making of an effective Mediation Movement in the country

The first and foremost requirement is to have a conducive law that promotes mediation.At present there is no specific legislative pronouncement on mediation in India. Court annexed mediation is recognised under Section 89 of Civil Procedure Code and is conducted in a manner as outlined in Mediation Rules enumerated on the recommendation of the Apex court. There is thus far no particular law or format for private mediation. This is unlike Arbitration and Conciliation in India which is explicitly recognised by the Arbitration and Conciliation Act 1996. In order that Mediation becomes a major instrument of dispute resolution in India, it is vital that it is legislatively pronounced upon so that different aspects of it are clarified and it gains definite recognition.

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satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment. Explanation--An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule." Afcons Infrastructure Ltd.and another v. Cherian Varkey Construction Co. Pvt. Ltd and others, (2010) 8 SC 3353.

21 Supreme Court has affirmed it in Afcons Infrastructure Ltd.and another v. Cherian Varkey Construction Co. Pvt. Ltd and others, (2010) 8 SCC 3353.

Apart from certain subject disputes, as matrimonial, labour etc that lend themselves easily to mediation, an array of disputes have emerged in the commercial sector that may be conducive for mediation too.

Awareness of Mediation as a potential tool of preventive litigation must be emphasised and given adequate publicity by media (including print media, internet etc.) and forums as National, State and District Legal Authorities etc. There must also be organisation of Legal aid camps especially by law colleges and National, State, District Authorities that may also be helpful in bringing mediation into the spotlight.

Although each dispute is unique and must be tackled in view of the set of circumstances that govern it, it must be realized that mediation is a fine art that has a 'commoncore' that may be adapted to the theme on hand. The adaptation may be to a particular theme as for e.g. matrimonialmediation, that in turn has certain 'fundamentals'. Both, the 'common core' that is generic as well as the 'fundamentals' of a given themeare subject to the process of dynamic evolution. There is thus need to be fully acquainted and conversant with the 'grammar' of mediation usually through studying, training and experience. At an advance level of practice, a mediator may even contribute to the dynamic process of the evolution itself.

There is the incessant need of organisations/institutions working for Mediation as Mediation Clinics in law schools, Mediation centres, Law firms in this field to be established. It would be akin to those that have already been established in the field of Arbitration etc. There would then be a ready panel of Mediators that could be drawn upon by parties consenting to Mediation. The requisite infrastructural services could also then be easily availed of.

Finally, the National, State, District Legal Service Authorities must coordinate the efforts at mediation and ensure that private mediation is not lost sight of but is prominently featured alongside court annexed mediation, conducted unimpeded, with alacrity and justice.

Conclusion

The emergence of law schools as a potential forum for mediation is immense. There is a favourable compendium of factors that

supports the rationale. Certain kinds of mediation as Peer mediation, Neighbourhood mediation, online e-commerce mediation may berelatively moreamenable tothe speedy, economical, participative, consensual, confidential and mutually beneficial (to opposing parties) process of dispute resolution through Mediation Clinics at law schools.

Apart from the plethora of logistical support sourced in law schools for the successful establishment of mediation clinics, the experiential learning by students of the process and nuances of mediation is an accomplishment with futuristic dividends for the overall well-being of the judicial system.

The Indian experience of mediation as contemporary instrument of legal redress is in its infant stage yet but its future is bright especially when compared to litigative remedies. Mediation at one level of perception is a means of avoiding the pitfalls of litigation.22All entities that are supportive of mediation efforts must thus be encouraged and supported. The sporadic attempts at setting Mediation Clinics in Law Schoolsmust be galvanised to become consistent so that the trickle becomes a deluge of mediation entities that sweeps away the overrun of the 'litigation quagmire' that pervades the justice system of the country and bring much needed succour to the 'docket' burdened justice delivery system.

With the conception, nurture and encouragementof the theory and practice of'mediation' to the teeming young talent at the law school itself (in multitudes of law schools), the emergence of a professional body of lawyers adept and alert as to the immense possibilities of 'Mediation'maybecome harbingers of hope andultimately be instrumental in deliverance of justice.

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22 Chandrachud D.Y., J., Bombay High Court, "Mediation- realizing the potential and designing implementation strategies", 2010. Further, "Mediation has significant potential not merely for reducing the burden of cases but more fundamentally for bringing about a qualitative change in focus of legal system from adjudication to settlement of disputes. Inducing a system to evolve from a litigation oriented approach to a more curative or preventive approach involves much more than the development of law. The development of law is an important step but.....developing capacities..... (is) are critical elements in the success of the process."

Reading Principles of Tribal Customary Laws of Marriage in Private International Law: A critical Analysis

Thangzakhup Tombing*

Introduction

Marriage whether arising out of custom, contract or sacrament, creates status of husband and wife to the parties in marriage which gives rise to corresponding rights and duties. In common parlance marriage is a civil institution that recognises the union of man and woman by giving a status of legitimacy thereby legalising the status of spouses, children and other dependents. A good status also ensures right to maintenance of spouses and dependants during marriage and on the dissolution of marriage. Valid marriages entail as well as create succession and inheritance rights. However, in some tribal community of Mizoram, Manipur and Meghalaya1 matters relating to validity of marriage and its antecedents rights duties may turn out to be more complex owing to the simplicity or over simplicity of the understanding of the institution of marriage among these communities2.

Through this research paper an attempt is being made to critically analyse the pertinent issues and challenges of private international law in regard to marriage, the validity of marriage on the ground of formal validity of marriage as well as essential validity of marriage will be explored, compared and analysed. Also, the antecedents of

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1 *Assistant Professor, National Law University, Assam, E-mail: t.tombing@nluassam.ac.in. Through the paper analysis of some of the aspects of customary laws of the Mizo tribe of Mizoram, the Paite tribe of Manipur and the Khasi tribe of Meghalaya will be analysed in the light of the study of the concepts and principles relevant to study of Private International Law.

2 Among the Paite tribe of Manipur it is the intent of the party to be simply be taken as husband and wife that would suffice the requirement of marriage. Thereby implying that elopement is valid process of marriage under customary law. Modern marriage form among Paites may be a semblance of Chiristian marriage and traditional.

inter- country marriage in terms of the intended matrimonial home, domicile, forum for ensuring rights and remedies in matrimonial cuases etc will also be explored. The tribal customary laws of different communities of Paite, Mizos and Khasis will be explored and examined in situations of dispute between two different nationals where one of the parties to the marriage is tribal person from the North East. Also, tribal customary laws of Paite, Khasi and Mizos will be tested to see whether they are scientific and holistic enough to meet the established standardsof the science of the best practices in private international law.

Illustratively, '**A**' who is a Mizo male, age 21 from Mizoram got married 'B' a British woman 17 years of age who was a tourist in Mizoram by the Mizo customary marriage practice of *inru*[3]. The validity of this marriage can be scrutinised from three perspectives: i) validity of marriage according to Mizo Customs[4]; ii) validity as per the law of the land of India[5]; or iii) validity of marriage according to British law[6]where each legal system must determine the attributes

3 'Inru' is a customary process of marriage where a man has taken a woman to live with him as his wife. Among the Mizos there are different types and forms marriages, a marriage can be very strict and formal or it may be casual and informal, where the intent to take each other as husband and wife maybe also be sufficient.

4 Vide Art. 371 (G) of the Constitution of India, Mizo Community of Mizoram shall have every right to be governed by their customary laws in matters of marriage, divorce and the antecedents of rights of property . In South Africa the Recognition of Customary Marriages Act 1999, validates customary marriages. The Act empowers to validate customary marriages which were registered prior to the coming of the Act.

5 Majority of the Mizos are Christian, however, they need not governed by the Indian Christian Marriage Act, 1872 and the Divorce Act, 1869, in fact Mizoram had enacted the Mizo Marriage, Divorce and Inheritance of Property Act, 2014. S. 2 of the Act provides that it applies to marriages where male member of the parties to the marriage belongs to Mizo tribe. Thus, indirectly providing provisions for validating the marriage of Mizo male with a non- Mizo or foreign national as the case maybe.

6 In cases where the marriage involve a British citizen and a foreign national the established applicable principle of law under Private International Law concerning the validity of the marriage in UK is the legal maxim, 'locus regit actum' which means the place govern the act, Cheshire, North

of the consensual union between man and woman[7].

Constitution and the Law:

The Indian Christian community, who constitute of 2.3 per cent of the entire population of India[8], is marked by its diversity in language, culture, traditions and geo-political locations[9]. The North East India tribal communities' showcases unique culture, traditions and languages which were preserved over time immemorial. Historically, most of the tribal communities were never directly under the British Colonial rule, however, post independence through a political process they have been assimilated into the union territory of the Union of India[10]. The Union of the States of India were not necessarily formed by agreement between the States and Union of India[11]. The Constitutional provisions of A. 244 and A. 371 mandate exclusive governance according to the customary laws of the tribal community within the constitutional framework[12]. Amidst the diversity and plurality of cultures, traditions, language, customary

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& Fawcett, Private International Law, 878 (14th ed. 2008).

7 Ibid, at 876.

8 Religion, Census of India 2001.

9 The socio- religious practice and conduct of Christians in North, South, East, West and North East of India in matters of worship, marriage, divorce, succession and inheritance are remarkably different in its form, structure and institutional organisation.

10 Art. 1 (1), the Constitution of India provides that, "India, that is Bharat, shall be a Union of States".

11 "...the federation was not the result of an agreement by the states to join in a federation...though the country and the people are divided on to different states for convenience of administration, the country is one integral whole... " Statement by Dr. Bhimrao Ambedkar, Constituent Assembly Debates, Reprint, Vol. VII, Paper 43.

12 In the case of Germanthangi v. F.Rokunga and others, AIR 2004, 42, the Gauhati High Court upheld the right of the Mizo community to be governed by the Mizo Hnam Dan, which was a compilation of the Mizo Customary Laws and Practices in matters of marriage, divorce, succession, inheritance etc., like wise in the other related cases of Smt. Lalliani v. R.L. Rina 1987 CriLJ 1295; Sailala v. Smt. Ngurtaiveli, 1980; Smt. Lalrutlungi v. Smt. Thanpari AIR 1992 GAU 100, the Gauhati High Court opined that among the Mizos the right to make will was well known and well recognised.

law and practices in India, defining the law of the land pertaining tomarriage law[13] involving foreign national, in the context of tribal customarylaw is a challenging task[14].

Understanding the Subject Matter of Private International Law in the Limited Scope of Tribal Law

The marriage law of India will be quite contrast to the marriage law of Japan, and the marriage law of the Japan will quite contrast to China, China to Korea and to Britain. According to the English law, questions relating to personal status are governed by the law of domicile but in France, Italy, Spain and most of the Continental European countries on the law of nationality.[15]Reading the subject matter of private international law where there is an interplay of the customary law of a tribal against foreign law requires firstly the need toascertain the efficacy and viability of tribal customary law as recognisable institution against foreign legal system. Thereby propelling the tribal customary law of the concern tribe to the status of reliable legal system, that is recognisable and enforceable in domestic as well as in foreign legal system(s)[16].

The diversity of law, custom and usages and the application of various systems of law create challenges in cases where the given factual situation involves foreign element. In such situation where both the parties in whatever capacity seek from court for determination of their rights and remedies, the diversity of law and legal systems

13 Schedule 7, List III, Para. 5, the Constitution of India empowers the Union and the State government(s) to make law on marriage and divorce subject to personal law.

14 Understanding the idea of limited self determination of tribal people in scheduled areas as mandated by the Constitution of India in the Sixth Schedule in matters of marriage and divorce, clubbed with Art. 4, the UN Declaration on the Rights of Indigenous Peoples, 2007 in the context of tribal rights and autonomy may posit a perplexing legal challenge.

15 Supra 6, at 9.

16 Ben Saul, Indigenous Peoples, Laws and Customs in the teaching of Public and Private international Law, Vol. 4, Ngiya: Talk the Law 63, 74 (2002) available at http:// www.austlii.edu.au/au/ journals/ NgiyaTLaw/2002/13.pdf, last seen on May 5, 2017.

around the world makes it pertinent that characterisation of factual situation having foreign element be defined.

Since 1725 it is an established under private international law whether marriage was formal or informalrequires that two essential conditions must be fulfilled for the validity of marriage:

i) Parties to the marriage must have performed the necessary ceremonies and rites of marriage, thus ensuring the formal validity of marriage governed by *lex loci celebrationis*[17].

ii) Parties must have fulfilled certain criteria of age, health, mental well being etc to be able considered capable of entering into a marriage, thus ensuring the essential or material validity of the marriage governed by the law of domicile, *lex domicile*.

The issues of law in marriage involving foreign element are matters pertaining to the validity of marriage and matrimonial causes, including recognition and enforcement of foreign divorce decrees in India[18]. In the context of India the internal law relating to marriage and the related matrimonial causes had been codified, however in the context of the tribes of the North East except for the state of Mizoram[19] rest of tribes follow their customary laws and practices.

***Nature of Marriage and Characterisation of Marriage*:**

In the case of Harvey v. Farnie[20]it was held that the nature and incidents of marriage are determined by *lex loci contractus* and the characterisation of whether marriage was monogamous or polygamouswas determined by the *lex fori*.[21] Marriage validity may as

17 Mira Devi v. Aman Kumari, AIR 1962 MP 212: 1962 MPLJ 248: ILR (1062).

18 Lakshmi Jambolkar, Marriage and Matrimonial Causes in Private International Law- Indian Perspective, 63 Select Essays on Private International Law (Lakshmi Jambolkar, 1st ed., 2011).

19 Supra 6.

20 6 PD 35, (1880, House of Lords), Sofia v. Shive Prasad, (1946) Calcutta 484, and Baindall v. Baindall 1 All ER, 342 (1946, House of Lords).

21 Paras Diwan, Peeyush Diwan, Private International Law: India and English,

well be determined by the law of domicile[22]. In the case ofCheni v. Cheni[23], parties to marriage who were in the prohibited degree of relation of uncle and niece domiciled in Egypt, later they migrated to England and made England their choice of domicile. When a petition for nullity of their marriage was brought to the English court on account of they being in a prohibited degree of relationship, the British court held that the decisive date for considering whether the marriage was polygamous or monogamous is not the date of marriage, but the date on which proceedings for matrimonial relief was filed, thus allowing the annulment of the marriage by applying law of their domicile[24].

In England it was not until the coming the of the Matrimonial Proceedings (Polygamous Marriage) Act, 1972 that its legal system permitted matrimonial relief for parties who were in polygamous relationship, Section 1 (i) of the Act[25]. This law paved the way for recognition and protection of rights and status of wife in polygamous marriage in the landmark case of Alhaji Mohammad v. Knott[26].

Defining the factual situation having foreign element(s) maybe discussed and understood under the relevant discourse and study of the nature of problem involved in characterisation, the relevant theories of characterisation and finally the process of characterisation[27].

Problem of Classification:

Any court which assumes jurisdiction over a case involving foreign

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239 (4th ed. 1998).

22 Supra 6, at 899.

23 3 All ER 873 (1965 House of Lords).

24 Supra 6, at 242.

25 S 1 (i) "A Court in England...shall not be precluded from granting matrimonial relief or making declaration concerning the validity of a marriage by reason only that the marriage was entered into under a law permits polygamy.

26 2 W.L.R. 1446 (1968, Queen's Bench Division).

27 Supra 21, at 73.

element for example in the cases of Hyde v. Hyde[28] and Warrender v. Warrender[29], where the English court refused recognise polygamous union as marriage, to determine whether a given factual situation gives rise to rights, or impose obligation, or creates legal relation or an institution or an interest in a thing[30] and ensuring socially desirable and just result is a cardinal question before the court with competent jurisdiction.

For instance in a factual situation of involving foreign element unless the court determines what is meant by capacity, formalities of marriage which is governed by the l*ex domicilli* and *lex loci celebrationis* it would be almost impossible to proceed[31]. This problem may become quite acute in some cases owing to the diversity and plurality of the custom and practices of each country. For instance in India there are diverse forms of marriage, the solemnisation of marriage, the essential requirement of marriage depending on the region, religion and culture of the parties to marriage where in European, Scandinavian countries and other western countries in may not be so diverse.

Theories of Classification:

Four theories of classification had been propounded for defining factual situation having foreign element under Private International Law[32]:

a) Classification on the basis of *lex fori;*
b) classification on the basis of *lex causae;*
c) classification on the basis of two stages: primary classification(governed by *lex fori*) and secondary classification (governed by *lex causae*);
d) Classification on the basis of comparative law and analytical jurisprudence.

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28 LR IP& D. 130 (1866, English Court of Probate and Divorce).
29 2 Cl. & Fin. 488 (1835, Court of Session).
30 Supra 21, at 74.
31 Supra 21, at 75.
32 Supra 21, at.76.

Classification on the basis of lex fori:

Bartin's after thorough study of the concept of laws of nation, its relevance when dealing with situational facts that had foreign element came to the conclusion that the classification of such problems under private international law must be made on the basis of *lex fori.*[33] Bartin suggested two approaches to his rule of *lex fori*[34]*:*

i) A court dealing with question of characterisation, must invariably (subject to few exceptions) apply and decide the issue on the basis of internal law. The internal law maybe invoke only when there is a corresponding rule, institution or legal relationship. In the absence of such corresponding rule it must be determined on the basis of the closest analogy available in its internal law.

ii) Once the court of competent jurisdiction had determined the law applicable is of particular country or place, then the court should apply that law as is applies d in that country or place, and also suggest relevant subsidiary characterisation of the problem.

Challenges and critique of Bartin's characterisation and suggestion:

i) The limitation on the application of internal law, if it was suppose to be based on voluntary willingness then it is highly probable that the application of foreign law may relegate the law of the sovereign to an inferior status[35].

ii) Likelihood that the law of the forum will be applicable even in those cases in which the suit has no relationship with the forum except that it is being adjudicated in the court of the forum[36].

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33 Bartin rejected the law of nations theory as he believed that law of nations does not have rules to adjudicate cases with foreign element.

34 Supra 21, at 77.

35 Supra 21, at 77.

36 Ogden v. Ogden, L.R.P. 48 (1908, Court of Appeal).

Lex causae:

Lex causae theory was propounded in opposition to Bartin's theory of lex fori by Despagnet and Martin Wolff[37]. According to the analysis of Wolff the classification of factual circunstances involving foreign element must be characterise on the following grounds[38]:

Every legal rule takes its classification from the legal system to which it belongs.

To examine the applicability of foreign law without reference to its classification is to fail to look at foreign law at all.

Thus, a court of competent jurisdiction examining the applicability of foreign law will have to take in consideration the classification as is done in the foreign court.

Despagnet analysis of factual circumstances that involved foreign element had been summed up by Lorenzen on the following arguments[39]:

When a court of competent jurisdiction would adjudication on factual circumstance involving foreign element involving judicial relationship the judge should keep in mind it must be organise and regulate such relationship.

i) The judge while adjudicating must also keep it mind the intend of the legislator in determining the nature or qualification of the relationship which he regulates.

Thus, the judge adjudicating such matter has to adjudicate and regulate the judicial relationship keeping the intent of the legislator before finally determining the rights of the parties. Any adjudication otherwise would tantamount to non application of the law to which the juridical relationship in question was, on principle, subject[40].

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37 Supra 21, at 81.

38 Supra 21, at55.

39 Ernest G. Lorenzen, Theory of Qualifications and the Conflict of Laws, 20 Columbia Law Review, 247- 282 (1920) available at http://digitalcommons.law.yale.edu/fss_paers/4569/ last seen June 5, 2017.

40 Ibid.

Classification on the basis of two stages:

The process of classification of factual situation concerning foreign element at two stages propounded mainly by Cheshire, seconded by Robertson. According to this process the primary classification at the first stage is that of the *lex fori* followed by *lex cuasae*[41].

According to this approach *lex fori* is used in a wider term thereby implying that not only the domestic rules of the forum but also include the rule of private international law[42]. Judges while adjudicating such cases must not limit themselves to the internal law of the forum as relying only on the internal will not be holistic enough to enable the judge to find the relevant counterpart of any provision of rules or institution, thereby end up defeating the science of conflict of law[43].

This theory requires that the later classification is governed by the *lex causae.* it is the process of delimitation and application of the proper law[44]. *Lex fori* must precede the *lex causae,* as such the conflict procedural rule is governed by the *lex fori* and the *lex causae* determine the proper law, whether the rule is substantial or formal, already shown as applicable to the question of which has to be characterised.[45]

Indian Private International Law Context:

In India where a foreigner is involved the solemnisation of marriage requires the following essential conditions[46]:

i) Whether the intending parties to marriage can invoke the applicable/ chosen law for getting married;

ii) Whether they fulfil the requirement laid down by the applicable/ chosen law.

The pre- requisites for the solemnisation of marriage involving

41 Supra 21, at 82.

42 Supra 21, at 82

43 Supra 6, at 33, A. Robertson, Characterisation in Conflict of Laws, 59 – 134 (1940)

44 Ibid, at 38.

45 Ibid, at 34.

46 Govindraj, The Conflict of Laws in India, 75.

foreigner had to be further authenticated with the domicile of either of the party's personal law. According to the provisions of Ss 1(1) and 2 (1) of the Hindu Marriage Act, 1955 domiciliary qualification was not required[47]. Likewise the Christian Marriage Act, 1872[48], the Parsi Marriage and Divorce Act, 1936[49] and the Special Marriage Act, 1954[50], except for the state of Jammu and Kashmir none of these Acts explicitly prohibit marriage of any two persons in India on the ground of domiciliary. S. 3 (c), the Muslim Personal Law (Shariat) Application Act of 1937 requires that only the resident of India (except for the state of Jammu and Kashmir) can make a declaration that in all matters including marriage he desires to be governed by the Act. Private international law does not bar parties from contracting marriage on the groundof non- domiciliary[51]. In India where the *lex domicile*of the parties to the marriage was different from the *lex loci celebrationis* the preferred law would be the *lex domicili*[52].

On the fulfilment of essential or material validity of marriage couple may form their matrimonial home. If the couples follow patri-local system of family, the wife will follow her husband's household. However, in community where matrilineal system prevails, it is the husband who would follow his wife's matri-local home[53]. So long as the parties are Indian citizens domiciledin India matrimonial home may be decided either on the basis of the couple'scustomary practices or on the basis of the economic capacity of either husband or wife. But when there is an involvement of foreign elements in the marriage deciding matrimonial home

47 Prem Singh v. Dulari Bai, AIR (1973) CAL 425.

48 S. 1 (2).

49 S. 3 (c).

50 S. 4 (e).

51 In the case of Padolecehia v. Padolecehia, 3 ALL ER 863 (1967, House of Lords), it was held that marriage solemnised in England between parries who had briefly stayed in England was a valid marriage.

52 Meera Devi v. Aman Kumari, AIR 1962 MP 212.

53 In the North East of India, among the Khasi and Garo tribes of Meghalaya State it is customary that matrilineal and matrilocal system are followed, whereas among the Nayyar community of South India, husbands enjoy the customary duality of options of matri-local and patri-local of household after marriage.

owing to the dual theory of domicile is a complicated issue[54].

In private international for deciding matrimonial home owingto the couple's duality of domicile, it is pertinent to first explore the relevant law(s)which will be applicable to ascertain the validity of the marriage? According to Cheshire the judicial dicta in such situation must be in favour of matrimonial domicile[55] whereas according to Graveson it should be each party's domicile. To explore the reasons for conflicting judicial opinions, the relevant concepts of formal validity and essential elements of marriage in private international law have to be further analysed.

Formal validity and the Principle of *Locus Regit Actum*:

The formalities of marriage under private international are governed by *lex loci celebrationis* i.e. the law of the place where the marriage was celebrated. In a situation where 'A' age 25, male who belongs to Khasi tribe[56] of Meghalaya who was already married to another married Khasi woman marries 'B' age 18, an English woman in Shillong through a Khasi custom of *ka tnga trait uh* or the stolen wife[57].

It is a well established law that a marriage to be formally valid must comply with the local law- *locus regit actum* which means that the place governs the act. Thus, if a marriage is good by the law of the country where it is affected or formally valid in accordance with law of the place, then the marriage will be valid everywhere[58]. Con-

54 The plurality of law and legal systems among different tribal communities in the absence of uniformity of personal laws of the North East of India renders the entire approach and understanding of the theories of classifications a complex definition.

55 Supra 2, at 896.

56 Khasi is a general name given to various tribes that inhabits the Khasi and Jaintia hilly tracks of Meghalaya in the North East India. Khasi community follows matrilineal system, thus according to the Khasi customary law a person born to a Khasi mother is considered to be Khasi.

57 Where a Khasi male had taken second a wife during the lifetime of his first wife it is treated as a man forming an informal alliance with another woman.

58 Chesire asserts that there is no rule more firmly established in private international law than that which applies the maxim locus regit actum to the formalities of marriage. Also See Supra 21, at 878.

versely, if the marriage was not valid at the place where it was celebrated, it will not be valid anywhere else even if the ceremonies or proceedings were conducted at the place(s) where the parties were domiciled[59].

In the case of Apt v. Apt[60] the English court held proxy marriage, which was a valid form of marriage in Argentina, as valid of marriage on the basis maxim of *lex loci celebrationis.* In another case of Compton v. Bearcroft[61] court upheld the marriage since the local law recognises validity of marriage on the basis of repute or cohabitation thereby implying that it is the place that governs the act.

In Simmonin v. Mallac[62], the parties to marriage who were both domicile of France cross the English Channel to get married in England to avoid irksome personal law practice in France[63] that prohibits solemnisation of marriage without the consent of parents. Later when the wife petitioned for the annulment of their marriage on the ground of non compliance with formalities of marriage, the English court maintained that the marriage was any way valid. Thus, evasion of domestic rule in order to avoid irksome lawdoes not affect the formal validity of marriage. However, in the case of Gandhi v. Patel[64] the English Court nullified the marriage of two Hindus solemnised in an Indian restaurant in England as per Hindu marriage rites and ceremonies in the presence of a Hindu priest on the ground that there was wilful neglect of the English law of Marriage Act, 1949. But marriage performed without "wilfully" neglect of the Act need not necessarily be denied effect.[65]

Thus the *lex loci* at the time of the marriage celebration determine the formal validity of marriage once and subsequent change in the law of celebration would not invalidate the marriage. However, marriage

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59 Ibid.
60 2 ALL ER 677, (1947, House of Lords)
61 2 Hagg. Con. 430 (1769).
62 2 Sw. & Tr. 67 (1860).
63 The Napolean Code that required parental consent to enter into marriage.
64 1 FLR 603 (2002).
65 Supra 21, at 879.

which was initially invalid by local laws for want of civil ceremony may be be validated by subsequent retrospective changes in the *lex loci*[66].

Exceptions to Locus Regit Actum:

There are certain marriages where the English courts had rendered the marriage valid even even when the marriage had failed to observe the formal requirement of *lex loci celebrationis.* Exceptions to *locus regit actum* may be owing to statutory exceptions or the common law exceptions[67].

Statutory Exceptions:

Statutory exception is further studied under the following heads:

a) Consular marriage;

Members of British forces serving abroad.

Consular marriage:

The English Foreign Marriage Act 1892- 1947 and the Foreign Marriage Amendment Act, 1988 provides that a marriage between two parties one of whom is a British subject solemnised before a marriage officer in a foreign country in a manner prescribed by the act, shall be valid as if it had been solemnised in United Kingdom[68].

Marriage of members Of British Forces Serving Abroad:

When the British Forces go abroad it carried with it the English law and consequently the British Forces- naval, military or air forces members could enter into marriageunder the administration of chaplain as if it had been solemnised in the United Kingdom[69],

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66 Starkowski v. Attorney General, A.C. 155 (1954), the issue in this case was whether a marriage between two Polish nationals which was invalidated at the time of its inception due to the prevailing law which prohibited religious ceremonies of marriage can be retrospectively validated when the prohibition was lifted.

67 Certain marriages maybe treated as valid marriages if it satisfies the requirement of the common law of England, Supra 21, at 887.

68 Supra 21, at 885, added in S.1 (2), the English Foreign Marriage Act, Amended in 1988.

69 S. 22, the Foreign marriage Acts, 1892, and substituted by the Foreign

whether they were in active service or in the occupation of foreign territories after the conclusion of hostilities[70].

Material Validity of Marriage:

The capacity of the parties to enter into a valid marriage as a general rule is governed by the ante nuptial domicile[71] of each party. In the cases of Brook v. Brook[72]and Satttomayor v. De Barros[73] the court annulled the marriages due to lack of capacity to marry based on the parties ante nuptial domicile. Further material validity of marriage requires the fulfilment of the conditions of consent, non- age and prohibited degrees.

Consent

Free consent for marriage is essential in all kinds of marriages. In some countries the guardian's consent on behalf of minor bride is an acceptable norm. Some communities may require explicit consent of the parties. While is some tribal community consent may be implied[74]. In the case of H v. H[75] a Hungarian domiciled girl for the sole purpose of getting out of Hungary underwent a ceremony of marriage with her cousin domiciled in France. After marriage she moved to England while her husband stayed back in France. The English Court annulled the marriage on the ground of lack of consent by applying her ante-nuptial domicile[76]. Condition of Non- age

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Marriage Act 1947 and the 1988 Amendment Act, SI 2005/ 3129.

70 Supra 6, at 271.

71 Notwithstanding the relevance of dual domicile doctrine and the intended matrimonial home doctrine.

72 1 ER 703 (1861, House of Lords).

73 2 P.D. 81 (1877, Court of Appeal).

74 Among the Paite tribe of Southern Manipur elopement is implied consent for customary marriage process.

75 (1954), P.258.

76 InMehta v. Mehta 2 All ER 690 (1945, House of Lords), the petitioner was under the impression that the ceremony that he had undergone was for the purpose of the betrothal while the girl's family contended that it was a ceremony for marriage. The English court annulled the marriage on the ground of lack of valid consent. As well, in the case of Qasim v. Qasim, P. 214 (1962), where the impression of monogamous marriage turned out to be polygamous marriage was annulled on the ground of lack of valid consent.

Marriageable age differ from custom to customs, region to region and from country to country. In India the legal age of marriage is 21 years for men and 18 years for women[77]. Art.16, the United Nations Declarationof Human Rights simply provides that men and women of full age have a right to marry and found a family[78].It does not provide any process of marriage but lends the idea that it for the man and woman who are of full age who have the right to marry and found family. What happens where parties to the marriage involves a tribal person and a foreigner?

In the case of Pugh v. Pugh[79], where marriage was solemnised between a British soldier, stationed in Austria, and a Hungarian girl age 15 domiciled in Austria. According to the Hungarian personal law marriage of an underage is a valid marriage which could be avoided before the age of 17 years. However, under English Age of Marriage Act, 1929 prohibits the marriage of under age of 16 years. Thus, the marriage was annulled on the ground of non- age of the party[80].

Condition of Prohibited Degrees*:*

The rule of prohibited degree is subject to the prevailing customs or the personal laws of the parties to the marriage. Among some community marriage between maternal uncle and niece is permissible. In the case of V.S Reddiar case[81] it was held that it was sufficient to establish proof of custom.In the context of the tribes of north

77 TheIndian Marriage Act 1872, the Parsi Marriage and Divorce Act, 1939, the Special Marriage Act 1954, the Hindu marriage Act, 1955 provided that marriageable age for male and female shall be 21 and 18 years respectively, however in the case of Hindu marriage underage marriage is neither void nor voidable.

78 Art. 16, United Nations Declaration of Human Rights states that, , "Men and women of full age , without any limitation due to race, nationality or religion , have the right to marry and to found family . they are entitled to equal rights to marriage, during marriage and on its dissolution"

79 2 All E.R. 680 (1951, House of Lords).

80 The marriage being treated to have been solemnised in the British soil vide the rule of marriage for British soldier serving in foreign soil (S. 22, the Foreign Marriage Act, 1947).

81 V.S. Reddiar and Anr. v. Seetharan and Ors. AIR 1972 Mad 421.

east different tribes have different custom for example among the tribe of Paite first cousin was not only permissible it used to be a practice that the maternal uncle's daughter was given the first preference in marriage[82]. In the case of Sattomayor v. De Barross[83], where the parties to marriage were first cousins. Though Portuguese customary prohibits marriage of first cousin, it was permissible at the discretion of competent papal who may have ordainedthe marriage. The couple had lived in England for six years before they approached the English court for the annulment of their marriage. The English Court annulled the marriage on the ground of lack of capacity of marriage.

Legal capacity of age to marry under Private International Law is ascertained on the basis of law of the forum[84].

If the *lex loci celebrationis* principle would have been applied to the ascertain the validity of the marriage in the above illustration, then the validity would have to ascertained on the basis of the internal law whereby it would have to be seen whether the Khasi customary law must be applied or the Indian Christian Marriage Act, 1872[85] or the Special Marriage Act, 1954. The Khasi customary law of taking an informal wife during the lifetime of the first wife is applicable to Non Christian Khasi. If the parties were Christians than the Indian Christian Marraige Act would have been applicable. In the case of Mariam Eva v. State of Himachal Pradesh[86] the High Court held that under S.4 of the Special Marriage Act marriage maybe solemnised between any two persons- between two citizens of India or between a citizen and a foreigner or between two foreigners. Thus, except for the Khasi customary practice of taking of informal wife the marriage would have been rendered a *void ab initio.*

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82 The Mizo Marriage, Divorce and Inheritance of Property Act, 2014, S. 9 connotes that the prohibited degree of relationship is on the basis of the either of parties to marriage religious affiliation not otherwise.

83 5 PD 94 (1879) see also in the case Brooks v. Brooks, 9HL Cas. 193 (1861).

84 Warrender v. Warrender 2 Cl &Fin 488 (1835).

85 Among the Khasi Christiansthe Act extends to the whole of the United Khasi Jaintia Hill District.

86 AIR 1993 HP 7.

Matrimonial home

Most of the tribal community of the North East practice patrilocal system thereby implying that it is the husbands place of residence which shall be the matrimonial home of the newly wedded couple. Among Khasi, Garo and Jaintia tribes of Megahalaya in North East India matrilocal is the prevailing system. In an Illustration say **A** who is a Hindu from Nepal marries**B** a Khasi Christian girl from Meghalaya in Shillong. In such context, what should be intended matrimonial home?

Intended matrimonial home:

Normally it is the husband's matrimonial home where the intended matrimonial home would be established. Earlier, it was a practice among most of the cultures across the world that it was the prerogative of the husband to choose matrimonial home. In the case of Pace v. Pace[87] Court in Georgia held that husband being the head of the family has the right fix matrimonial residence arbitrary. Also, in England it was an accepted and established norm that the choice of the matrimonial home was on the husband owing to his duty to provide his wife according to his circumstance[88]. In the Indian context the husband must actually establish matrimonial home if he is the primary wage earner and as such matrimonial home must be established near his place of his work[89]. This argument is rebutted if it can be inferred that the parties at the time of marriage parties intended to establish their matrimonial home elsewhere and that they did in fact established it within a reasonable time and that the law on matrimonial home must be interpreted in the context of present day conditions and needs of society[90].

The poignant issue is what happens when the parties to marriage as is given in the illustration are from two different systems one belonging to a matrilineal system while the other is govern by a patrilocal system. In such type of marriage the domicile of the parties to the marriage plays a pivotal role in determining the

87 154 Georgia 212 (2010, Supreme Court of Georgia).

88 13 Halsbury's Laws of England, Fourth Edition (1975-76) para. 623.

89 Kailashwati v. Ayodhia Prasad 1971 CLJ 109 (P&H).

90 As was iterated by the Delhi High Court in Swaraj Garg v. K.M. Garg, AIR1978 Del 296. The similar rational was also laid down in the case of Shanti Nigam v. R.C. Nigam, (1971) All LJ 179.

capacity of the party to marry. Where nothing much is known about a person except that the Court shall assume that his personal is the law that prevails in his country[91].The situation becomes more precarious when such a marriage involve foreign element where one of the party is governed by local customary law[92]. After marriage it is customary that a Khasi husband goes and lives with the wife at the house of his mother-in-law[93].Thereby implying that it is the law of the land where their matrimonial home is established that shall be governing their marriage rights and matrimonial remedies, in the context rule of *domicile*. In the case of Willson Reade v. C.S. Booth[94], where the issue arose as to whether children of Khasi mother and English father is a Khasi? The Gauhati High Court made a poignant observation that according to Khasi customary law mere living as husband and wife constituted a valid marriage[95]and that aperson born of Khasi mother though of non- Khasi father, was in course of time assimilated and treated as a member of Khasi community[96].

Conclusion:

Till the last decade or so to the shy and insulated tribal communities of the North East India the principles and concepts of Private International Law would not have much relevance. The impact of globalisation and liberalisation of economy, cultures and easy availability internet accessibility, affordable smart phones and social media had opened up vistas of unexplored possibilities. Inter-country marriages is one such vista which the tribal communities in the North East India is gradually but surely experiencing. Right to choose a partner and to find a family is every individual's basic human rights.However, the poignant question is, whether the

91 Balwant Rao v. Baji Rao, (1921) 47 IA 213.

92 A. 371 clubbed with provision of 6th Schedule of the Constitution of India gives protection to scheduled tribe in scheduled areas of North East India their own customary law in marriage and other matters of personal laws.

93 Kusum, P.M. Bakshi, Customary law and Justice in the Tribal Areas of Meghalaya, ILI,N.M. Tripathi Pvt. Ltd., Bombay, 1982, p. 92.

94 AIR 1958 Assam 128.

95 Ibid, at para 3.

96 Ibid, at 136, similar rationale was applied by the Gauhati High Court in Clifford v. Stanley D. D. Nichols Roy, First Appeal 29 of 1964, against an elected candidate in a local election whose mother was an American and father a Khasi.

tribal communities of the North East and their customary laws are equipped to handle the complex classification of finding the relevant forum and remedies in matters pertaining to technicalities of rights of citizens of two different countries. Inter- country marriage has the potential of triggering communal disharmony among close knit tribal community[97].The uncertainty of the applicable customary laws and the Constitutional mandates for self -governance among the tribal communities for preservation of their unique language, cultures, traditions and customary laws have created plurality of different layers of legal system which may be too informal to meet the science of justice dispensation mechanisms as established in private international law. Among the Paite community of Manipur the marriage law are govern by the customary laws which had been passed on by memories from generation to generation. In the case of Khasi tribe of Meghalaya, marriage and divorce laws are governed by the Indian Christian Marriage Act, 1872 and the Indian Divorce Act, 1869. In the case of Mizos except for the three district which are under the Sixth Schedule, the Mizoram Marriage, Divorce and Inheritance of Property Act, 2014 governs marriage and divorce among Mizos. Critical analysis would reflect that the available laws to these tribal communities are parochial, community centric and likely to be highly patriarchal in their approach and understanding of the basic concept of justice. Constitutional mandate of Articles 244 (2), 275 (1) and 371 (C) in the State of Manipur for the Hill people, and Article 371 (G) for the State of Mizoram mandates that laws passed by the Parliament need not necessarily be implemented for the tribal people in these states. The uncertainty and plurality had necessitated the need of developing sound jurisprudence for understanding and reading of the principles and concepts of private international law among the tribal communities of the North East India.

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97 Marriage between Christian Khasi woman and immigrant Nepali Hindu male triggered communal violence in Meghalaya in the year 2010 (Dinesh Wagle, Meghalaya India: Marriage is not a Private Affair (05/07/ 2010), available at http://wagle.com.np/ 2010/07/05/Meghalaya-india-marriage-is-not- private-affair/ last seen on May 10, 2017.

Violence through Online Fake News and Need for Better Legal Regulation

Mohammad Umar*

Introduction

While referring to the First Amendment to the United States (US) constitution, the Supreme Court in US v. Alvarez (2011) upheld the freedomof speech and expression, even if it is found to be alie.[1] The ruling said if all the untruthful speech is unprotected. We all could be either made into criminals or compelled to "censor our speech to avoid the risk of prosecution".[2] It almost gave an impression as if the "right to lie" is inherent in the freedom of speech and expression. However, Justice Samuel A. Alito Jr. in his strongly worded dissent found the majority opinion an act of "breaking sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest". [3]

Therefore, even if the freedom of speech and expression includes right to lie, it is not absolute. In India, a fair constitutional scheme is available to balance out the use and abuse of speech. Among several other grounds under Article 19(2) of the Indian constitution, public order or incitement to an offence are also mentioned. With the advent of news websites, social media and mobile messengers the debate around free speech has assumed new proportions and dynamics. The power of false information (or "fake news" as it is popularly termed), supplied through online sources is such that it has started posing a threat to the life and property of innocent people. There have been increasing incidents in India wherein people are killed by violent mobs merely on the basis of suspicion that finds its genesis in unfounded rumour spread through mediums like - WhatsApp, Facebook, Twitter and news websites. For once

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1 United States v. Alvarez, 183 L. Ed. 2d 574 (2012, Supreme Court of the United States).

2 Ibid.

3 Ibid.

(if at all we have to follow the American idea of free speech), a political lie, defamatory accusation or attempt of false propaganda can be accepted. But any communication leading to the loss of innocent people'slives must not be accepted. Our constitutional and legislative policy protects the victims of such speeches rather than speeches themselves. With the free space of internet, where most of the content is unregulated and available freely, it becomes very tricky to regulate or trace the material that can potentially cause damage to the public order and peace of the country.

This research paper is an attempt to emphasize the urgency of taking implications of fake news seriously and search for practical legal solutions to it, given the fact that information in cyber space has its own peculiar behavior and cannot be equated withtraditional print or television media. Part 2 identifies the problem of violence paved by fake news and tries to make a case for regulation of the virtual availability of such news items to the readers. Part3 shall assess the legal and jurisprudential matrix related to the same. It shall look into the relevant provisions of the Indian Penal Code, 1860 (IPC) and the Information Technology Act, 2000 (IT Act) along with analyzing the constitutional scheme in the light of decided court cases. Part4 and 5 shall look into the issues regarding cybercrimes cells of police and liability affixation.Finally, the last section shall mark out specific suggestions after giving concluding remarks.

Mapping the fake news eco-system

Creating online content to cater to the predilections of a certain population is one of the easiest things to do today. In the civilized world where free speech is considered a basic virtue, it is rather healthy to have writings exchanged from different point of views. But the problem arises when propagators subscribing to predilections or ideological standpoints maliciously start using the web space as a forum to generate falsehood.

Since last half a decade or so, the world is realizing the potential impact of the fake news, not only on human lives but on entire gov-

ernment establishments. The United States,[4] Germany,[5] Pakistan[6], France, Myanmar,[7] India etc. have been considerably affected by the news generated fabrication. India, of all, has been one of the worst affected.

As per the trend, fake news isspread to achieve three purposes in India. Firstly, it helps in publicizing propaganda, which can originate at the behest of the ruling regime, political party, group or an individual.[8]Secondly, it is used as an instrument to inflict violence upon vulnerable groups such as religious minorities, dissenting media and people belonging to lower castes.[9]Lastly, it is seen as

4 See Hunt Allcott& Matthew Gentzkow, Social Media and Fake News in the 2016 Election, 31:2 Journal of Economic Perspectives 211 (2017); RichaKohli, 2016 Where Fake News Won Elections and Incited Violence, The Citizen, available at http://www.thecitizen.in/index.php/NewsDetail/index/8/9570/2016-Where-Fake-News-Won-Elections-and-Incited-Violence, last seen on May 25, 2017.

5 Joshua Philipp, 'Fake News' Crackdown Spreads Around the World, The Epoch Times, available athttp://www.theepochtimes.com/n3/2206375-fake-news-crackdown-spreads-around-the-world/, last seen on May 24, 2017.

6 Ben Westcott, Duped by fake news story, Pakistani minister threatens nuclear war with Israel, CNN, available at http://edition.cnn.com/2016/12/26/middleeast/israel-pakistan-fake-news-nuclear/index.html, last seen on May 16, 2017.

7 Kate Connolly & Angelique Chirsafis (et.al), Fake News: An Insidious Trend That's Fast Becoming a Global Problem, The Guardian (02/12/2016), available at https://www.theguardian.com/media/2016/dec/02/fake-news-facebook-us-election-around-the-world, last seen on May 24, 2017.

8 Recently, the ruling party's official twitter handle tweeted the news -"Major boost to India's tourism industry: India jumps 16 places from 40 to 24 in UN world tourism rankings". Later on, the tweet was found to be fake by independent media portal. See Sam Jawed, Did India jump 16 places in UN World Tourism rankings as claimed by BJP?, AltNews, https://www.altnews.in/fact-check-india-jump-16-places-un-world-tourism-rankings-claimed-bjp/, last seen on June 15, 2017.

9 Rituparna Chatterjee, Dadri Beef Rumour: Hindu Mob Lynches Muslim Man Suspected Of Killing And Eating A Cow, Huffington Post (15/07/2016), available at http://www.huffingtonpost.in/2015/09/30/beef-killing-up_n_8219828.html, last seen on May 25, 2017; KarnikaKohli, BJP Spokesperson Sambit Patra 'Falls' For Fake News on Social Media, Again, The Wire, available at https://thewire.in/146379/bjp-fake-news-sambit-patra-ndtv/, last seen on June 14, 2017.

a tool by substandard media channels to generate high television rating points (TRPs).

The latter phenomenon has existed since quite some timeand isneither considered serious journalism nor is taken seriously by the masses. Their only aim is to woo viewers by featuring insignificant and speculative stories on the occult, celebrity gossips and politicians.[10] While, on the other hand, the stories circulated online through untrustworthy websites and social media or through mobile messengershave a tendency to be believed as the truth by the public which is not habituated to gathering information from reliable sources. In the recent past, significant damage has been caused to life and property of innocent people merely on thebasis of rumours floated on the internet. For instance, according to the findings of the police investigation, an old video of two young men being allegedly lynched was mischievously circulated to incite communal riots in Muzaffarnagarand Shamlidistricts of Uttar Pradesh in 2013.[11] The violence was so intense that it left at least sixty dead and thousands displaced.[12]

10 Daisy Hasan, Neil Postman and the Rise of Infotainment in India, 240 in Recharting Media Studies: Essays on Neglected Media Critics (Philip Bounds & Mala Jagmohan, 2008).

11 Apurva and Dipankar Ghose, Muzaffarnagar Rioters Used WhatsApp To Fan Violence, Find Police, The Indian Express (12/09/2013), available at http://archive.indianexpress.com/news/muzaffarnagar-rioters-used-whatsapp-to-fan-violence-find-police/1168215/, last seen on April 2, 2017; See Samarth Bansal, Faking it on WhatsApp: How India's favourite messaging app is turning into a rumour mill, The Hindustan Times (19/05/2017), available at http://www.hindustantimes.com/india-news/faking-it-on-whatsapp-how-india-s-favourite-messaging-app-turned-into-a-rumour-mill/story-QAkM4RnF3NeeulOXlFDyUK.html, last seen on June 5, 2017.

12 Betwa Sharma, 3 Years After Muzaffarnagar Riots, Displaced Families Move Into Houses They Can Actually Call Home, Huffington Post (19/08/2016), available at http://www.huffingtonpost.in/2016/08/19/in-a-first-displaced-up-riot-victims-will-move-into-houses-that_a_21454867/, last seen on April 2, 2017.Learning the lesson from Muzaffarnagar riots, the Uttar Pradesh government blocked WhatsApp and social media to reduce the escalation of community clashes in Saharanpur. See Samarth Bansal, Saharanpur Dalit-Thakur violence: Here's why UP blocked WhatsApp, social media, The Hindustan Times (13/06/2017), available

Incident like this suggest that our system is not yet fully prepared to deal with fake news circulated online, especially the ones that can pose serious threat to public order and tranquility.

The Law Commission of India Report on "hate speech" has also not dealt with the problem satisfactorily. In the context of fake news generated on social media, it has confined its recommendation to "strategic interventions" as non-legal measures to address the problem, without elaborating the nature and form of those measures.[13]It is therefore important to explore the legal solutions for the issue and assess the present options and look into their varied applications, utility and interpretations.

The legal matrix

Application of the IT Act and the IPC

Section 66 A of the IT Act was struck down through the judgment authored by Justice RohintonNariman in *Shreya SinghalCase*.[14] The provision was considered in violation of freedom of speech guaranteed under Article 19(1)(a) of the Indian constitution, as it penalized anyone using internet to send messages on as vague grounds as – "annoyance" and "inconvenience". However, in the same judgment the apex court refrained from striking down Section 69 and 79. While Section 69 gives the power to the Central Government to issue directions for blocking the information from being made available to public, Section 79 exempts the intermediaries (such as Google, Facebook, Twitter and YouTube) from any liability in case any offensive material is published by their users.

It means, the Central Government continues to have the power to block the content without affixing any liability on the intermediaries. Under Rule 3 of the Intermediary Guidelines framed under Sec-

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at http://www.hindustantimes.com/india-news/saharanpur-dalit-thakur-violence-here-s-why-up-blocked-whatsapp-social-media/story-Ccx9MdU2LFu8VI6eksgeVK.html, last seen on June 15, 2017.

13 The Law Commission of India Report No. 267 on Hate Speech, March 2017, available at http://lawcommissionofindia.nic.in/reports/Report267.pdf, last seen on May 14, 2017.

14 *Shreya Singhal* v.U.O.I, AIR 2015 SC 1523.

tion 79, upon receiving knowledge of any unlawful act or publication/communication of certain type of content, the intermediaries are required to remove the information, data or communication link responsible for the restricted content.[15]Some of the grounds enunciating the nature of restricted content are contestable and at places as vague as they were in Section 66A.[16]But other grounds have sound rationale and serve important purpose of keeping a check on mischief laden information. Rule 3(2)(e), for instance, prohibits the flow of any message that "deceives or misleads the addressee" about its origin.[17] Rule 3(2)(i) further restricts anything that threatens public order or causes incitement to the commission of any cognizable offence.[18]

Both these rules must be read along with the corresponding provisions of the IPC to make complete sense. Section 153 A of the IPC criminalizes "any act" that promotes or attempts to promote enmity, hate or ill-will between "different religious, racial, language or regional groups or castes or communities."Authorities also have the option of Section 505(1)(c) which criminalizes any statement, *rumour* or report published or circulated with intention to incite "any class or community of persons to commit any offence against any other class or community."[19]

Today it is common on social media and WhatsApp to see material depicting some form of content that has the potential to fan discord between the people on communal, ethnic and caste lines.Fortunately, we now also have dedicated websites run by members of the civil society that are instrumental in thwarting attempts of such propaganda machineries by exposing their mischief. Some recent examples are as follows:-

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15 The Information Technology (Intermediaries guidelines) Rules, 2011, available at http://www.wipo.int/edocs/lexdocs/laws/en/in/in099en.pdf, last seen on May 15, 2017.

16 Ibid.

17 Ibid.

18 Ibid.

19 Section 505(1)(c), Indian Penal Code, 1860. Other applicable provisions of the IPC in cases of mob lynching are – Section 302, 307, 323, 147, 148 and 149.

- An online video was posted by the supporters of the current ruling party on social media, which showed a young girl being beaten up and then set on fire. The video was run with a text that a Marwadi girl who married a Muslim boy from Andhra Pradesh was lynched because she refused to wear a Burkha (a dress prescribed for Muslim women).[20] In an independent investigation, Mr. Pratik Sinha, the founder of Alt-News (an independent online platform to expose fake news) found that in reality it was a two year old mob lynching video from Guatemala, which was maliciously being passed off as a Hindu woman being lynched and murdered by a violent group belonging to the Muslim community.
- In avideo circulated on WhatsApp and Facebook,[21] a man belonging to Hindu community was falsely shown asbeing hacked to death by a group of Muslim men.[22] It was claimed that the incidence has taken place in Nawada, Bihar. The effect was such that it led to communal clashes between the two groups injuring at least three persons. It was later found that the clip belonged to a place in Bangladesh where the two persons seen in it were accused of murdering Awami League leader Sheikh Monir.[23]

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20 Pratik Sinha, Right-wingers pass off a Guatemalan mob lynching video as one of a Marwadi woman being burnt alive by a Muslim mob, AltNews,available at https://www.altnews.in/right-wingers-pass-off-guatemalan-mob-lynching-video-one-marwadi-woman-burnt-alive-muslim-mob/, last seen on April 24, 2017.

21 The video was shared 37000 times on Facebook. See Trisha Mukherjee & Manish Sain, Fake news in the time of the internet, India Today (28/05/2017), available at http://indiatoday.intoday.in/story/fake-news-in-the-time-of-the-internet/1/964950.html%20-, last seen on June 5, 2017.

22 KarnikaKohli, Fake News: Hatemongers Passed Off Bangladesh Video as Anti-Hindu Violence in Bihar, The Wire,available at https://thewire.in/124455/fake-news-whatsapp-hindu-muslim-violence/, last seen on April 24, 2017.

23 Pratik Sinha, A video from Bangladesh is being circulated as Kashmiri students killing a CRPF Jawan, AltNews, available at https://www.altnews.in/video-bangladesh-circulated-kashmiri-students-killing-crpf-jawan/, last seen on June 5, 2017.

With around 200 million users of WhatsApp and Facebook in India,[24]it can be logically understood that such kind of videos can become a sourceof a widespread violence. Unfortunately, factually wrong and cooked up messages on social media and chat messengers become the reference point for many illiterate/semi-literate sections of the population. Therefore, in the absence of 66 A of the IT Act, it seems appropriate for the state to use the IPC provisions to control the situation that can compromise peace and public order. Even that would be insufficient to deal with the problem completely. Both the sections – 153-A and 505 of the IPC relate to clashes between groups, castes and communities. They do not address situations whererandom fake news can become life threatening for completely innocent people. A recent incident of Jharkhand lynching is a case in hand. A WhatsApp hoax was doing rounds since one month before the dreadful incident in which parents were appealed to stop their children from stepping out of their houses because they will be kidnapped by child lifters and killed.[25] As fallout to this, seven men were lynched by the tribal mob merely because they were suspected to be the child abductors as described in the message.[26]Some arrests were made, but because of the nature of encrypted messages in WhatsApp, the source of the fake message could not be traced. Even if the source is identified, the only option in such case is to levy the charge of abetment to murder under Section 108 of the IPC.[27]But, in the court of law it will be difficult to

24 Staff report, WhatsApp now has 200 million users in India, Firstpost, available at http://tech.firstpost.com/news-analysis/whatsapp-now-has-200-million-users-in-india-364150.html, last seen on April 13, 2017.

25 Ravik Bhattacharya, Jharkhand lynching: Amid WhatsApp rumours, tribals stopped school, outdoors for kids, The Indian Express (22/05/2017), available at http://indianexpress.com/article/india/jamshedpur-amid-whatsapp-rumours-stoked-fears-tribals-stopped-school-outdoors-for-kids-jharkhand-lynching-non-tribal-clash-4666068/, last seen on May 28, 2017.

26 B Vijay Murty, Jharkhand lynching: When a WhatsApp message turned tribals into killer mobs, The Hindustan Times (22/05/2017), available at http://www.hindustantimes.com/india-news/a-whatsapp-message-claimed-nine-lives-in-jharkhand-in-a-week/story-xZsIlwFawf82o5WTs8nhVL.html, last seen on May 28, 2017.

27 Section 108, IPC 1860.

establish whether the abettor had the same intention as the murderers themselves or that he foresaw any grave mishap that his fake message could result in.

Fake News as component of free speech?

Freedom of speech and expression is one of the most sacred rights conferred by the democratic countries of the world on their citizens. It is also an international obligation of all the 193 members of the United Nations to guarantee their citizens the right to "hold opinions without interference" and "freedom of expression".[28] Recently when Germanypassed a bill[29] to improve law enforcement on social networks, it drew flak since it was perceived as an attack on free speech. According to the law, social media companies can be fined up to €50 million if they fail to delete the online content laced with hate speech or fake news.[30]It was seen as a reflection of mounting concern in German political circles about the role that such hate speech or fake news can play in elections.[31]Before the law was passed, David Kaye, the incumbent Special Rapporteur on freedom of speech in the UN Office of the High Commissioner for Human Rights had already submitted his opinion stating that since

28 Article 19, UN General Assembly International Covenant on Civil and Political Rights, Res. 2200A (XXI), (16/12/1966) available at https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf, last seen on May 25, 2017. Clause 3 of the provision makes an exception to the freedom of speech and expression if it leads to disrespect of the "rights or reputation of others" or threatens national security or public order.

29 See Act Improving Law Enforcement on Social Networks [Netzdurchführungsgesetz], available at http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=127 , last seen on June 20, 2017; Melissa Eddy & Mark Scott, Delete hate speech or pay up, Germany tells social media companies,, The New York Times (30/06/2017), available at https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html, last seen on June 30, 2017

30 Ibid.

31 Guy Chazan, Germany cracks down on social media over fake news, Financial Times (14/03/2017), available at https://www.ft.com/content/c10aa4f8-08a5-11e7-97d1-5e720a26771b?mhq5j=e, last seen on April, 25, 2017.

the step by German legislature tends to place the responsibilities "upon private companies to regulate the exercise of freedom of expression", due to short deadlines and severe penalties, as a precautionary measure, it could lead to social media companies' over-regulation of the legitimate expression not susceptible to restriction under ordinary law.[32] It was anyway notconsidered by the German parliament and they went ahead with passing the bill.

India, like all democracies, also guarantees freedom of speech under Article 19(1)(a) of its Constitution subject to reasonable restrictions on the grounds (among others) of public order, morality and incitement to an offence. As the grisly events (discussed in preceding sections) have unfolded, it can be concluded that online fake news in India can very well make a base for disturbance of public order and violence, even resulting in murder. Hence, there is a need to bring these false and dangerous virtual news items under the purview of Article 19(2) of the Constitutionwithout giving them the privileges of Article 19(1)(a). Although, *Shreya Singhal Case*[33] was hailed as a victory for freedom of speech in India, a closer look at the judgment reveals that the Honorable Supreme Court did not completely rule out the possibility of restriction on social media content.According to the judgment a "discussion or even advocacy of a particular cause howsoever unpopular" must not be curtailed;but, when such discussion or advocacy reaches the level of "incitement" Article 19(2) can be invoked.[34] At this stage a law can be used to curtail "the speech or expression that leads inexorably to or tends to cause public disorder" or for that matter qualifies as any other ground mentioned in Article 19(2).[35]The court further referred to the "clear and present danger test" as explained by Justice Holmes in Schenckv. United States[36]in the following words-

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32 Letter of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, OL DEU 1/2017, (01/06/2017) http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf, last seen on June 15, 2017.

33 Supra 14.

34 Ibid.

35 Ibid.

36 Schenck v. United States, 249 U.S. 47 (1919, Supreme Court of the United States).

> "…The most stringent protection of free speech would *not protect* a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.…The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[37]

Although the court in*Shreya Singhal Case* read down Section 66 A of the IT Act*in-toto*, it did not do away with the contingency of restricting any act that can lead to public order issues or pose a clear and present danger to peace and harmony. It would have been better if the court clarified on this a little more. Some may argue that by declaring whole section unconstitutional the court has also exempted online activities causing "danger…injury, criminal intimidation, enmity, hatred or ill will", since they made a part of Section 66A. This perception however does not stand true if we look at the entire judgment holistically along with the applicable provisions of the IPC and the Intermediary Guidelines framed under Section 79 of the IT Act.

Issues with administration of Cybercrimes

It is impossible for the intermediaries to trackall the fakeitems published online. Therefore, the first responsibility lies with the police administration to control any notorious material from being communicated to the public.[38] National Crime Record Bureau's (NCRB) 2015 data shows that from Uttar Pradesh and Maharashtra alone,

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37 Ibid.

38 In cases of WhatsApp messages police in Maharashtra arrested the group admins. However, this is not the nationally accepted administrative practice till now. See ShubhomoySikdar, If you are a WhatsApp group admin, better be careful, The Hindu (12/08/2015), available at http://www.thehindu.com/news/national/other-states/if-you-are-a-whatsapp-group-admin-better-be-careful/article7531350.ece, last seen on March 20, 2017.

85 percent of the total number of cybercrimes related to religion took place resulting in at least 110 arrests.[39] Nevertheless, the conviction rate of these arrests remains abysmally low. According to the data, out of 8,121 arrests related to cybercrime in 2015 only 270 persons were finally convicted (250 under the IT Act and 20 under the IPC).[40] This is particularly alarming when the rate of online offences is continuously rising.[41]Independent reports by online media show unpreparedness and even impropriety of police administration in dealing with cybercrimes. While many state IT secretaries are still unaware of their quasi-judicial powers under the IT Act, there also seems to be a lack of standard seizure procedures and digital evidence analysis.[42]Further, even when fake news continue to circulate unabated, there have been cases (including the *Shreya Singhal Case*) wherein police arrested people for the alleged acts that posed no apparent threat to public order, peace or security.[43]

The question of liability

Intermediaries

Although it is widely believed that the content writer must be booked for posting anything that can incite violence, liability of the interme-

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39 NCRB Compendium, Crime in India, (2015), available at http://ncrb.nic.in/StatPublications/CII/CII2015/Compendium-CII-2015.pdf, last seen on June 15, 2017.

40 Ibid.

41 Bharti Jain, Cyber crime cases under IT Act continue to rise, shows govt data, The Times of India (25/03/2015), available at http://timesofindia.indiatimes.com/india/Cyber-crime-cases-under-IT-Act-continue-to-rise-shows-govt-data/articleshow/46683053.cms, last seen on June 15, 2017.

42 ArunabhSaikia, Why most cybercrimes in India don't end in conviction, liveMint (29/07/2016), available at

http://www.livemint.com/Home-Page/6Tzx7n4mD1vpyQCOfATbxO/Why-most-cyber-crimes-in-India-dont-end-in-conviction.html, last seen on May 18, 2017.

43 ShrutiTomar, MP police arrest student for social media post lampooning CM Chouhan, The Hindustan Times (27/11/2016), available at http://www.hindustantimes.com/india-news/mp-police-arrest-student-for-social-media-post-lampooning-cm-chouhan/story-44Z58mgiJv2OY7IkFl4Y4M.html, last seen on June 12, 2017.

diaries[44] remains a hotly contested issue. Germany (as discussed before) has passed a law fixing the liability of the intermediary if it does not take down the content within a stipulated time. Under the Indian law, intermediaries are required to "strictly follow the provisions of the Act or any other laws for the time being in force".[45]Even after the 2008 amendment in the IT Act, when Section 79 was altered to extend immunity to the intermediaries for making available or hosting "any third party information data or communication link",[46] they can be still be held responsible if upon receiving actual knowledge of the unlawful material or a takedown notice from the appropriate authority regarding the same, they fail to expeditiously remove or disable access to the material.[47]Therefore, a deeper understanding of the IT Act reveals that the immunity to intermediaries under Section 79 is in reality subject to vague qualifierslike "actual knowledge".[48]This in effect makesprovisos under Section 79 susceptible to same criticisms that the German lawreceived by the United Nations Special Rapporteur.[49] In the virtual world, it is almost impossible for the intermediaries to monitor every spurious message or information posted online. Thus, it is appropriate to put the liability on the person initiating the misleading information instead of levying charges againstintermediaries. In a recent judgment of the Delhi High Court,[50] which was regarding the liability of the WhatsApp Group Administrator for statements made by the members of the group, Justice Endlawrightly observed–

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44 Section 2(w) of the IT Act, 2000 defines intermediary as "any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message".

45 Supra 15.

46 Section 79(1), IT Act, 2000. However, according to the clause 2 of the section, the immunity to the intermediary will follow only if it does not- (i) initiate the transmission, (ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission.

47 Section 79(3)(b), IT Act, 2000.

48 Ibid.

49 Supra 32.

50 *Ashish Bhalla v. Suresh Chawdhury & Ors,* CS(OS) No.188/2016, available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=242183&yr=2016, last seen on June 19, 2017.

> "To make an Administrator of an online platform liable… would be like making the manufacturer of the newsprint on which statements are published liable…It is not as if without the Administrator's approval of each of the statements, the statements cannot be posted by any of the members of the Group on the said platform."[51]

The same rationale applies in cases of the content posted by the members on social networking websites too. Withhighly advanced tracking and surveillance technology, it is very easy for our trained police officials to catch the culprit.[52]In fact, the IPC even allows for action to be taken against a person situated outside India.[53] It is thus appropriate for the authorities and legal practitioners alike- till the time we have holistic framework for online intermediaries ready, we must focus on making the content creator liable instead of the publisher.

Websites

In dissemination of fake news, websites are as important as social media or messengers. Some of them like – "dainikbharat.org", "post-card.news", "opindia.com"etc are known to be particularly notorious.[54] Being the news portals, these websites must ideally adhere to the norms of journalism that apply on the print media.[55]While in-

51 Ibid.

52 PTI, Man arrested for harassing woman over social media, phone, The Indian Express (22/02/2017), available at http://indianexpress.com/article/india/gender-harassment-man-arrested-for-harassing-woman-over-social-media-phone-4536954/, last seen on June 2, 2017.

53 It will still be overboard to assert the effectiveness of IPC's extraterritoriality in cases where fake news is created outside the Indian boundaries.

54 T Navin, Countering the Fake News Industry, Countercurrents, available at http://www.countercurrents.org/2017/05/25/countering-the-fake-news-industry/, last seen on 28/05/2017;Pratik Sinha, Who's behind the fake news site Hindutva.info?, AltNews, available at https://www.altnews.in/whos-behind-fake-news-site-hindutva-info-secret-popularity/, last seen on May 23, 2017.

55 According to the government's definition – "'News Media' shall include newspapers, wire service and non-wire service news agencies, News Feature Agencies, Electronic Media Agencies and organisations containing news and comments on public news". See The Central Newsmedia

terpreting the provisions of the Press and Registration of Books Act, 1867(PRB Act) the Supreme Court in GambhirsinghR. Dekarev.FalgunbhaiChimanbhai Patelconcluded that "it is the Editor who controls the selection of the matter that is published in a newspaper" and that s/he has to take the responsibility of "everything" s/he publishes.[56]

Generally all news websites with considerable readership have designated editor(s);but they do not qualify as accreditation worthy news media under the government norms.[57] In any case, in the era of information explosion, where most of the information is freely accessible, getting accreditation from the government is becoming increasingly irrelevant. Online news media enjoys handsome readership regardless of - registration with the registrar of newspapers or,obtaining any governmental approvals as such.

We have no media policy/law dealing with these news portals like we have for the print or television media. Even if they find mention in some of the state documents, the overall policy still appears outdated and fragmented. In 2013, Singapore made it mandatory for the news websites to obtain individual license from its Media Development Authority, just as, it was required for the newspapers, television broadcasters and radio stations.[58]With fake news impli-

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Accreditation Guidelines, 1999, available at http://pib.nic.in/prs/accreditationguidelines.pdf, lasts seen on May 25, 2017.

56 Gambhirsingh R. Dekare v. Falgunbhai Chimanbhai Patel and Anr., (2013) 3 SCC 697. As for definition of the editor, Section 1(1) of the PRB defines himsimply as a person who controls the selection of the matter that is published in a newspaper.

57 Supra 55.

58 What is the licensing framework for online news sites all about?, available at https://www.gov.sg/factually/content/what-is-the-licensing-framework-for-online-news-sites-all-about, last seen on 25/05/2017. Malaysia also announced intentions to come up with a similar requirement for news websites. See Are Concerns Over Online Media Registration Valid Or Just Overblown Propaganda?, Malaysian Digest, available at http://malaysiandigest.com/features/565039-are-concerns-over-online-media-registration-valid-or-just-overblown-propaganda.html, last seen on May 25, 2017. It is not just the Asian countries that have taken steps to filter the online news content, Section 127 of the United Kingdom's

cations reaching alarming proportions, a desperate need is felt for a similar scheme in India too, which guarantees a check over theeditors responsible for publishing content that can cause disruption of national harmony. In addition to the *Schenck case* (as pointed out earlier) the apex court in *Shreya Singhal Case*also referred to another American case with approval -Whitney v. California[59] in which Justice Brandeis made way for regulating free speech by further sanctioning the "clear and present danger" doctrine that would apply if "immediate serious violence was to be expected". Nothing stops the legislature, to take steps on these lines.

Once this is achieved, the Press Council of India can also play an instrumental role in ensuring the flow of accurate and fair information online. Section 13(1)(c) of the Press Council Act, 1978 mandates the Council to ensure "the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship" on the part of newspapers, news agencies and journalists.[60]Council's Norms of Journalistic Conduct requires the press to "eschew publication of inaccurate, baseless, graceless, misleading or distorted material" and to restrain from setting forth "unjustified rumours and surmises" as facts.[61]They also require the editor to ensure a pre-publication verification and check the factual accuracy of a news item which is of "public interest and benefit" or is "containing imputations or comments against a citizen", with due care and attention. However, even with the statutory responsibility and well drafted code of conduct, the Press Council of India lacks the biting capacity. Comparing the Indian structure with countries like South Africa, Sweden and Ireland one finds that the idea of having press councils is not limited to assigning them the duties of

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Communications Act 2003 also makes it an offence to send a message that is grossly offensive or of an indecent, obscene or menacing character over a public electronic communications network.

59 Whitney v. California, 274 U.S. 357 (1927, Supreme Court of the United States).

60 Press Council Act, 1978.

61 Press Council of India Norms of Journalistic Conduct, (2010), available at http://presscouncil.nic.in/OldWebsite/NORMS-2010.pdf, last seen on June 2, 2016.

pronouncing guidelines or discharging symbolic supervisory functions. They can also be vested with duties and powers of an independent ombudsman, making the citizens empowered through a robust structure of hearings and appeals.[62] This will make the media (online or otherwise) more accountable to the readers. Till the time we have such systems in place, the only legal recourse is the calculated application of the provisions under the IPC and the IT Act.

Conclusion and Suggestions

There have been enough incidents in the last few years to deduce that fake news can be a direct threat to public order and tranquility. It has become a tool in the hands of mischievous internet users and propaganda machines with ulterior agendas, to attack the cardinal values enshrined in the Indian constitution. Even though *Shreya Singhal Case* struck down Section 66 A of the IT Act, it is wrongly perceived as a ruling that outdid online censorship altogether. Justice Nariman made it sure to spell out in detail - the restrictions on freedom of speech and expression as mentioned in Indian constitution and as interpreted by the foreign courts; main assertion being that there is no absolute right of free speech if the words written or communicated lead to disruption of public order. The Rules framed under Section 79 of the IT Act (requiring due diligence on the part of intermediaries) and the provisions of the IPC related to community/ group violence are insufficient to efficiently tackle problems arising from online fake news. They can only be treated as alternative solutions till we have a balanced online media policy reflected through amendments in our present legislations. Supporters of free speech argue that governmental control on words, images or videos communicated online is not healthy for democracy. But, we fail to appreciate the fact that if the print and television media has enjoyed the said freedom till now under the existing regulations and laws,

62 See Home, Press Council, available at http://www.presscouncil.org.za/, last seen on June 20, 2017;See Home, Press Council of Ireland, available at http://www.presscouncil.ie/, last seen on June 20, 2017; See Home, Press Ombudsman, available at http://www.po.se/, last seen on June 20, 2017.

there is nothing to be skeptical if we bring the online media under the same fold.

Suggestions:

- Like editors are responsible for works published in print media, the same principles of liability should apply in case of news websites also. By the rationale of Justice Endlaw in *Ashish Bhalla Case*, it is impractical to mull over liability of the intermediaries, unless they act against the *Shreya SinghalCase* and Rules framed under the IT Act. Rather primary liability must be conferred upon editors or managers of the news websites for publishing any fake content.
- The PRB Act is an outdated legislation that needs meticulous overhauling. It must be amended to make registration mandatory for the online news with the appropriate authorities before initiating any dissemination of information. As discussed before, we can take a clue from steps taken in Singapore and Malaysia in this regard.
- There is an urgent need to anoint Press Council of India as the National Media Ombudsman also, since there is no existing functional mechanism to that effect. Again, this would require amendment of Section 13 of Press Council Act, 1978. As an ombudsman, the Council should be given enough teeth to prohibit and punish the publication of false material in print, television or online media.
- Members of the civil society must acknowledge the seriousness of the implications of fake news and conduct awareness and sensitization programmes in sensitive areas. Some of the members has prepared a draft Human Security Act (Manav Suraksha Kanoon, which is expected to be floated soon), taking into considerations the recent technological developments.[63] While it is a welcome step to some extent,

63 Debayan Roy, Civil Society Comes Together To Draft 'Law' Against Mob Lynching, News 18 (29/06/2017), available at http://www.news18.com/news/india/civil-society-comes-together-to-draft-law-against-mob-

it is however submitted that there is enough space in the present legal structure and mechanism to cope up with the problem of internet induced killings, especially after the enactment of the IT Act.

- Once identified, media organizations/associations and the governmental outlets such as Press Trust of India and Press Information Bureau must immediately report the ominous news on their respective web pages (including social media pages). Individual media houses must exercise restraint in running unverified news and must adhere to Press Council's Norms of Journalistic Conduct.[64]
- Since much of the fake news is time sensitive and has instant ramifications; the Ministry of Electronics and Information Technology can establish a dedicated vigilance cell to monitor the online flow of information on news websites and social media.[65] Indonesia's Ministry of Communication and Information Technology has collaborated with the country's own Press Council to combat fake news.[66] According to the understanding, the ministry will block fake news websites once confirmed by the Press Council.[67] Along with the vigilance cell, such kind of cooperation can also be thought of by the concerned Indian ministry.

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lynching-1446177.html, last seen on 29/06/2017.

64 Supra 61.

65 Government is expected to release a social media policy soon, but going by the media reports, the policy shall be concentrating more on "anti-national" content without taking any due notice of anti-people news items that lead to violence and deaths. See PTI, Government plans a new social media policy to check anti-India activities, The Economic Times (23/06/2017), available at http://tech.economictimes.indiatimes.com/news/internet/government-plans-a-new-social-media-policy-to-check-anti-india-activities/59276445, last seen on 25/06/2017.

66 Haeril Halim, Ministry, Press Council combat fake news, The Jakarta Post (03/01/2017), available at http://www.thejakartapost.com/news/2017/01/03/ministry-press-council-combat-fake-news.html, last seen on 24/06/2017.

67 Ibid.

- Intermediaries must also follow a strict code of ethics with regards to the fake news published on their platforms. Facebook and Google have taken some initial steps. For instance, Google blocked nearly 200 publishers from its AdSense advertising network; and Facebook, along with adopting the decision on consulting third party news organizations, has updated some of its policy language to include fake news.[68] Although these are piecemeal measures when compared to the quantum of the problem, it is nonetheless a welcome step. Same kind of initiative is missing from messengers such as WhatsApp (now owned by Facebook) because of the inherent complexity in the technology of encryption, which makes it almost impossible to trace the source of the false information. As of now, the only practical solution to such untraceable content appears to be public declaration of the fakeness of news item through government and non government channels, on print, television and online platforms.

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68 Daisuke Wakabayashi & Mike Isaac, In Race Against Fake News, Google and Facebook Stroll to the Starting Line, The New York Times (25/01/2017), available at https://www.nytimes.com/2017/01/25/technology/google-facebook-fake-news.html, last seen on June 24, 2017.

Impact of Demonetization on the workers of Moradabad Brass Industry

Ishrat Husain*

Introduction

On November 8, 2016, it was decided to demonetise high value currency notes of denomination of 1000and 500 (called specified bank notes - SBNs). Such notes, valued at 15.4 trillion, constituted 86.9 per cent of the value of total currency in circulation. The decision was in continuation of a series of measures taken by the Government of India during last two years aimed at eliminating corruption, black money, counterfeit currency and terror funding. The decision was guided by the aim of reaping its enormous potential medium-term benefits in the form of reduced corruption, greater digitisation of the economy, increased flow of financial savings and greater formalisation of the economy. All of these would lead to higher GDP growth and tax revenues that could be used by the Government for inclusive and stronger economic growth within the norms of fiscal prudence, besides contributing to overall improvement in business environment.

India has traditionally been a cash intensive economy. According to an estimate, about 78 per cent of all consumer payments in India are effected in cash[1] . It was, therefore, obvious that currency squeeze during the demonetisation period would have had some adverse impact on economic activity, although such impact was expected to be transient. In order to mitigate the adverse impact on the common man as also on economic activity, a series of measures were undertaken.[2]

Growth of any country depends on its Export Import Trade. Indeed

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1 Government of India (2016), "Medium Term Recommendations to Strengthen Payments Ecosystem", Report of the Committee on Digital Payments (Chairman: Shri Ratan Watal), New Delhi, December 2016.

2 Macroeconomic Impact of Demonetisation: A Preliminary Assessment, Reserve Bank of India, March 10, 2017, https://rbidocs.rbi.org.in/rdocs/Publications, last seen on August 9,2017.

it is very crucial for India too. Especially after demonetization the exports have slowed down due to currency crunch. True to its core that instability in the exports leads to inflation and that in turn leads to an uncertainty of internal purchasing power and unstable economy.

India's import and export business is hugely affected by the announcement of demonetization. The Foreign Trade Industry issuffering in the aftershocks and shall continue to suffer for a long. However, the influx of money from the black market may prove to be beneficial in the long run for Export Import Trade. The fact lies at the moment that plunge in money supply with overflowing bank deposits ring an alarm in consumption demands, means creating imbalance in trade.

The Indian Government has always paid incentives and promoted Export with easy policies. Nonetheless the Exports market is taking a toll at the moment. Make in India projects need easy flow of currency for manufacturing, hence the Import and Export both trade have got their bottlenecks. This has changed the algorithm in today's economic situation. However stable exchange rate is an idle situation as volatility vitiates the Trade for India.[3]

Brass is an alloy (mixture) of copper and zinc and with the addition of small amount of other elements may be added to the alloy for special uses. The Moradabad Brassware Cluster, in Uttar Pradesh, is mainly focused on the export market. The annual turnover of the cluster is over Rs 3,500 crore of which 80% is earned through exports of metalware, including brassware. The cluster has evolved from utilizing only brass a decade ago to now incorporating other metal alloys. Despite growth in the number of exporters in the cluster, there has been a significant decline in the number of artisans due to challenges in living conditions, wages, raw material procurement, prices and stricter international compliance norms. Artisans form the backbone of the cluster and there is a dire need to improve their socio-economic conditions. The National Innovation Council (NInC) has facilitated pilot innovation interventions at the Moradabad cluster

3 International Institute of Import & Export Management http://www.iiiem.in/ last seen on August 19,2017

which are expected to impact the business economics for the artisan, manufacturer and exporter. Though there are multiple challenges at the ground level, including need for improvements in processes, infrastructure and skill development, National Innovation Council (NInC)[4] has focussed on facilitating the creation of an innovation ecosystem and the Cluster Innovation Centre (CIC) that is expected to address the long term challenges. [5] The recent demonetization further added hardship to the workers engaged in this industry.

The genesis of brassware production in India can be traced back to the Moghuls from Persia in the 17th century who settled in Delhi. Indian brass handicraft is recognized globally. The articles include brass artwork, furniture, brass figurines, giftware, decorative and other collectible items. Moradabad is home to one of the oldest brassware clusters in India and is also called 'Peetal Nagri', meaning Brass City. The cluster has an annual turnover of Rs 3,500 crore of which exports stand at approximately Rs 2,700 crore which in turn is approximately 20% of the total handicraft exports from India. According to local industry estimates, there are 1,200 registered exporters who outsource work orders to small scale manufacturing units who, in turn, employ the artisans. In some instances, the exporters work directly with the artisans. The cluster consists of 1,800 small scale manufacturing units, locally called karkhanedars, and 25,000 unregistered household units. In 2008-09, these units together employed 3, 60,000 people. According local industry exporters, the number has now come down to around 1, 80,000 artisans. According to the United Nations Industrial Development Organization (UNIDO) report indicates that in 2001 Moradabad exported Rs 4,000-crore worth of brassware. In 2006, the exports dropped to Rs 3,000 crore. Currently only Rs 2,200-crore worth of various metal alloy products are being exported, of which brassware constitutes Rs 800 crore.[6] Moradabad

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4 The National Innovation Council Report on National Innovation Initiatives by The Government of India, 2010-2014.

5 http://initiatives.sampitroda.com last seen on August 21,2017

6 Diagnostic Study of Moradabad art metalware cluster, prepared by Infrastructure Leasing & Financial Services, New Delhi, 2012.

Brassware industry was already in crisis, one can easily imagine what must be going through the workers after demonetization.

Objectives of the study are:

To know the impact of demonetization effect on the workers engaged in Moradabad Brass industry;

To understand the actual present outcomes of the demonetizationon Moradabad Brass industry;

To analyze impact of demonetization on Small Scale Industry and the financial problems faced by workers during andafter demonetization;

To identify measures taken by the government to rectify the imbalances if any.

Research methodology

The data was collected from primary source in which the author preferred the methods of Questionnaire and collected response from small scale industry at Moradabad. The author also relied on the secondary source of data includes newspapers, journals and online data base.The collected data was analysed and interpreted to draw conclusions keeping in mind the set objectives of the study.

Scope and Limitations

This study investigates how the sudden demonetization move by the Indian government played a vital role on the Moradabad small scale industry. The author collected 50 sample response from the city of Moradabad. The aim of the research is to find out the impact of demonetization on the workers of Moradabad industry. This research has also been conducted to see if there is any significant impact among the different factors those are related to demonetization and its outcome. In this research the author also questionnaire methods for measuring Impact of demonetization, the implementation process and the perceptions of the target group (Moradabad) with regards to the government's intention. The data were analysed by using statistical tools and analysis of data through the questionnaire methods and finds that there is a relation between the implementation, government's intention and the impact due to

this move. For primary data, non-response error cannot be ruled out.

Data analysis and interpretation

(Workers)

Fig: 1

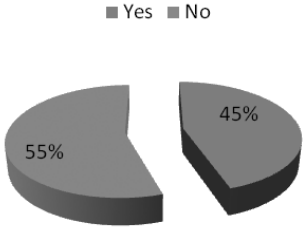
Q.1. Do you think that banning of Rs. 500 and Rs. 1000 note is a good decision?

(a) Yes

(b) No

Interpretation:

The above graph shows that 55% respondents consider the decision of banning note was a good decision but remaining 45% respondents did not consider it as good decision of the government. There is marginal difference of 5% between the two opinions.



Q.2. The ban of Rs. 500 and Rs. 1000 notes will bring to an end of the:

(a) Black Money

(b) Corruption

(c) Terrorism

(d) Counterfeiting

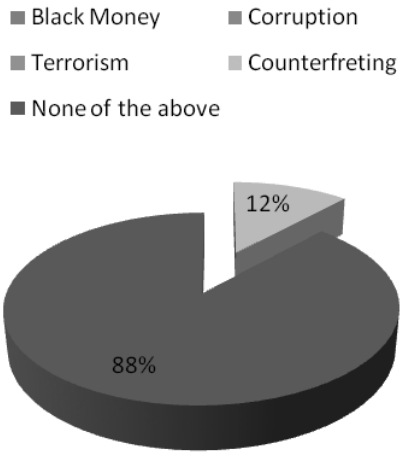
(e) None of the above

Fig: 2

Interpretation:

The above graph shows that 12% respondents think that it will of course bring to an end of black money, corruption, terrorism

and counterfeiting. However, 88% of respondents are of the view



that nothing is going to change and the things will remain same as before. In question number 1 majority of the respondents opined that it was good decision. Despite it, in question number 2, they hold the view that nothing is going to change. In question number 1, there is a perception of workers that it is a good decision. It shows that respondents have no doubt about the intention of government but instantly the response in question number 2 shows that they have doubts over its implementation.

Q.3.Do you think that the transaction has become more transparent after demonetization?

(a) Yes

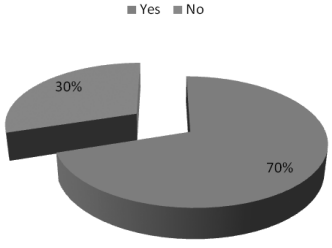
(b) No

Fig: 3

Interpretation:

The above graph shows that 70% respondents think that transaction has become more transparent after demonetization.

But 30% of the respondents are of the view that there is no change with regard to transaction even after such a drastic step.



Q.4. Did the move cause any inconvenience to you?

(a) Yes

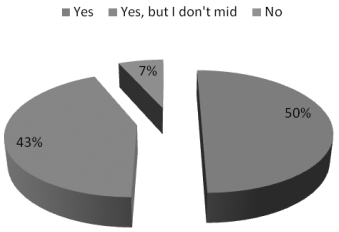
(b) Yes, but I don't mind

(c) No

Fig: 4

Interpretation:

The above graph shows that 50% respondents are of the view that this move created difficulties for everyone, 43% respondents think it did create difficulties but they didn't mind it at all. However, remaining 7% did not see any problem in this move.



Though 43% of the workers faced hardship even then they did not mind it, they must have thought that it would be a good decision in country's interest. As a whole, it may be inferred that this move caused inconvenience to 93% of the workers.

Q.5. Have you faced any professional and personal crisis due to a severe cash crunch?

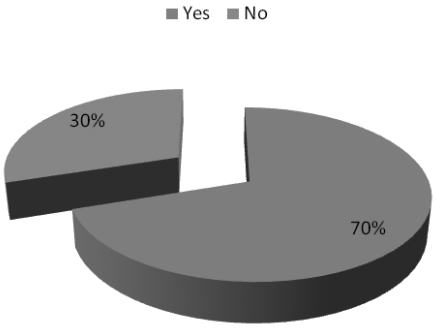
(a) Yes

(b) No

Fig: 5

Interpretation:

The above graph shows that 70% respondents faced professional and personal crisis due to a severe cash crunch and remaining 30% respondents did not feel like that.



Q.6 How much wages do you earn per day?

(a) 100-400

(b) 400-700

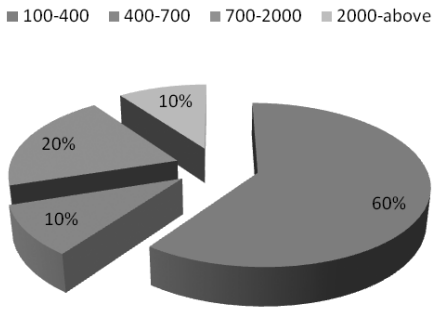
(c) 700-2000

(d) 2000-above

Fig: 6

Interpretation:

The above graph shows that 60% respondents get wages Rs. 100to Rs.400 per day and 10% are lying between Rs. 400 to Rs.700



per day, 20% get between Rs 700 to Rs. 2000 per day as their wages and only 10% get wages per day more than Rs. 2000. So the majority of the workers belong to lower income group.

Q.7. Which types of transaction do you prefer?

(a) Cash

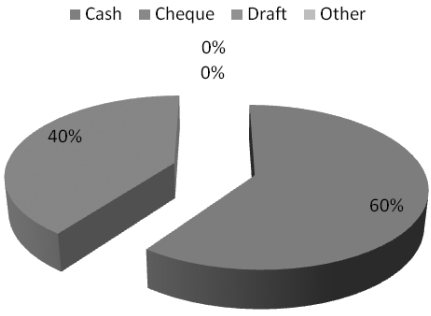
(b) Cheque

(c) Draft

(d) Other

Fig: 7

Interpretation:



The above graph shows that 60% respondents prefer cash and 40% respondents prefer cheque for a transaction. Preference of cheque was not less even before demonetization. It is a considerable size for such an income group. Workers are not hesitant to receivetheir wages through cheques provided they have bank accounts.

Q.8. Were you able to pay your daily expenses?

(a) Yes

(b) No

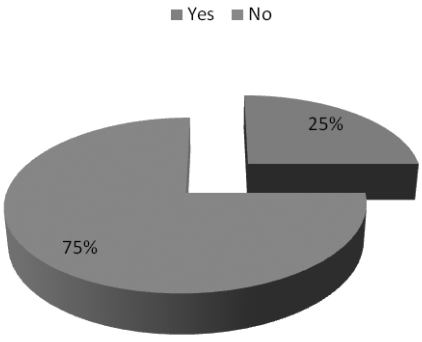


Fig: 8

Interpretation:

The above graph shows that 25% respondents were able to pay their daily expenses and remaining 75% were not able to pay even their daily expenses after demonetization.

Q.9. Have you faced any difficulty in using the new 2000 Rs. note in the market?

(a) Yes

(b) No

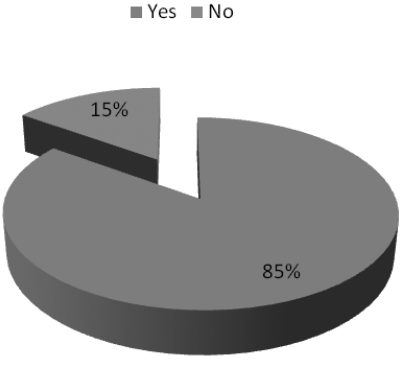


Fig: 9

Interpretation:

The above graph shows that 85% respondents faced difficulty in using 2000 rupees note, 30% respondents have not faced any

problem in using rupees 2000 note. Being a small income group, as majority is getting wages between Rs 100 to Rs 400, the two thousand rupees note must have created problems for them.

Q.10. Do you think the new demonetization policy will bring a positive change in economic conditions of India?

(a) Yes

(b) No

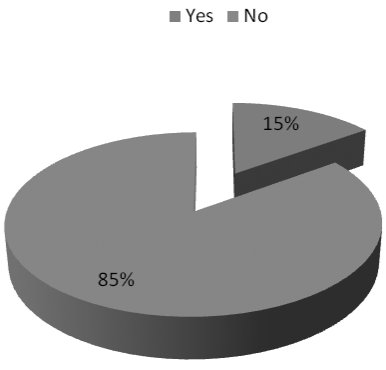


Fig: 10

Interpretation:

The above graph shows that 15% respondents consider it a better policy and it may bring a positive change in economic condition of India. However, remaining 85% respondents do not think so or consider it a better policy. Majority is of the view that it is not going to bring any positive change in the economic condition of India.

Q.11. The demonetization has brought positive changes in Moradabad Brass Industry.

(a) Strongly Agree

(b) Agree

(c) Neutral

(d) Disagree

(e) Strongly disagree

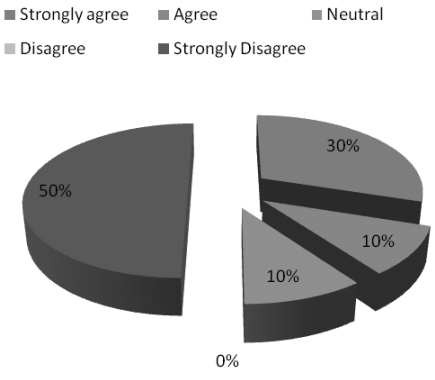


Fig: 11

Interpretation:

The above graph shows that 30% respondents strongly agree with the presumption. However 10% of the respondents agree that demonetization has brought positive change in economic condition of Moradabad Brass industry. While 10% are neutral. However remaining 50% strongly disagree with the presumption that demonetization has brought any positive change in the affairs of Moradabad Brass Industry.

Analysis of the effect of Demonetisation

The annual exports of the Moradabad brassware industry has already fallen due to a rise in the price of raw materials and a decline in sales.The price of raw materials like copper and zinc have gone up four times. Copper has jumped from Rs 100 kg to Rs 400 kg, while zinc has shot up from Rs 30 kg to Rs 150 kg in a year. This has already brought down the sales of the brassware manufacturers by 10-20 per cent. As the cost of raw material and labour have shot up, the price of final products has also gone up substantially. However, firms are unable to pass on the increased cost since the buyer is not ready to make the increased cost.Now, the move of demonetization created additional problems for this sector. Either they need to diversify, shift to aluminium products, and convince the customers to pay a higher price. In the international market, there iscompetition

with Chinese products which are priced 20 per cent lower. As a result, there is tendency to lose customers to China, in addition to absorbing the increased cost of manufacturing. Moradabadi brassware is mostly exported to European countries and West Asia.

The raw material for brass is supplied by people who deal in scrap. They sell scrap to the consolidator who buys it in cash. The consolidator is the one who combines three to four activities. The scrap is melted. It is turned into brass silli (slab or bar). The next stage involves making moulds, for instance, of a flower vase or a tap. The brass is melted and poured into these moulds. After this stage, there are craftsmen who make designs on it, then comes the stage of polishing, then of lacquering. Each of these stages is based exclusively on cash. Thereafter, the brass products come into the distribution network. That, too, works on cash.[7] Like the rest of the country, demonetisation has hit Moradabad and its numerous brass factories. The brass manufacturers and dealers are hit hard by the demonetization that left the country reeling. Despite the fact that the notebandi is over, its impact is still visible on the entire brass industry in Moradabad, known as Pitalnagri. The brass business in Moradabad provides employment to thousands of artisans, workers and traders. It is also an important source of foreign exchange. But now all people associated with the brass business sit with a bitter taste in their mouth. It has been calculated that brass business in Moradabad is down by 80%.Entire families are involved in the business and so the financial shock goes wide and deep here. Financial experts would call it unemployment of the kind that seeps to every member of the family. For most, they have lost their family business that had been going on for generations. The people are not trained or educated to do any other work, nor are they mentally prepared to give up and look for work elsewhere and be ready to work under a stranger. This fact is realised by the political parties during the recent Assembly Election and none of the candidates representing these constituencies promised jobs to the unemployed people here.[8]

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7 https://scroll.in/article last visited on August 21,2017

8 http://viewsheadlines.com last visited on August 21,2017

The country's much known Peetalnagri (city of brass), Moradabad, has been beaten all out of shape as a result of the demonetisation of high-value currency notes. The government's move has shrunk demand, inflated raw-material prices, delayed pay handouts and led to large-scale retrenchment in the brassware industry. Brass factory owners are of the view that the demand for brassware has halved since November 8, when ₹500 and ₹1,000 notes were withdrawn. Artisans and labour working for the factories complain that earnings have shrunk to less than half; worse, many people have lost their jobs. "*My business has reduced by more than half. My buyers in Mumbai and Bengaluru are not able to sell the items because of the cash crunch and have therefore slashed their orders. The payments from exports to Qatar are coming into the company's bank account, but withdrawing the money is a big challenge*," says Asif Iqbal, a domestic supplier and exporter. The brassware industry in Moradabad has an estimated turnover of ₹8,000 crore per annum, of which ₹6,000 crore comes from exports, and employs 3-4 lakh workers and artisans. Iqbal had to let go of six of his eight artisans as there was not enough work or cash following the government's decision to demonetise. His unit, Decent Collections, in the Lal Masjid area of the city, shares its fate with hundreds of others. The locality, once bustling with activity, now wears a deserted look, with several units shuttered, even at noon. Mohammad Aslam of Sonakpur village, soldering brass handles in his tiny workshop close to the Masjid, stops his work and peers through his glasses when asked about the effect of demonetisation on his work. "My work has reduced to 25 per cent," Aslam says ruefully, adding that before demonetisation, orders from just four-five factories would fetch him about ₹300 daily. "I now earn less than ₹100,"There are others such as Ismail Kasim and Nafis Khaleef, who haven't received any orders in the past few months. "Most factories have shut shop. There is just no work for workers. Notebandi has finished off their livelihood, and the normalcy has not restored yet, they will have to start pulling rickshaws or do some other low-skill work. Spiralling prices of raw materials such as aluminium and copper sheets have made things worse for the brassware industry.

"*Demonetisation has affected the production of the raw materials obtained from scrap as it is totally cash-driven, and prices have risen by about 20 per cent. Work has reduced to less than a third and orders are getting cancelled. "Rising raw material prices are affecting the bottom line of exporters, too, as foreign buyers are not ready to accept higher prices*", points out Satyapal of Globe Exports, who is also the spokesperson for the Moradabad Handicrafts Exporters Association. He adds that while many of the 1,200 export houses in Moradabad district were paying workers and suppliers through cheques, the artisans working for the suppliers were not getting paid as they did not have bank accounts.[9]

Findings

Majority of respondents say that banning of Rs 500 and Rs 1000 notes is overall a good decision. But there is margin between 'yes' and 'no'. It is only of 5 percent.

However,majority of the respondents agree on the point that transaction has become more transparent after demonetization.

Majority of respondents get their daily wages between 100-400 Rupees.

A few people accepted to do transaction in draft but mostly prefer cash and other mode of transaction.

Maximum numbers of respondents did not agree that they were able to pay daily expenses during demonetization.

Majority of the workers of Moradabad Brass industry faced an acute financial problem due to demonetization.

Maximum of respondents accepted that the demonetization could not brought any positive change in the Moradabad Brass industry.

Majority of respondents viewed that black money still exists in India. Demonetization could not make any difference.

A few people think that Government's efforts against corruption and black money are not appreciable.

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9 http://www.thehdubusinessline.com last seen on August 21,2017

Conclusion

Demonetization in India is a great effort taken by Indian government to combat with black money and corruption. Although Demonetization has created so many hurdles for the Small Scale Industry in India and the employees faced so many problems due to the demonetization drive. Several businesses disrupted due the lack of liquidity, business owners, workers as well as consumer faced many problems. It brought a massive change in the economy. People are not able to pay their daily expenses in the time of demonetization. The main purpose of demonetization was to eradicate the black money and reduce the corruption. Government of India has become successful to some extent but not up to the mark. When government took this bold decision about the demonetization in India, government didn't know that Indian citizen will have to face this kind of problem for such a long time. However, government has given so many remedies to the citizens of India from time to time. Some economics expert viewed that positive impact of demonetization will be showed in future. Now, we have to wait and watch the overall impact of demonetization drive.

Moradabad's Brass industry comprises of 1200 organized and as many as unorganized units and employees over 3 Lakh, workers, is staring at what looks like a temporary shutdown. Owners have no money to pay wages of workers or buy raw materials as stock of manufactured goods is still piling up in their storehouses. Most of the Brass units were forced to retrench their workers as employers were not able to pay them. Most of the workers who come from villages in adjoining districts have gone back home. The worst hit are the daily wage workers. Almost 70% small and cottage scale units, including unorganized one, have either closed down or are on the brink of shutdown. Some workers attempted suicide by setting themselves on fire after standing in a bank queue for many days, trying unsuccessfully to exchange money, their yearlong savings from small wages. Workers have not learned anything in life other than work in Brass industry. They do not know what they will do now.

It was a severe squall to the historic Brass industry of Moradabad

through demonetization. For the workers in the city who were actively involved in the functioning of this cash driven trade, one shudders to think as to what would be the situation when these jobless people will start to roam around aimlessly. Commercial Banks are in no situationto provide cash for keeping small scale industry on its feet.The transition of a cash driven economy into a plastic money economy does require a considerable time. It needs proper infrastructure and amenities to the people irrespective of economic classes. It is difficult to guess the long term effects of demonetization, but the present situation is terrible and production in more than 60% units has been at a standstill because of extreme cash crunch.

Demonetization has overall vacuumed liquidity from a cash based economy that provides livelihood to more than half of the population in the country. The amount of Rs 2000 notes printed is a lot more than Rs 500 ones, causing lack of lower denomination notes in circulation. This was done under the pretense of curbing black money. However, seeing the latest figures given out by Reserve Bank of India, it is evident that the promise was a farce. With almost all the demonetized money back into Banks, it seems the black money has vanished into thin air. The adverse impact of the scheme can be evidently seen on the formal sector. But there is no measure that would reflect how the informal sector has been damaged. Not only the economy will shrink but the GDP too, has gone down.

Impact of IPR on Indian agriculture and farmer: an empirical study of Gulbarga District

-Ms.Bheemabai S. Mulage*

Introduction

When an individual expends intellectual power which results in the creation of a new entity, such as genetically engineered seed, a distinct property interest arises in that creation that is separate and independent from physical ownership of that entity. In the absence of common law or statutory rights, however, an inventor's property rights are limited to the physical entity that embodies the expenditure of intellectual power. As a result, others can freely imitate these inventions.

The creation of statutory intellectual property rights has been the legal answer to protect those who have expended considerable amounts of time and energy in the creation of new varieties of seeds. Intellectual property law restrains the free use and disposition of property and vests in the creator the recognition of property rights in the creation. In this sense, what makes inventions or creations valuable is not their specific physical embodiment, but rather the intellectual protection of the physical embodiment. Indeed, the inventions or creations that are most appealing to intellectual property are those that are easily duplicated.

As in the case of the agro-biotech industries, the seed industry also derives intellectual property protection from basic three sources, namely (i) patents, (ii) *sui generis*[1] system and plant variety protection, and (iii) trade secrets. Other legal frameworks governing the seed industry in India includes the Seed Act, Rules, and other related Orders under the Essential Commodities Act.

Seed is the Ultimate Gift of God andis considered as first link in

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1 Sui generis means 'self granting' or any system a country decided on, provided it grants effective Plant Breeders' Rights Protection.

the food chain. Hence, it is considered as the ultimate symbol of food security. It is the embodiment of life's continuity and renewability; of life's biological and cultural diversity. Seed, for the farmer, is not merely a source of future plants/food; it is the storage place of culture. Free exchange of seed among farmers has been the basis of maintaining biodiversity as well as food security. This exchange is based on cooperation and reciprocity. Seed not only plays an important role in the rituals and rites of communities, it also represents the accumulation over centuries of peoples' knowledge. In today's context of biological and ecological destruction, seed conservers are the true creators of seed. Hence, conserving seedsleads toconserving biodiversity, conserving culture and conserving sustainability.

It is well known fact that seeds developed through conventional/ traditional breeding techniques do not cause any major threat to environmental safety compared to the varieties produced through genetic engineering.[2] However, the culture of seed saving and seed exchange which has been the basis of Indian agriculture is today under threat. New technologies, like the technologies of the green revolution and biotechnologies, devalue the cultural and traditional knowledge embodied in the seed and erode the holistic knowledge of the seed from the community. This results in the seed itself becoming extinct, as the existence of the seed is tied intimately with its holistic knowledge.

New Intellectual Property Rights are being introduced through the WTO in the form of patents or breeders' rights. The ancient system of saving seed or exchanging seeds freely with neighbors is thus viewed as 'intellectual property theft' under IPR regimes and in industrialized countries, companies are taking farmers to court for seeds saving and seeds exchanging.[3]

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2 K.M.Gopakumar and Sanjeev Saxena, Seeds Bill 2004: For Whom? Journal of the Indian Law Institute, Vol. 47:4, (2005), p.488.

3 In Monsanto v. Percy Schmeiser.

A patent infringement case was tried in the Canadian Courts by alleging that unauthorized saving of GM seeds. In this case, Monsanto Company sued Percy Schmeiser, a local farmer, for saving and planting GM seeds produced from pollen that had blown into his fields from a neighboring farm. Schmeiser himself had no contract with Monsanto. The Court held

The empirical study of Gulbarga district through light on the conditionsand problems of farmers' and agriculture, who uses GMO/Hybrid variety for their cultivation. The study also highlights the level of awareness ofgovernment facility introduced by the State Government and impact of IPR i.e., MO/Hybrid variety on farmers in this district.

Objectives of the Study

The major objectives of the present study may be stated as follows:

- To explore the socio-economic status of farmers and to find out how far these factors have been responsible to influence the agriculture;
- To find out the actual living and working conditionsof farmers and actual problems which they face in the field;
- To find out theimpact of genetically modified organisms on farmers, agriculture and on the environment. The concern of farmers regarding disappearance of traditional variety from the society and the effect of seed monopoly on farmer and farming sector etc.; and
- To enquire in to the awareness regarding various IPR laws applicable to them, different governmental programs launched for their benefit and loss and benefits which they could get out of these.

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that the defendant planted seed saved from a field into which pollen from GM canola had blown. The Court further held that Schmeiser had engaged in these activities knowingly. This violated the patent of Monsanto held on the Roundup tolerant seed. Mr. Schmeiser was required to deliver to Monsanto any remaining saved seed and to pay to Monsanto the profits earned from the crops, plus interest. If the parties could not agree on the "quantum of profits," the Court stated, Schmeiser would have to pay $15,450 to Monsanto.

This is an example which shows that, under a private contract between a grower and a biotech company, the grower's rights to the purchased seed are significantly limited. Such contracts generally contain a "no saved seed" provision. This provision prohibits growers from saving seed and/ or reusing seed from GM crops. In effect, the provision requires growers of GM crops to make an annual purchase of GM seeds.

Geographical Map of the Field of Study

Writing a brief profile of Gulbarga district is important and necessary. In this study,an attempt is made to portray the socio-economic conditions of Gulbarga district.

About district:

The Gulbarga district is one among the 30 districts of Karnataka State, which is transferred from Hyderabad State to Karnataka at the time of re-organization of the State in 1956.Its extent is 117.47 km. from North to South and 172.73 km. from East to West, covering a total geographical area of 10,954 sq.km.[4](As shown in table 3 & 4). It is conveniently well placed 623 km away from the Bangalore metropolis with a population of 25, 66,326 (As shown in Table 1

4 http://censuskarnataka.gov.in/Final-DCHB_CRC_to%20 ORGI_03.06.2016/579.Gulbarga.pdf, last seen on June 26, 2017.

& 2). Large portion of its population is dependent on agriculture. Since its being an agrarian economy supplemented by a handful of cement, textile, leather and chemical industries.[5]

Table 1 Distribution of Population, Decadal growth rate, sex ratio and Population density of Gulbarga District 2011

District Code	District	Population 2011			Percentage decadal growth rate of population		Sex ratio (females per 1000 males)		Population density (Per sq. km.)	
		Persons	Males	Females	1991-01	2001-11	2001	2011	2001	2011
25	Gulbarga	25,66,326	13,01,755	12,64,571	21.76	17.94	958	971	198	234

Table 2description of distribution of population, decadal growth rate, sex ratio and population density of Gulbarga district 2011

Description	Year 2011
Actual Population	2,566,326
Male	1,301,755
Female	1,264,571
Population Growth	18.01%
Area Sq. Km	10,954
Density/km2	234
Proportion to Karnataka Population	4.20%
Sex Ratio (Per 1000)	971
Child Sex Ratio (0-6 Age)	943
Average Literacy	64.85
Male Literacy	74.38
Female Literacy	55.09
Total Child Population (0-6 Age)	365,372
Male Population (0-6 Age)	188,076
Female Population (0-6 Age)	177,296
Literates	1,427,368
Male Literates	828,359
Female Literates	599,009
Child Proportion (0-6 Age)	14.24%
Boys Proportion (0-6 Age)	14.45%
Girls Proportion (0-6 Age)	14.02%

Source: http://www.census2011.co.in/census/district/256-gulbarga.html

5 http://www.mapsofindia.com/maps/karnataka/districts/gulbarga.htm, last seen on June 26, 2017.

Table 3Geographical Area of Gulbarga District

Classification of Total Geographical Area of Gulbarga District - 2010-11 (Area in hectares)													
Sl. No.	District	Total Geo-graphical area	Classification of area										
			Forest	Not available for cultivation		Culti-vable Waste	Uncultivated land excluding fallow land		Fallow land		Net area sown	Total cropped area	Area sown more than once
				Land put to non-agri. uses	Barren & un-cultiva-ble land		Pmt. Pastures & other gazing land	Mics. tree, crops, groves	Cur-rent fallows	Other fallow land			
1	**Gulbarga**	**1094120**	**35316**	**38420**	**35113**	**9417**	**25855**	**1131**	**22242**	**2624**	**924002**	**1061757**	**137755**

Source: http://raitamitra.kar.nic.in/imp_agri_stat.html

Table 4Operational Land Holding in Gulbarga District

Agricultural holdings and Operated area in Gulbarga District																				
2005-2006 Agricultural Census																				
Unit: Holdings: Nos. Area: Hectares																				
Sl. No.	District	Marginal farmers		Small farmers		Total MF/SF		Semi.-Med. Farmers		Medium Farmer		Large farmer		Total		% of SF/ MF		Avg. LH of Non-SMF	% of Non-SF/ MF		Avg. LH of -SMF
		No.	Area	No.	Area	No.	Area	No.	Area	No.	Area	No.	Area	No.	Area	No.	Area		No.	Area	
1	**Gulbarga**	**65763**	**40127**	**130271**	**192238**	**196034**	**232365**	**109022**	**297788**	**49698**	**292199**	**8175**	**112518**	**362929**	**934870**	**54**	**25**	**4.2**	**46**	**75**	**1.19**
Holding size:																					
Marginal Farmers: Below 1 Hect. Small farmers: 1 to 2 hects., Semi-medium farmers 2 to 4 hects. Medium farmer's 4 to 10 hects. Large farmers 10 hects, and above.																					

Source: Agricultural Census 2005-06, report on Operational Holdings in Karnataka, Directorate of Economics & Statistics, Bangalore.

Brief history of the Gulbarga District

Gulbarga is locally known as Kalaburgi. The term Kalaburgi in Kannada connotes a stony land or heap of stones and this bears references to the nature of the landscape and the soil of this region. The meaning of Gulbarga in Persian language, 'Gul' means flower and 'Berg' means a leaf. This means a flower with a leaf. Till the 16th century, the area was popularly known as 'Kalburgi' and thereafter it came to be called Gulbarga.[6]The area has a rich cultural heritage. The area was ruled by Chalukyas and Rashtrakutas. During the period of King Nrupatunga, the great literary work "Kavi Raj Marg" was shaped. The work on Mathematics by Mahaveeracharya and the work entitled "Mitakshara" by Vijnaneshwara also originated here. The Social Reform Movement led by Shri Basaveshwara and Shivasharanas took place in 12th century. Gulbarga was once a capital of the Bahamani kingdom which has rich historical and cultural traditions. Gulbarga is also the seat of great Sufi Saint Hazrath Khaja Banda Nawaz.

Gulbarga District is sub-divided into 2 revenue sub-divisions viz., Gulbarga and Sedam. There are 7 revenue blocks in the district namely Aland, Afzalpur, Chincholli, Chittapur, Gulbarga, Jewargi and Sedam. Gulbarga being a regional headquarters of government is been considered as an important city in northern part of Karnataka. District is located on an undulating plain, presenting a vast rich stretch of black cotton soil is known for bumper red gram and jawar crops. The district is a "Daal bowl" of the State. District is blessed by the incessant flowing of river Bhima in addition to this, a few tributaries flow in this region. The Upper Krishna Project and Bennethora Project are the two major irrigational ventures in the district. It is indeed unfortunate that this great heritage has been forgotten over a period of time to the point that the area has become one of the most backward areas of Karnataka.[7]

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6 Government of Karnataka, Karnataka State Gazette-Gulbarga District, p.1-2.

7 http://www.icssr.org/Gulbarga%20final[1].pdf.

Methodology

The data were collected from two random samples of hybrid & genetically modified seeds growers of red gram and cotton in the district of Gulbarga over two seasons (2015 and 2016). Gulbarga has an area of 10,954 km^2 and a population of 25, 66,326.58.5 percent of the total population of the district, are engaged in agricultural sector and the income generated from agriculture is about 17% of the State's GDP.

Area's under Study

The present field study consists of farmers who grow red gram and cotton seeds spread over the district of Gulbarga. The ideal situation would have been to investigate all the red gram and cotton growers of the district that would not be possible because of limitations of resources. Hence some of the villages from different talukas were selected for conducting the field study. The obvious criterions of selecting these villages from different talukas have been the investigators' accessibility and acquaintance.

Sampling

The technique of stratified random sampling was adopted for the study. Equal number of cases was included from three categories of farmers, namely, small farmers, medium farmers and large farmers. Those respondents belonging to each category, who responded properly to the interview questions, were included in the sample. The required number of the cases was available from eight villages of Gulbarga district; two of these respondents from each category were picked up randomly to be described in detail.

Tools

It was realized right from the beginning that an elaborate questionnaire would not be able to meet the needs of the study due to lack of awareness regarding existing Intellectual Property Laws and due to the ignorance of influence of genetically modified organisms on agriculture. A brief questionnaire was formulated and was given to a very limited number of respondents in the beginning but it did not fetch any proper and meaningful responses or any complete

and substantial information. Therefore, an interview schedule was formulated keeping in view of the aims of the field study and also the mental abilities of the interviewees so that their responses may easily be recorded by the investigator himself and the information collected may be classified and analyzed properly.

Data Collection

The investigator visited a few villages interviewing small, medium and large farmers on the lines determined in the interview schedule and recording their responses. Sometimes strictly adhering to the interview schedule would not serve the purpose, so the investigator resorted to some informal questions to elicit the required information. Apart from the interview the investigator also jotted down some information by observing the conditions in which these people actually lived and worked.

Processing

The collected data were edited in order to ensure that all the required information had been gathered and irrelevant information omitted. After editing, the data were classified and analyzed. Two cases from each category were randomly picked up to be discussed in detail.

Interview Schedule

The Karnataka census figures were subjected to various changes during last 30 years. Re-organization for the States and the re-formation of the districts resulted either in addition or deletion of certain places and population from the map of the Gulbarga region.

In spite of these variations, the proportion of the marginal farmers, small farmers, semi-medium farmers and mediumfarmers are more in the district. The small farmers and medium farmers have higher participation in agricultural activities than that of the large farmers. It may be due to deep rooted customs and traditions prevailing in the society since long.

The generalizations established regarding socio-economic status working and living conditions and safety and developmental measures are common formarginal, medium and large farmers of the

district the increase in the strength of agricultural farmers, inherent weakness of agricultural occupations and existence of exploitative feudal characteristics are explicitly visible in agricultural sector of Gulbarga district. The macro level diagnosis reveals little variation in major problems and available solutions throughout the district. The agricultural farmers in general are bound to involve all sections of the society to work as agricultural farmers irrespective of their economic status. This makes availability of all the three category of farmers –small, medium and large, a common trend in agricultural occupation. The frequent involvement of small and medium level of farmers give more scope for their easy exploitation this has necessitated to study their problems keeping them in different categories in the present field study.

Analysis of Data

Despite the rapid adoption of genetically modified (GM) crops by farmers in many states, public controversies about the risks and benefits continue. Numerous independent science academies and regulatory bodies have reviewed the evidence about risks, concluding that commercialized GM crops are safe for human consumption and the environment. However, here is the field study which shows that though the GM crops cause benefits in terms of higher yields and cost savings in agricultural production but uncertainty about GM crop and health impacts are some reasons for the widespread public suspicion towards this technology.

The personal data of the farmers constituting the sample reveals that majority of cases belongs to small, medium and large farmers prefer to use genetically modified seeds to get more yield**(Table 5).** There were 30, 30 and 30 cases belonging to small, medium and large farmers are the cultivators ofhybrid or genetically modified seeds, in spite of knowing the impact of these varieties on health.

So far as the educational status of the respondents was concerned, majority of them were illiterate or educated upto SSLC (the number was 26, 16 and 2 for small, medium and large farmers). 0 small, 2 medium and 10 large farmers were educated above SSLC and only

2 medium farmers and 10 large farmers have got their education above SSLC, None of the small farmers had the opportunity to continue their education beyond Class V. And all the 30 large farmers owned the land on their name which is above 4 hectares and some 20 small and 22 medium farmers have owned the land which is less than 4 hectares and 9 small farmers and 8 medium farmers were landless.

Table 5: Personal Data

			Small farmers Total number of cases = 30	Medium farmers Total number of cases = 30	Large farmers Total number of cases = 30
1	Type of seed cultivation				
	Traditional seed grower	Red gram	--	--	--
		Cotton	--	--	--
	Genetically modified seed grower	Red gram	30	30	30
		Cotton	30	30	30
2	Education Qualification	Illiterate	24	15	02
		Upto class V	06	08	06
		Upto SSLC	00	04	09
		Above SSLC	Nil	02	10
3	Ownership	Land	21	22	30
		Landless	09	08	Nil

Table 6 revealed that except two small, two medium and one large farmer were the attached farmers and rest all wereeither casual farmers or marginal farmers.

The small farmers worked for 10 to 12 hours during peak season while during slack season they worked for 6 to 8 hours a day. For

medium farmers the length of working hours was 9 to 11 hours and 5 to 6 hours daily during peak and slack seasons respectively.

For large this length was 8 to 10 hours and 4 to 6 hours during peak and slack seasons respectively. All of them were given break for lunch etc., in between the hours of work.

The availability of employment was 170 to 190 man days for small farmers, 130 to 150 man days for medium farmers and 140 to 160 man days for large farmers in a year in which 130 to 145 man days were available to small farmers in agriculture and 35 to 45 man days in other occupations, 105 to 115 man days to medium farmer in agriculture and 20 to 35 in other occupations and 115 to 130 man days to large farmer in agriculture and 20 and 35 in other occupations.

The number of man days in self-employment ranged between 35 to 45 for small, 10 to 25 for medium and 15 to 30 for large agricultural farmers.

Table 6 Working conditions

			Small farm-ers Total number of cases = 30	Medium farmers Total number of cases = 30	Large farmers Total number of cases = 30
1	Nature of Employment	Attached	2	2	1
		Casual	10	12	19
		Marginal	18	16	30
		Share-cropper	Nil	Nil	Nil
2	Hours of work (in hours)	During peak season	10-12	9-11	8-10
		During slack season	6-8	5-6	4-6

3	Total man-days (in a year)		170- 190	130-150	140-160
		Employment in agriculture	130-145	105-115	115-130
		Employment in other Occupations	35-45	20-35	20-35
		Self-employ-ment	35-45	10-25	15-30

As shown in **Table 7** none of the farmers are ignore about the availability of the genetically modified seeds in a market. In fact, during interview they shared their experience that they prefer to grow genetically modified organisms only because it yields more in a less expense though it pose danger to the human health, animal health and environment. While 15 out of 30 small farmers and 10 out of 30 medium farmers are not having any knowledge about the use of new technology for agricultural process.

7 out of 30 small farmers, 15 out of 30 medium farmers and 20 out of 30 large farmers know that improved forms of pesticides are available in the market.

So far as the concept of plant patenting or plant variety protection is concerned, none of the respondents were having any idea about this monopoly concept through protection under Intellectual Property Rights Laws.

None of the respondents from the category of small and medium farmer had any knowledge of the existence of Intellectual property laws and other laws relating to seeds. Whereas 05 out of 30 large farmers knew that some laws are there for the protection of farmers.

Further, none of the respondents from the category of small and medium farmer had any knowledge about the availability of compensation on crop failure from the seed companies. Whereas 05 out of 30 large farmers knew that they are entitled to get the compensation from the concerned seed company if the crop got failed after following the required procedure for in the field.

2 out of 30 small farmers, 4 out of 30 medium farmers' and 12

out of 30 large farmers are knowing about the crop insurance facility provided by the government on crop failure. But the respondents who knew about this facility, they never tried this because of lengthy and time consuming procedures. Though National Agricultural Insurance Scheme (NAIS) crop insurance scheme, Livestock insurance, Agriculture equipment, Farm machinery, Poultry insurance etc., are operating since 2002-03 in the study area majority of respondent (>80%) are not aware that who is implementing agency and who pay's compensation. Almost all respondents are in the wrong perception that banks will pay compensation and are the implementing agency.

All the respondents are aware about the farmers' suicide. However, during an interview some respondents have revealed the other fact which they have experienced that, always agricultural problems may not be the sole reason for the farmers' suicide. Some time they may decide to end their life due to family problem or personal problem. But later their family, relatives or friends will give a color of agriculture debt or crop failure etc., for such incident.

4 out of 30 small farmers, 7 out of 30 medium farmers' and 11 out of 30 large farmers are aware of the disappearance of traditional crops from the society due to the influence of genetically modified seeds. But these respondents who knew are also not willing to go about traditional one because of less yield and high expenditure.

None except 7 large farmers had any knowledge about the loss of biodiversity and no one had any idea of rehabilitation of lost and extinguished biodiversity.

Table 7 Awareness

			Small farmers Total number of cases = 30	Medium farmers Total number of cases = 30	Large farmers Total number of cases = 30
1	Regarding the availability of Genetically modified seeds in a market	Nil	--	--	--
		Some	30	30	30

2	Regarding use of new technology for agricultural process	Nil	15	10	--
		Some	15	20	30
3	Regarding the availability of improved form of pesticides	Nil	23	15	10
		Some	07	15	20
4	Regarding Intellectual property Laws and other lawsrelating to seeds	Nil	30	30	25
		Some	--	--	05
5	Regarding Plant Patenting/ Plant Variety Protection	Nil	30	30	30
		Some	--	--	--
6	Regarding compensation on crop failure	Nil	30	30	25
		Some	--	--	05
7	Regarding Crop insurance	Nil	28	26	18
		Some	02	04	12
8	Regarding farmer suicide	Nil	--	--	--
		Some	30	30	30
9	Regarding the disappear-ance of traditional variety from the society	Nil	26	23	19
		Some	04	07	11
10	Regarding the loss of Biodi-versity	Nil	30	30	23
		Some	--	--	07

Table 8 shows the major crops cultivated in the field of sample. All respondents of the entire category have sown red gram, cotton, chickpea, sunflower, bajra and safflower which is of either hybrid or genetically modified seed. No farmer is interested in growing traditional small grains.

However, 20 out of 30 small farmers, 15 out of 30 medium farmers and 18 out of 30 large farmers have sown traditional Sorghum variety and rest of the respondents have sown hybrid/genetically modified varieties in their field.

And 18 out of 30 small farmers, 13 out of 30 medium farmers and 10 out of 30 large farmers have sown traditional wheat variety and rest of the respondents has sown hybrid/genetically modified varieties in their field.

Table 8 Major Field Crops Cultivated

Sl. No.	Name of the Crop		Variety	Small farmers Total number of cases = 30	Medium farmers Total number of cases = 30	Large farmers Total number of cases = 30
1	Redgram	Traditional Variety	Bili Togare,	--	--	--
		Hybrid variety	TS-3R, GRG-811 BSMR-736, TS-3, GS-1, PT-221, ICPL-87 (Pragati), Maruti (ICP-8863), ICPL-87119 (Asha), WRP-1, Benur, Gulellu, Kempu Gulellu	30	30	30
2	Cotton	Traditional Variety	Laxmi , Jaidhar, Varaadi Hatti	--	--	--
		Hybrid and Genetically modified variety	Mahyco, Bt Banni, Bt 2, Kaveri, Jaadu, Bindas, Ajit , DHH -11, Ajanta (DB-3-12), NHH-44, Varlaxmi	30	30	30
3	Sorghum (Jowar)	Traditional Variety	Maaldandi, Phul-mallige, Khodmurki, Kenjola, Hallejola, Kaagejola, Holigejola, Raosabjola, Mukhtijola, Gundtenejola	20	15	18
		Hybrid variety	CSH-16 (SPH-723), CSH-18 (SPH-960), CSV-216 (Phule Yashoda, SPV-1359), M-35-1, SPH-468 (CSH-14) AKMS-14A, SPH-468 (CSH-14) AKMS-14B, SPH-468 (CSH-14) AKR-15009A150R	10	15	12
4	Chickpea (Gram/ Bengal Gram/ Kabuli/ Chana)	Traditional Variety	Jawari Chana	--	--	--
		Hybrid variety	Vijay (Phule G 81-1-1), JG-11, Jawahar Gram-130(JG-130), Annigere-1, ICCV-2, Jawahar Gram-6(JG-6), JG-14	30	30	30

5	Sunflower	Traditional Variety	Jawari Suryakanti	--	--	--
		Hybrid variety	Jwala, Kargil, Ganga Kaveri, KBSH-44, KBSH-1, KBSH-41, KBSH-53	30	30	30
6	Bajra	Traditional Variety	Jawari Sajjhe	--	--	--
		Hybrid variety	MP-124 (ICTP-8203)	30	30	30
7	Wheat (Gehon)	Traditional Variety	Sharbati, Ronak, Bansi, Doddhagodi, Javegodi.	18	13	10
		Hybrid variety	UP-301, DWR-195, LOK-1, DWR-162	12	17	20
8	Safflower (Kusum/ Kadali)	Traditional Variety	Jawari Kadali	--	--	--
		Hybrid variety	A-2, Annigere-1	30	30	30

Table 9 shows the services availed from the following components in the sample. 10 out of 30 small farmers, 13 out of 30 medium farmers and 18 out of 30 large farmers have availed agriculture department service in their 15 to 20 years of farming activity. 20 out of 30 small farmers, 15 out of 30 medium farmers and 12 out of 30 large farmers have availed the service of Bank/ Co -operative societies.

10 out of 30 small farmers, 10 out of 30 medium farmers and 08 out of 30 large farmers have availed Grameen Bank service. And 5 out of 30 medium farmers and 07 out of 30 large farmers have availed the service of Commercial bank.

20 out of 30 small farmers, 22 out of 30 medium farmers and 18 out of 30 large farmers have availed the service of Karnataka Togari Abhivrudhi Mandali Limited. All respondents of the entire category have availed the service of Talati/Gram sevakfor the smooth functioning of their agricultural activity.

15 out of 30 small farmers, 08 out of 30 medium farmers and 10 out of 30 large farmers have availed the service of Raith Samparak

Kendra (RSK). Whereas, none of them have availed any service from APMC.03 out of 30 small farmers, 03 out of 30 medium farmers and 05 out of 30 large farmers have availed the service of Krishi Bhagya. 08 out of 30 small farmers, 11 out of 30 medium farmers and 15 out of 30 large farmers have availed the service of Kisan Call Centre.

Some of the farmers have not availed the services from the mentioned components and the reason for this isilliteracy, ignorance and lack of consciousness. In fact they are aware of the fact that these services are useful to overcome from the problems which they face in the field.

Table 9 Services availed from the following Components

Sl. No.	Components		Small farmers Total number of cases = 30	Medium farmers Total number of cases = 30	Large farmers Total number of cases = 30
1	Agriculture department		10	13	18
2	Bank/ Co -operative society's		20	15	12
3	Grameen Bank		10	10	08
4	Commercial bank		--	05	07
5	Karnataka Togari Abhivrudhi Mandali Limited		20	22	18
6	Talati/Gram sevak		30	30	30
7	Raith Samparak Kendra (RSK)		15	08	10
8	APMC		--	--	--
9	Krishi Bhagya		03	03	05
10	Kishan Call Centre		08	11	15
11	**Reasons for not availing services from the above mentioned components**	Illiteracy	15	08	02
		Ignorance	13	12	10
		Lack of consciousness	12	11	10
12	**Importance**	Useful	10	12	17
		Not useful	--	--	--

Table 10 shows the position of occupational risks in the sample. All farmers from all category are used the hybrid or genetically

modified seeds instead of traditional seeds to get more yield. In fact they knew that hybrid or genetically modified seeds are tasteless and not good for the health. 30 small farmers, 30 medium farmers and 10 large farmers used dangerous machines in the agricultural tasks assigned to them and all 30 farmers made use of fertilizers and chemicals. 4 medium farmers and 9 large farmers have taken special care while using machines or chemicals and fertilizers. Whereas, none of the small farmer respondents took special care while using machines or chemicals and fertilizers and none of them receive any special training while using the same. Out of 30 small and 30 medium farmers included in the sample 2 suffered from temporary total disablement and 05 from temporary partial disablement due to accident or occupational disease. Only 3 small farmers suffered from occupational disease. So far as the provision of relief is concerned, 4 of the affected farmers have taken medical care. But none of them have got any compensation or any other kind of relief.No help was given by governmental or non-governmental agencies. None of the affected farmers claimed any compensation with any authority.

Table 10 Occupational Hazards

Sl. No.		Small farmers Total number of cases = 30	Medium farmers Total number of cases = 30	Large farmers Total number of cases = 30
1	Use of Hybrid/ Genetically modified seeds	30	30	30
2	Use of dangerous machines	30	30	10
3	Use of fertilizers and chemicals	30	30	30
4	Use of special care	--	04	09
5	Special training	--	--	--

6	Accident/ Occupational disease	Disablement	--	--	--
		Permanent and total	--	--	--
		Permanent and partial	--	--	--
		Temporary and total	01	01	--
		Temporary and partial	03	02	--
		Occupational disease	03	--	--
7	Relief	Medical care	01	1	02
		Compensation	--	--	--
		Others	--	--	--
8	Help provided by	Government Agency	--	--	--
		Non-governmental Agency	--	--	--
9	Claim of compensation		--	--	--

Field Report of 5 Talukas in Gulbarga District

Alland Taluk Field Report[8]

State	Karnataka
Division	Gulbarga
Headquarters	Alland town
Total Area	1735Sq. KM.
Total Population (2011 Census)	297,136
Literacy Rate	45.47 %
Sex ratio	901 female for 1000 male
Official Languages	Kannada
Density	4,413.5/km^2 (11,431/sq mi)
Time Zone	IST (UTC+5:30)
Telephone code/ Std. Code	08477
Vehicle Registration Number	KA-32

Aland is a Taluk in Gulbarga District of Karnataka State, India. Aland Taluk's head quarter is Aland town and it belongs to Gulbarga Division. Very recently people have shifted from agricultural occupation to other occupation due to lack of rainfall and contamination of ground water.[9]

Field survey was conducted on 27/07/2016 and 28/07/2016 and Keri Ambalga, Naroni, Munnalli, and Khajuri areas in Alland taluk were selected for the field study.

8 http://www.census2011.co.in/data/village/620024-aland-karnataka.html.

9 http://www.iijnm.org/media_uploads/mastersproject/2014/Aland_taluk.html.

The conditions of the farmers are not so good. Around 15 farmers were interviewed, out of them only 25 % of the farmers knew about the impact of GMO on human health.

The interviewer when approached the farmers, to obtain information, they replied that they knew that Hybrid/GMO are not healthy for consumption and the food they prepare from it is tasteless but they are helpless. To balance the expenditure which they have incurred for the agriculture purpose that can be recovered only from hybrid/ GMO varieties, which yield more compared to the traditional variety. Hence, they prefer to go with GMO.

1.1.2 Gulbarga Taluk Field Report

State	Karnataka
Division	Gulbarga
Headquarters	Gulbarga town
Total Area	10,954sq. km.
Total Population (2011 Census)	286,683
Literacy Rate	65.65 %
Sex ratio	962 female for 1000 male
Official Languages	Kannada
Telephone code/ Std. Code	08441
Vehicle Registration Number	KA-32
Density	233 per km2
Time Zone	IST (UTC+5:30)

Gulbarga Taluk, is a taluk in Gulbarga district, located in Gulbarga district of the state Karnataka in India and it has been identified in the `backward' Category. 40 percent of its rural population is dependent on agriculture and they also interested in Dairy activities.

Field survey was conducted on 29/07/2016 and 30/07/2016 and Bhoopal Tegnoor, Malgatti, Hagaragi, Benur and Tavargera areas in Gulbarga taluk were selected for the field study. The total number of 35 farmers of various categories were surveyed and interviewed. In this the interviewer found that only 08 farmers were aware of the consequence of the use of genetically modified seeds on human health and environment. The interviewer when approached the farmers, to obtain information, they said that in spite of knowing

the impact of these hybrid/genetically modified seeds on the society, still they prefer to go with hybrid/genetically modified seeds only to get more yield to manage the expenditure which they have incurred for the agricultural activity.

1.1.3 Chittapur Taluk Field Report[10]

State	Karnataka
Division	Gulbarga
Headquarters	Chittapur town
Total Area	1765 sq. km.
Total Population (2011 Census)	366,802
Literacy Rate	64%
Sex ratio	840 female for 1000 male
Official Languages	Kannada
Telephone code/ Std. Code	08474
Vehicle Registration Number	KA-32
Density	7,706.86/km^2
Time Zone	IST (UTC+5:30)

Chittapur is a Taluk in Gulbarga District of Karnataka State, India. Chittapur Taluk Head Quarters is Chittapur town. It belongs to Gulbarga Division.

Field survey was conducted on 25/07/2016 and 26/07/2016 and Gola (K), Margol areas in Chittapur taluk are selected for the field study.

Chittapur is mainly famous for its polished stones and huge production of toor dal. Some developmental things have taken place in this taluk compared to other areas in Gulbarga district.

The farmers in Chittapur taluk have availed some government facilities. In these areas, the conditions of the farmer are better compared to other taluks. Around 15 farmers were interviewed, out of them only 40 % of the farmers knew about the benefits under the various Acts.

Jewargi Taluk Field Report[11]

10 http://indikosh.com/vill/174453/chittapur last seen on June 26, 2017.

11 http://www.onefivenine.com/india/villag/Gulbarga/Jevargi, last seen on June 26, 2017.

State	Karnataka
Division	Gulbarga
Headquarters	Jewargi town
Total Area	1822 Sq. KM.
Total Population (2011 Census)	235,254
Literacy Rate	73.83%
Sex ratio	980 female for 1000 male
Density	4,511.53/km^2 (11,684.8/sq mi)
Official Languages	Kannada
Time zone	IST (UTC+5:30)
Telephone code/ Std. Code	O8442
Vehicle Registration Number	KA-32

Jewargi Taluk is a taluk in Gulbarga district of Karnataka State, India. Jewargi is a town punchayat city in Gulbarga district. Jewargi town is the headquarters of Jewargi taluk. It belongs to Gulbarga division.

Field survey was conducted on 23/07/2016 and 24/07/2016 and Andola, Guddur, Itga and Wadgera areas in Jewargi taluk were selected for the field study.

The taluk is having considerably good number of farmers but in search of better opportunities they are migrating to Gulbarga district. Due to ignorance the farmers in Jewargi taluk have not availed much government facilities and have claimed any compensation from the seed producer for their crop failure.In these areas, the conditions of the farmers are not so good. Around 20 farmers were interviewed, out of them only 20 % of the farmers knew about the benefits under the various Acts. Majority of the farmers are illiterate and the main problem faced by the farmers is water and power problem. Normally farmers of this area gave preference to cash crops but none of them are aware of the impact of GMO on lives of the human being and environment. And only few farmers are aware of the developmental programs and schemes provided to them by the government.

Sedam Taluk Field Report[12]

State	Karnataka

12 http://indikosh.com/subd/664233/sedam-22, last seen on June 26, 2017.

Division	Gulbarga
Headquarters	Sedam town
Total Area	1025 sq. km.
Total Population (2011 Census)	172,759
Literacy Rate	53%
Sex ratio	1019 female for 1000 male
Official Languages	Kannada
Telephone code/ Std. Code	08441
Vehicle Registration Number	KA-32
Density	5,734.36/km^2
Time Zone	IST (UTC+5:30)

Sedam is a city in Sedam Taluk in Gulbarga District of Karnataka State, India. It belongs to Gulbarga Division. It is located 60 KM towards East from District head quarters Gulbarga. It is a taluk head quarter. Like other taluk, the people of this taluk are also the victims of problems like drinking water, sanitation and education and 70% of the people are living in below poverty line. Field survey was conducted on 21/07/2016 and 22/07/2016 and Kukunda, Mallikhed and Meenhabal areas in Sedam taluk were selected for the field study.

The farmers in Sedam taluk have also not shown any interest in growing traditional variety. Around 15 farmers were interviewed, out of them only 10 % are aware of IPR laws and the concept of plant variety protection under IPR laws.

Interpretation of Data

The analysis of data shows consonance with the generalization that majority of the farmers aresmall farmers. The trend has historical background, how tillers of the soil have shifted from traditional variety to hybrid/GMO seeds.

The villages taken where the sample have drawn, have no employment generating facility.Hence, the farmers have to depend on agriculture and prefer to use hybrid/GMO seeds to manage their expenditure.

The trend of illiteracy or low rate of literacyis found commonly in the sample. The reason for this lies in poverty, lack of consciousness

among the people and economic pressure due to less earning and large family size forced farmers to run behind the cash crops without thinking about the consequences of such use.

As for the ownership of land or other assets are concerned, the majority of small farmers of study villages have very little agricultural land and assets.

Conclusion

It is evident from the analysis that farmers have not witnessed any radical change in their life style over the years despite of using Hybrid/GMO seeds. The work situation of the farmers included in the sample exhibits deterioration rather than improvements. The objectives of the various laws, governmental schemes, viz.,protection of farmer variety, protection of traditional variety, farmers' rights, benefit sharing is yet to be achieved fully. The main reasons are lack of awareness, ignorance and ineffective implementation of provisions of IP laws.

In trying to project an overall picture of the lives and conditions of the farmers in their different facets the intention was to test the generalizations. Although these generalizations are made for whole of the country and to extend the field study to that much area is neither feasible nor needed, yet testing was essential to know the truth at primary level. For this purpose a limited field work was under taken with a sample drawn from various villages of five talukas in Gulbarga district. The analysis of data relating to the socio-economic conditions has established the fact that poverty, ignorance,illiteracy, influence of seed industries and interference of middle men are the root cause of various problems of farmers. The illiteracy and unorganized structure have further intensified their ignorance towards laws and developmental policies and programs meant for them.

CHILD VICTIMS OF SEXUAL OFFENCES: AN ANALYTICAL STUDY OF SOCIO-LEGAL MEASURES

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> *"Forgiveness is possible but I don't think it is safe for any survivors to establish any contact with the perpetrator. You forgive but it doesn't mean you forget. There are many things to work through. The wounds are deeper than forgiveness. You need to work on taking your life back. Finding the child within and restoring him or her back to health."*[1]
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> CecibelContreras

Introduction

A baby is God's opinion that life should go on.[2]They are precious and crown jewels not only of a family but also of their nation because they are the future of the country as they in turn shape the world's outlook. A child of today can be an efficient human resource of tomorrow. They are ingenuous in nature. Hence, they need special care and protection.

Now-a-days it is observed that the children are treated insensitively and rudely by the society. Therefore, they experience nasty facets of life and sometimes it's aggravated, such as sexual abuse and sexual violence. Such heinous and inhuman acts leave an unforgettable bad memory in the mind of the person which he/ she experienced in their childhood or adolescence age. During these ages a child

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1 Goodreads, Cecibel Contreras, available at, https://www.goodreads.com/author/quotes/9749875.Cecibel_Contreras, last seen on May 25, 2017.

2 Cecibel Contreras, 'Best Self Help Quotes,' available at, http://www.bestquotes4ever.com/authors/cecibel-contreras-quotes, last seen on April 28, 2017.

learns the importance of physical and mental activities. Like all other human creature, sexual maturity begins at birth to adulthood. The expansion of sexual knowledge includes the physical changes of one self. As children get older, the manner in which they behave and express these feelings alters and they move through diverse, and typical, phases. These days' children are exposed to sexual images and videos in a very younger age, which create query among themselves relating to the sexual behaviour. Therefore, sometimes it happens that, at the very early age the children are become the victims of sexual abuse by not knowing its consequences and hence, the victim and the abuser both engage in such activity in their very childhood days.

Almost all the countries are facing the problems relating to child abuse whether developed or underdeveloped and among them the worst part is the child sexual abuse. Children are victimised by various ways including sexual offence. Often the available data is not reflecting the real magnitude of the phenomenon. There are laws and Conventions to protect the innocent children from such evil practice but deficiency in the implementing mechanism is creating a major setback to implement the child protection laws. This practice is a growing phenomenon and is going on in different socio-economic classes. The society itself is responsible towards the victimisation of children, because, the abuser most of the time are the known faces in the family itself.

Child Victims of Sexual Offences: Nature and Problem

Now-a-days the cases of child sexual abuse are frequently being reported by the media and other source of information. The fact cannot be denied that the sexual offences against the children are rapidly increasing. Unfortunately, all cases related to child sexual abuse are not disclosed and reported due to the social and other reasons, that's why such shameful harsh reality of the society could not be combated and controlled effectively. Apart from that, they remain silent due to the cluster of shame and fear of hampering the family reputation. The feeling of physical and mental insecurity did not permit the children to disclose that how they have sexually

abused by their elders. Traditional believe and deep rooted orthodox practices teach the children to respect and abide by the words of the elders. The children due to the fear hardly ever reveal the information of their sexual exploitations to the parents, relatives or near and dear on whom they may relay.

This ethnicity of life prevents the children to speak up against the abuse. To avoid criticism also some of the victims did not want to tell their story. The society only believes in orthodox practices which in actual sense murder the victim from inside. The neighbours did not lend a hand for help or treated them sympathetically, rather, it only ostracised the victim's family. It is only the victim who are again victimised by society's reaction. The offender always shrouded their real face from the society. They exploit the children by gaining their faith or by using their position.

The Indian Penal Code 1860 dealt with the provision of sexual abuses of children before the enforcement of The Protection of Children from Sexual Offences Act (POCSO Act) 2012 either under the provision for the rape or unnatural lust (under sections 375 and 377 respectively). Such acts were not prosecuted under separate category of offences against the children, rather considered like other criminal wrongs against the person, whether the victim is adult person or minor did not matter. Reasons of not doing so might be in the early era of human civilization the relationships between the people were governed by the higher moral values. High morals were the major influencing factor which regulated human behaviour. Whereas, the same is decreasing day by day therefore the moral values are getting weakened. Therefore, to maintain the social order among the people, other mechanisms need to be developed in the country. The moral values in today's era are breaking down that is why the offenders do not find wrongfulness in abusing a child.

According to Aminigo and Nwaokugha (2006); morality is "an accepted code of human conduct in a society."[3] It includes honesty,

3 Ime N. George and Unwanaobong D. Uyanga, Youth and Moral Values in a Changing Society, Volume 19, Issue 6, IOSR Journal of Humanities and Social Science, p. 41, 2014, http://www.iosrjournals.org/iosr-jhss/

endurance, compliance, sincerity, reliability, accountability, admiration, faithfulness, liberty, and respect for human being, impartiality, equality and parity.

Ethical assessments in today's generation are degrading and the generations are perplexed about their ethics. Morals are mostly about being a good person and treating others well. This is the basic quality for a human being to inculcate values. In the former days, individuals value their relation with each other which is very much absent in today's era. Therefore, they require moral education which improves the behaviour towards others. But, present education is more vocation based rather than the values based education.

Today, life is based on the so called modern values where sympathy and respect of the feelings of others is missing. Problem of child sexual abuse is one of the effects of such transition from value based society to value deficient society.

Sexual exploitation of the child starts from their house itself, where children are assuming to be safe and secure. To prohibit crimes of sexual abuse the non-governmental organisations as well as the Government took significant steps to curve that problem. One of such initiative is the enactment of POCSO Act 2012. This Act is a complete law to save the children from sexual offences. Further it also provides protection for other related crimes of child sexual abuse. Special Courts can also look into such crimes for speedy trial under the said Act. The increasing crimes against children led to the realization to the legislature, media and public at large to enact new Act to protect the children.

Definitions Relating to Child Sexual Abuse

To know the concept of child sexual abuse some of the definitions need to be known. Some of the definitions which relate to the child and child sexual abuse are as follows,-

Child

papers/Vol19-issue6/Version-1/G019614044.pdf, last seen on May 2, 2017.

Etymologically, the term "child" comes from the Latin *infants* which mean "the one who does not speak."[4] The Convention on the Rights of the Child of 1989 also defines the term 'child' more accurately as,-

"[…] *a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."*[5]

Child Sexual Abuse

Child sexual abuse is an offence. A child can be sexually abused in many ways. An adult member of the society can exploit the child by using his power or by taking benefit of the child's trust.

Sexual intent is a necessary element to constitute the crime of sexual assault. The World Health Organisation (WHO) defines child sexual abuse as:[6]

"Child sexual abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society."

In other words,Child sexual abuse includes:[7]

- Oral sex
- Pornography
- Sexual intercourse
- Touching

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4 Rights of the Child, Humanium : Together for Children's Rights, http://www.humanium.org/en/child-rights/, last seen on May 3, 2017.

5 Convention on the Rights of the Child 1989, a 1.

6 Child Sexual Abuse, World Health Organization, http://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf last seen on May 4, 2017.

7 Child Abuse-Sexual, The New York Times (2/10/2015) http://slu.adam.com/content.aspx?productId=617&pid=1&gid=007224, last seen on May 2, 2017.

Touching behaviours may involve touching of the vagina, penis, breasts or buttocks, oral-genital contact, or sexual intercourse. Non-touching behaviours can include voyeurism (trying to look at a child's naked body), exhibitionism, or exposing the child to pornography.[8]The abuser uses many manipulative activities to engage the children in such evil practice, like, buying a gift, giving chocolates etc. These tactics referred to as "grooming," which can further confuse the victim.[9] Child sexual abuse can involve many forms, such as, a child may be seduced by a person he/she likes or it can be an aggressive act done by an outsider. The person responsible for the exploitation of the child may introduce them to showing online pornography through internet or influence them to take attractive pornographic snapshot.

Sexual Harassment[10]

Section 11 of the POCSO Act defines the term Sexual Harassment. The following are included in the definition of sexual abuse,-

(i) Penetrative and non-penetrative sexual assault

(ii) Aggravated penetrative sexual assault

(iii) Sexual assault

(iv) Aggravated sexual assault Sexual harassment

(v) Using a child for the purpose of pornography

(vi) Trafficking of children for sexual purposes.

Grooming

8 Child Sexual Abuse Fact Sheet: For Parents, Teachers and Other Caregivers, The National Child Traumatic Stress Network, http://nctsn.org/nctsn_assets/pdfs/caring/ChildSexualAbuseFactSheet.pdf, last seen on May 3, 2016.

9 Ibid.

10 Section 11, The Protection of Children from Sexual Offences Act 2012. See also, Sydney Moirangthem, Naveen C. Kumar and Suresh Bada Math, Child Sexual Abuse : Issues & Concerns, Indian Journal of Medical Research (July, 2015), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4557243/, last seen on May 17,2017.

Grooming is a technique of creating belief with a child. The abusers create such trust to take sexual advantage of the child. It includes the chances by the adults also so that the child will not consider the sexual advances of the perpetrator unpleasant or improper.

Molestation

It includes the act of a mature person to induce the adolescent for sexual favours. Molestation of a child is a crime. It involves sexual activities among the adult member and a child.

Rape

Literally rape means a forcible seizure. It means sexual intercourse by a man with a woman against her will and without her consent. In other words, rape is violation with violence of the private person of *a* woman, an outrage by all means.[11]

Re-Victimization

It means the evil incident is repeated to the sufferer of a crime. The victimization may be of the same kind or it may differ from the previous offence. Quite a lot ofsufferers are re-victimised by the same or a different perpetrator. Childhood exploitation may affect the whole life of the victim as she would be prone to many consequences.

Perpetrators of Child Sexual Abuse

It is a brutal reality of our society that, sometimes children are sexually victimised by their own family members, such as—a parent, step-parent, brother or sister or any other relatives. It is almost always by someone the child knows previously, for example, friend, neighbour etc. The study on Child Abuse conducted by the Ministry of Women and Child Development of the Government of India in 2007 found that in most of the incidents, the child knows the wrong doer.[12] For example, 31 percent of the incidents of child

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11 Phul Singh v. State of Haryana**,** AIR 1980 SC 249.

12 Ministry of Women And Child Development, Government of India, Study on Child Abuse : India 2007, available at, http://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf, last seen on May 7, 2017.

sexual assaults were committed by the victim's uncle or neighbour.[13]

Nature of Child Sexual Abuse

Children are very sensitive in nature. They live without knowing the harsh reality of the society and sometimes even they do not understand the character of the abuser. Therefore, they become the easy victim of the abuser. The children who experienced parental insufficiency, disagreement and emotional deprivation are become easy victim of such abuse.

Child Sexual Abuse: A Dark Reality

Children are very sensitive in nature. They need more protection as a special category. The Court put up with this statement in the renounced case, namely, **State of Rajasthan v. Om Prakash.**[14]

Problems of Child Sexual Abuse

Children are not capable to understand the nature and effects of the happenings in their surroundings because of their immature minds. Since, they are very immature and vulnerable due to their fragile nature, it is often seen that they are abused.

The worst part is the children who are sexually abuse will sometimes never recover. The scar always remains inside them. Child sexual abuse can be perpetrated by anyone; he may be an adult or minor. The Ministry of Women and Child Development 2007 provides that, boys face more sexual abuse in comparison to girls. At times it is happen that, boys are not generally put into knowledge about the sexual abuses, so, they become the easy victim of sexual abuse. His silence gives push to the abuser to continue the abuse for a long period of time.

Causes of Sexual Abuse and Its Impact on Child Victims

Sexual abuse against children cuts across limitations of geography, race, class, creed and civilization. It takes place in homes, schools

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13 Breaking the Silence: Child Sexual Abuse in India, Human Rights Watch, https://www.hrw.org/report/2013/02/07/breaking-silence/child-sexual-abuse-india, last seen on May 7, 2017.

14 (2002) 5 SCC 745.

and in care and detention centres. The most pathetic part of child sexual abuse is that the perpetrators are in most of the cases known to the child and they start from the homes, for example, parents, family members, relatives and neighbours etc. Sometimes, children are exploited by their teachers or caretakers. Some of the children are mostly open to sexual abuses due to sexual category, ethnic origin or disability, whether rich or poor but the present study is an attempt to reveal some hidden facts regarding the factors responsible for such kind of inhuman behaviour against the children. Children belong to poor families or lower socio-economic statuses are more exposed to the risk of their sexual harassment.

It has been noticed by the detailed study on the reasons of criminal behaviour that the people commit crime because any of the following reasons as-

- **Pleasure**

Pleasure is the most stimulating drive which causes the person to do certain act and in the zeal of enjoying pleasure people ignore the fact that their pleasure may cause the pain to other person. In this kind of sexual abuse the abuser enjoy when they physically abused the children. They enjoyed their lustily bodily feelings and sensations and perhaps some aspects of how the child reacts with them.[15]

- **Aggression**

It is the second ground as to why people commit any crime. Human anger is a feeling which results in a violent behaviour. This term is related to the psychology of the abuser. It may happen that of aggression the abuser commit the crime of child sexual abuse.

- **Ignorance of law**

Sometimes it may happen that the wrong does are not aware of their act by reason of their illiteracy or tender age. Some NGOs

15 Sexual Feelings During abuse, KalimunroPhychotherapist, http:// kalimunro.com/wp/articles-info/sexual-emotional-abuse/sexual-feelings-during-abuse, last seen on May 8,2017.

and UNICEF are doing ground-breaking works to expand public awareness about the crimes against children. These organizations do their work by awareness campaigns; distribute knowledge by educating the people and by establishing child security connections.

Lack of Social Justice

Earlier if any crime is committed in the society, the society expressly repines against that person due to the moral values existing in them but in present time people are not even aware of the fact that what is happening in their next door. The concept of social justice guaranteed by the Constitution of India is not able to provide adequate protection to those children who are victims of sexual exploitation or likely to be victimised. One of the reasons of failure of social justice may be that now-a-days people do not hold the moral principles. Previously if any person committed crime he was punished by the law as well as by the society and also his family members had to face the repercussions. The whole family was expelled from the society and they were also deprived from other social entitlements.

Lack of Moral Values

The moral values of the people are more governed by the external factors rather than spiritual values. Hence, these circumstances are also responsible for abuse of the children sexually. When values are not strong circumstantial factor effect strongly.

Geographical Factor

Prior to these days the design of the houses are very big, so one member of the family is not aware the facts that what is happening to the other member of the family. So, crimes happen within the houses and the members of the family remain unknown to the facts. But at present houses are small so individuals remain aware of the facts what is happening in their homes. Therefore the crimes are reported in a large number in the present situation.

Enticement to get into the Silver Screen

It's been a disappointment to everybody that children in our society are makes a victim of sexual abuse. It is also noticed that the children are abused by saying that they will give them chance to the film industry if they abide by their words. As we all are aware of the fact that the children are very innocent and they believe what the individuals told them, it become easy for the abuser to trap these innocent minds. These issues need to be maturely and carefully handled by the authority so that children remain liberated in society.

Cultural differences

In our society the cultural variations works in each and every society. The societies which respect the girls or women have fewer crimes against girls and vise-versa. Cultural norm, like to respect the male members, mannish behaviour etc. promote collective approval of sexual assault in different manner. Where the beliefs of superiority of male member are strong child sexual abuse is more common in nature.

Psychological Reasons

Psychological factors strongly influence sexual drive. The children who carry ontheir child nightmare of such abuse to their adulthood are at high risk of posttraumatic stress disorder (PTSD). This disorder leads to immense fear, incapacity to gain faith towards people, helplessness etcetera.

Poverty

This grim reality did not come into actuality due to presence of various social taboos. One of the brutal realities which at times remain behind the veil is the parents themselves treat their children as a means of earning. They neglect their children and think them as only a burden to them. These parents did not take care of the child's basic needs like food, clothes, shelter etcetera. They have to pass through their mediocrity life on a daily basis. The children who have their birth right to be cared by their own parents become deprived of this right.

Due to all this issues the abusers of the child sexual offences target the poor children who are more vulnerable in nature due to their poor economic condition, sexual category, age or sexual orientation. The poor economic condition of the children makes easy for the abusers to victimise them. For the sake of survival these peoples walk through the dark side of our society. They become an easy victim of violence and sex trade. The abuser more often give remuneration to the victim's family and get rid of such crime.

Negative Impact of Social Media

Now-a-days, technology becomes a part and parcel of our daily life. It has made its place in our personal life also in the form of social media. It has both positive and negative cons. In recent times, child pornography becomes a common incident in our society. In addition, online child sexual abuse is a growing phenomenon. The offenders use internet as a medium of victimised the children. They target the responsive children who are poor and needy. These children become exposed due to the need for proper safeguards measures. They become an easy victim by digital devices at home or through internet cafes. The harasser may also be able to use individual communication to the victim by means of internet. Mostly, these harassers intension were to sexually exploit the victim personally or on the internet. The growing number of pornography and sexting turn out to be a trend in the young minds. Lots of children involve themselves willingly for pleasure but, on the other side there are children who are forced to do so. They are blackmailed or tortured by the harasser to participate in the online sexual activity or sexting.

Child Marriage

Child marriage can also be considered as a form of child sexual abuse. It is a heart breaking truth that, in Rajasthan and some of the countries in India this wickedness is still is picture. On the day of Akshya Tritiya, a huge number of children are given into marriage on the belief that it will bring good fortune for them.

Statistical Ratio of Child Sexual Abuse

Crime against children is a major concern in India. The statistics put forward an eye-opening insight into the child sexual abuse in India. It is deep rooted societal practice which bears its seeds from the past history. The percentage of crime against the children under the Protection of Children from Sexual Offences Act in the year 2015 was 15.8%. The maximum number of cases were reported by Bengaluru (273 cases) followed by Ahmedabad (191 cases) and Indore (189 cases) accounting for 11.6%, 8.1% and 8.0% of total such cases registered during 2015 respectively.[16]

The children have to grapple from their very early age as they are not safe in their childhood also. In today's era girls as well as boys are also exploited both physically and mentally. Although there are various mechanisms to prohibit this heinous practice, the ratio of child sexual abuse is a different story revealing the brutal reality of our society. The following tables show the statistics of gender-wise and State-wise ratio of child sexual abuse.

States	% Boys	% Girls
Andhra Pradesh	54.21	45.79
Assam	53.48	46.52
Bihar	52.96	47.04
Delhi	65.64	34.36
Goa	52.27	47.73
Gujarat	36.59	63.41
Kerala	55.04	44.96
Madhya Pradesh	42.54	57.46
Maharashtra	49.43	50.57
Mizoram	59.96	40.04
Rajasthan	52.50	47.50
Uttar Pradesh	55.73	44.27
West Bengal	43.71	56.29
Total	52.94	47.06

Table : 1 Gender-wise percentage of children reporting sexual abuse[17]

16 Crime in India 2015 Compendium, National Crime Records Bureau, Ministry of Home Affairs, available at http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf, last seen on May 12,2017.

17 Ministry of Women and Child Development, Government of India, Study on Child Abuse: India 2007, available at https://www.childlineindia.org.

States	No	Yes
Andhra Pradesh	86.33	13.67
Assam	88.22	11.78
Bihar	89.66	10.34
Delhi	85.23	14.77
Goa	99.60	0.40
Gujarat	98.08	1.92
Kerala	93.95	6.05
Madhya Pradesh	98.28	1.72
Maharashtra	99.18	0.82
Mizoram	98.63	1.37
Rajasthan	98.18	1.82
Uttar Pradesh	97.78	2.22
West Bengal	95.51	4.49
Total	94.31	5.69

Table : 2State-wise percentage of children reporting sexual assault[18]

Impact of Child Sexual Abuse

As India is a patriarchal country it continues to treat girl children as a secondary object. The parents even consider them as a burden or an inferior creature. These children suffer from their very childhood days.

It has been observedbythevarious studiesthat long-term effects of sexual abuse in child hood include hopelessness, anxiety, depression, feelings of isolation, troubling in believe others, a tendency toward re-victimization, substance abuse, and sexual maladjustment.A very few such impacts may be listed as under,

Impact on Mental Health

Child sexual abuse has an adverse effect to the mental health of the children and related outcomes for survivors. The abused children become essay victim of the post-traumatic symptoms, like, depression, alcohol dependence, social anxiety, attempted suicide, nightmare, difficulty in experiencing feelings etc. They frequently take personal responsibility for the abuse and internalise negative messages about themselves.

in/pdf/MWCD-Child-Abuse-Report.pdf, last seen on May 10, 2017.

18 Ibid.

Impact on Intimate Relationships

The children who face sexual abuse in their childhood face greater difficulties in interpersonal and particularly intimate relationships. This creates vagueness in relationships as due to the effected mind of the children they do not feel comfortable to such behaviour and activities and they have lack of enthusiasm towards their partners.

Impact on Physical Health

The children face many physical health problems, when they become victim of the sexual abuse. The sexually transmitted diseases are a common phenomenon after the children are victimised. Physical exploitation of the children can escort to grave physical substantial consequences, such damage of the brain.

Impact on Human Rights

Child sexual abuse is inhumane violation and against the notion of the fundamental human rights. It is in the contravention of the spirit of Human Rights. The children who face sexual abuse in their childhood are not able to live their usual course of life.

Impact on Human Dignity

Child sexual abuse violates the dignity of the individual child. All the individuals are born with human dignity which includes the children also. It is an inbuilt or birth right of every child to live their life freely. Article 21 of the Constitution of India protects such right of every individual.

Impact of Discrimination

Although Indian Constitution promises to give justice, social, economic and political assurance of freedom, equality, dignity, various forms of violence are ravaging the lives of the children. The ill practice of sexual abuse of the child is possibly the most disgraceful violation of human rights and it is possibly the most pervasive.

Psychological Impact

Child sexual abuse creates a mental trauma and the felling of humiliation in the sufferer. The victims who are too young sometimes even do not find a way to express what is happening with him/her.

Emotional Impact

The children who are sexually exploited suffer a lot. Often these children bear pain after the ill-treatment has ended. The family members also bear the consequences of such harm to the children.

Depression

The children who suffer sexual abuse may feel miserable and due to which they become depressed. They may not show attention in their education and other academic works. The behaviour of the children keeps changing on the nature and gravity of the crime. The children activities may demonstrate to such abuse, such as, grievance, difficulty in eating, lack of ability to focus in studies etc.

Social Impact

The victims often suffer from various hardships in their life. It has many detrimental ramifications in their working place also. People did not give them respect and condemn the victim only. It hampers their physical as well as mental stability to overcome the situation. Often they need counselling and medical treatment to recover their condition. The society did not permit the victim to overcome the situation and remind them of their abuse. The victims are not respected by the people and sometimes even they are forced to leave their studies and employment.

Social Measures in Controlling Child Sexual Abuse

A child today is a man tomorrow, they are the countries future. Generally, they are so innocent and delegate that they are always in need of special care, love and affection. Preventing child sexual abuse is everybody's responsibility within society.

Prevention Strategies

The prevention of sexual assault is very easy. If such heinous crime is prohibited from its root cause then the prevention is possible.

What is needed is to shake hand in hand to eradicate such evil practice from the society. The peoples of the society must take preventive measures to tackle such crime against the children.

Legal Measures in Controlling the Prevention of Child Sexual Abuse

Acts and other legal measures is the chief measure to protect children from sexual abuse. The legal measures can be summarised below,-

Provisions under the Constitution of India, 1950

The Preamble of the Constitution itself defines about the social justice, equality, morality etc. The right to equality, protection of life and personal liberty and the right against exploitation are enshrined in Article 14, 15 (3), 19 (1) (a), 21, 21 (A), 23, 24, 39 (e) and 39 (f) of the Constitution of India. These provisions ensure the obligation of the State to protect the life of the people against any crime including children.

Article 21 of the Constitution has a vast umbrella, under which many aspects are included. It gives the right to live with human dignity.[19] The suffering which children bear may be unwritten and unrevealed, but, the truth is they experience all these pain. The children might not understand the brutal reality behind the crimes, but, they are always exploited mostly by the known faces surrounding them.

Provision under the Indian Penal Code (IPC) 1860

The Indian Penal Code, 1860 also provides certain measures to get rid of this evil practice from our society. Such as, Section 366A, 366B, 371, 372, and 373.

Section 366A and 366B were inserted in the Code for punish import or export of girls for prostitution. Section 372 and 373 are made in consonance with Article 23 of the Constitution of India, which prohibits traffic in human beings. These sections punish the trade

19 Francis Coralie v. Union Territory of Delhi, AIR 1978 SC 597.

of selling and buying minors for purposes of prostitution.

In 2012 the Protection of Children from Sexual Offences Act was enacted for the protection of children from sexual abuses. To alert the people regarding such heinous crime awareness programmes are also initiated by the Government authorities.

The Protection of Children from Sexual Offences Act, 2012 (POCSO)

The Protection of Children from Sexual Offences Act 2012 is a special Act enacted to protect the children from sexual offences. It is the first legislature which enacts to tackle the predicament relating to child sexual abuse.

The push for the POCSO Act was also come from Article 15 (3) of the India Constitution. This Article permits the State to enact special laws for women and children. The UN Convention on the Rights of the Child 1989 requires the State to make a shield for the children to save them from sexual exploitation through prostitution and pornography.

This Act gives protection to the children at each and every step of the proceedings. It includes child-friendly apparatus and speedy disposal of offences through designated Special Courts.[20]

The Supreme Court in Sakshi v. Union of India[21] issued guidelines for child sexual abuse trial procedure. In this guideline the Court held that, arrangements should be made in such a manner that the victim or the witness should not be able to see each other.

Juvenile Justice (Care and Protection of Children) Act 2000

Children bring constructive future of a Nation. They need equal

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20 Section 28 of the POCSO Act 2012 defines the meaning of the Special Court as, a court which is to be set up for providing speedy trial and to try the case in a child friendly atmosphere. To try the offences under POCSO Act, the State Government shall in consultation with the Chief Justice of the High Court designate for each district a Court of Session to be a Special Court.

21 AIR 2004 SC 3566.

protection for their development and to reduce the inequalities. This Act makes provision for the betterment of the children and for their bright future who in their very early age becomes victims of crime. But, this Act did not directly deal with child sexual abuse.

The Child Welfare Committees (CWC) has been established under this Act. In such Committees a child who is likely to be abused or threatened can make application and sought for help.

Prohibition of Child Marriage Act 2006

Child Marriage curtails basic rights of the children. It deprives the development of the children. The children in child marriages are sometimes sexually abused by their partner and face several health consequences as well.

Other Measures

There are some other measures also to protect the children from sexual abuse. They are,-

Raising Awareness

It is very much necessary to aware the people of such evil practice in our society. The awareness programmes makes the people conscious about the laws and regulations to prohibit such practice. In the rural areas where people are not capable to attend the schools by attending these campaigns they can gather knowledge about this ill practice in a better way.

Education

Education act as a measure to exclude such crimes from the society. If the people become educated they will learn about the ill effects of sexual abuse and related consequences thereon. People become educated by attending programmes, meetings etc. Further, if the children become educated they themselves can identify about the right and the wrong. They become alert of their basic rights if they get education.

Childline (Telephonic Help Lines)

In 1996, CHILDLINE India Foundation (CIF) launched CHILDLINE. The children who are in distress and need of aid and assistance by dialling 1098 can contact to the Childline.

Integrated Child Protection Scheme (ICPS)

This scheme was launched by The Ministry of Women and Child Development, Government of India in the year 2009. It gives responsibility to the State to create a system which will help and protect the children.

International Conventions Relating to Child Sexual Abuse

India is a party to various International Conventions, Treaties and Declarations which protects the rights of the children. All these Conventions and Declaration provides security to the children which are being curtailed by such crimes in the society. These International instruments also give provisions to protect the dignity of the children which is incorporated in Article 21 of the Constitution of India.

The Universal Declaration of Human Rights (UDHR) 1948

This Declaration came into force by the General Assembly of the United Nations. It is a landmark declaration which includes the rights of the children. It gives acknowledgment to the child as an individual. In addition UDHR also specified that early days of a children need more care and support.

The Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999

This Convention prohibits bonded labour, slave or obligatory employment, whoredom and other works which are likely to affect the mental and physical health of the children.

UN Convention on the Rights of the Child 1989

The Convention on the Rights of the Child recognises the rights of the child. India recognised this Convention in the year 1992. The State parties of this Convention recognise the rights of each and

every child.

Article 34 and 35 of this Convention forbid sexual exploitation or trafficking of children.[22] One Committee was also established on the Rights of the Child under this Convention to look into such ill practice.

The SAARC Convention on Prevention and Combating Trafficking in Women and Children for Prostitution 2002

Child sexual abuse is related with trafficking. This crime occurs when a trafficker uses force, fraud or coercion to control another person for the purpose of engaging in commercial sex acts or soliciting labour or services against his/her will.[23]Children are kidnapped and send to different places and forced to do sexual activities, although trafficking is prohibited in the Constitution of India.[24]

Role of Judiciary in Controlling the Prevention of Child Sexual Offences

Justice is everybody's right. The judiciary plays a significant role to protect and implement the rights of children.

Tuka Ram And Others v. State Of Maharashtra[25]is related with custodial rape. The fact of the case was in the Chandrapur district of Maharashtra a tribal minor girl was raped by two policemen who was minor at that time. There were huge public protests after the Supreme Court acquitted the accused.

InBharwadaBhoginbhaiHirjibhai v. State of Gujarat[26]two minor girls was confined by the accused in his house.These two victims came to visit the daughter of the accused. The accused then raped the two other girls. The Supreme Court imprisoned the accused in this above mentioned case.

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22 Articles 34 and 35, UN Convention on the Rights of the Child 1989.

23 National Human Trafficking Hotline, https://humantraffickinghotline.org/, last seen on May 20, 2017.

24 Article 23, The Constitution of India, 1950.

25 1979 AIR 185.

26 1983 AIR 753.

In State v. Aas Mohammad[27] a minor girl and her landlord was in a sexual relationship. When the victim's mother discovered that the victim was six months pregnant filed a complaint against the accused. The girl admitted in the Court that the matter was informed due to the reason that, the man had denied marrying her. In continuance of the Courtprocedures, the accused deposited a sum of Rs 30,000 in the name of the victim and also offered to marry her. The accused further provide shelter to her mother. When the accused was released on bail he married the victim girl. The judge acquitted the accused in this case as the victim and the mother of the victim withdraw their statements.

In State of Maharashtra v. Dattatraya[28] death penalty was awarded to the accused. The accused was found blameworthy under POCSO. The accused reside near the house of the victim. The victim girl was 5 years of age. The accused had vaginal & anal sex with the minor girl and due to this reason the victim girl died.

InAvinash v. State of Karnataka[29]Court observed that the scrutiny of the objects placed on record would disclose that the age of the victim is an important aspect to be decided before considering the question as to whether there was either an offence under Section 4 of the POCSO Act and Section 366 IPC.

The above mentioned landmark cases and whatever judgements were delivered by the Courts made a very remarkable change in the ground of child sexual abuse in India. Judiciary has played an active role in combating the problem of child sexual abuse in India.

Conclusion

The child rights are non-negotiable. The laws which are made for the protection and prevention of crimes against children should not remain on paper only; these laws must work in the practical scenario. Although the State and other social organizations are taking all

27 Decided on 13.8.2013 by Judge T.S. Kashyap. SC NO. 78/2013.
28 1977 AIR 915.
29 MANU/KA/1273/2015.

best and necessary measures to protect the children from such measurable conditions, the children are not safe in the society. Sex education and awareness among the parents and children are very much essential as only this can made possible the promise made by the International Conventions as well as national laws commitment to protect and improve the situation of children in India. One of the key factors which are responsible for child sexual abuse is lack of communication between the children and their parents regarding sex education. The children remain in an unknown condition as they do not know the reality what is wrong with them.

The Constitution of India provides to take all best and necessary measures for the development, upbringing and suitable conditions of the life to the child under Part – III and Part – IV of the Constitution which enable the State to make separate provisions for the children according to the Constitutional mandate the child is believe to be considered under a separate category other than the ordinary provisions of the law. In the light of the Constitutional mandate the Parliament has enacted Protection of Children from Sexual Offences Act 2012. This Act was enacted to tackle the problems of sexual abuse against children. What is needed is strong implementation mechanism. This evil practise should be abolished from its grass root level. The legal officers and society both requires shaking hand in hand to stop this heinous practice from the society.

Policing The Police: Police Accountability In India

ELUCKIAA A.*

Introduction

The three pillars of the Criminal Justice System are- the police, the prisons, and the Criminal Courts. It is very pertinent to strengthen these three pillars for the better protection of the human rights in India. Reforms have been undertaken in all the three sectors, particularly police reforms. These reforms were to strengthen the police accountability to the public. One area for strengthening the police accountability to the public is to establish an independent authority to enquire into the complaints against the police. Ina democratic society, a police while exercising his power conferred by the state, should respect the fundamental rights of the people and should act in compliance with the law. Since ample power is conferred upon them and in order to ensure that they don't abuse or misuse the powers conferred upon them, various checks and balances are necessary. Usually, in a democratic society, the Police Department is accountable to the judiciary and other civilian bodies like Human Rights Commissions, ombudsman etc. However in other jurisdictions, an independent body is in place to oversee the investigations of complaints against police but in India, if the complaint is of grave nature and if it is related to the gross violation of human rights, the complaints can be preferred to the National Human Rights Commission or State Human Rights Commissions. In other cases, there is no another civilian body like Ombudsman or Police Complaints Board in India.

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The criticism that is common throughout the world for constituting an independent body to monitor the investigations of complaints against the police is that the very existence of such a body would undermine the police morale and when the discussions for constituting an independent authority to monitor the investigations of the complaints against police come up in the Parliament, it would always be suggested to strengthen the internal review process instead.

When ample powers have been granted to the law enforcement which is quintessential for the protection of the society, it must also be borne in the mind that measures should be taken so such powers are not being abused. However, it is evident from the experience that the law enforcement agency in India habitually abuses the power it is entrusted with and does not meet not just the ethical and moral standards but sometimes the legal standards also. The worst case scenario is when the law enforcement uses their power to limit a person's human rights. In such cases, complaints can be made to the Human Rights Commissions.

When can the police effectively maintain the law and order situation? The efficiency of the police is directly proportional to the public's confidence in them. If the police adhere to the human rights norms and other rules, they will receive public trust and also cooperation. If the police are in the habit of abusing their power conferred by the state, it will be faced with a general reaction of non-cooperativeness.

Remedies Available Against Police Misconduct

What are the remedies that are available against the police misconduct? The victim can directly complain to the superior officer and the superior officer may take disciplinary action against the concerned police officer. But the public may feel reluctant to file a complaint against a police to another police. How can the public be assured about the proper investigation into their complaints? As in practice, it can be witnessed that an internal review process doesn't work satisfactorily and after observing the working of civilian

oversight boards in monitoring the investigations of complaints against the police in other jurisdictions, it is a safe bet to say that the constitution of an independent authority into such complaints is quintessential.

The other remedies include the filing of civil suits or criminal complaints. As far as civil remedies are concerned, the primary function of the police is to maintain law and order which is a sovereign function, therefore the suit must be filed against the state. Moreover, if the suit is filed against the concerned police officer, there may be difficulties in the execution of the decree even if there is a decree in the plaintiff's favour. But according to article 300 of the constitution which still continues the pre-constitution position in the matter of liability, the Government is not liable for any action incidental to exercising its sovereign powers.

This position was reiterated in Kasturi Lal v State of Uttar Pradesh.[1], where the police arrested a man on suspicion that he was in possession of stolen goods and seized a large quantity of gold from him but he was not found guilty and the seized gold was not returned to him and he instituted a suit against the State of Uttar Pradesh. The gold was kept in the 'malkhana' (property room) of the Police station and the head constable who was in charge of the 'malkhana' ran away with the gold. The Constitution Bench of five judges, however, held that the power to arrest a person, to search him and to seize the property is a sovereign power and dismissed the suit.

But later in 1994, a two-judge bench in Nagendra Rao v State of Andhra Pradesh.[2], observed the inequity inherent in Article 300 and urged the state to enact a law in that behalf. The High Court of Andhra Pradesh also in Challa Ramakrishna Reddy v State of Andhra Pradesh[3],held that the plea of sovereign immunity cannot be entertained when a fundamental right of a citizen is violated. The State of Andhra Pradesh appealed against this judgment and

1 AIR 1965 SC 1039.
2 AIR 1994 SC 2663.
3 AIR 1989 AP 235.

the Supreme Court confirmed the High Court judgment in State of Andhra Pradesh. v Challa Ramakrishna Reddy[4].

Can an individual initiate a criminal proceeding against police conduct when he is illegally arrested or if his arrest is made with some mala fide intention or without any justification? Can he prosecute the police officer who arrested him under section 342 of the Indian Penal Code for wrongful constraint? But again such police officer is protected by section 197 of the Code of Criminal Procedure. Under section 197 of the code, the courts cannot take cognizance of criminal charges against a public servant without obtaining the previous sanction of the central government or state government as the case may be. This aim of this provision is to ensure public servants to perform their duty without any fear of malicious prosecution. However, this provision could be interpreted in such a way that committing an offence is not a part of the official duty of a public servant and therefore, he/she is liable to prosecution but such an interpretation defeats the very purpose of this provision.

Moreover, obtaining consent from the appropriate government for prosecuting a public servant is an arduous task and very rarely such consent could be obtained. Even if such consent is obtained, there is a good chance that the complainant may be harassed in several ways to withdraw the complaint. With a staggering number of illegal arrest, enforced disappearances, very few cases have been reported because nobody wants to challenge the mighty police.

Only in some cases, especially if the cause is espoused by a human rights group or a political party, a disciplinary proceeding may be initiated against the concerned police officer by the Department. In such cases, the victim will not be a necessary party to the proceeding but merely a witness.

The question with regard to the applicability and the extent of section 197 of the code was interpreted in various cases to arrive at the conclusion that the protection cannot be extended to corrupt officials. In Shambhoo Nath Misra v State of Uttar Pradesh and

4 AIR 2000 SC 2083.

others[5], the Supreme Court of India held and confirmed the views of the TrialCourt and the High Court that the offence of fabrication of record or misappropriation of public fund is not in furtherance of his official duty but his official capacity only enabled him to fabricate the records and to misappropriate the funds and the government's sanction is not required to prosecute him. In Parkash Singh Badal v State of Punjab and others[6], the Supreme Court held that if the criminal act is performed under the colour of authority for the concerned public authority's own pleasure or benefit then such act shall not be protected under section 197 of the code. Similarly, in Rajib Ranjan and others v R. Vijaykumar[7], the Supreme Court again reiterated that even while discharging the official duty if the public servant involves in a criminal misconduct, then such misdemeanour on his part will not be protected under section 197 of the code. In Subramanian Swamy v Manmohan Singh and another[8], the Supreme Court held that the section 197 of the code must be construed in such a manner as to advance the cause of honesty, justice, and good governance. In Inspector of Police and another v Battenapatla Venkata Ratnam and another[9], the Supreme Court held that the public servants are treated as a special category under section 197 of the Code to protect them from malicious proceeding and such a protection is given in the public interest. Therefore, the same cannot be treated as a shield for corrupt officials.

Under the present framework, after the departmental inquiry, article 311(2)(c) of the Constitution is usually invoked to dismiss the alleged police officer from service. In practice, this provision is usually invoked only for greater offences like fake encounters, cold-blooded murders, custodial deaths etc.

Sec 7 of the Police Act, 1861 confers power on the Inspector-General, the Deputy Inspector-General, the Assistant Inspector-

5 (1997) 5 SCC 326.
6 (2007) 1 SCC 1.
7 (2015) 1 SCC 513.
8 (2012) 3 SCC 64.
9 (2015) 13 SCC 87.

General and the District Superintendents of Police to dismiss or suspend their subordinates if they are negligent in discharging their duties or if they render themselves unfit for discharging their duties. The punishment under section 7 includes the imposition of fine no exceeding one month's pay or confinement to quarters for a term not exceeding 15 days.

Awarding of compensation for complaints against police by the High Courts and the Supreme Court has become the trend.

Apart from the courts and the executive, National Human Rights Commission and various State Human Rights Commissions investigate into complaints against the police. Most of the complaints regarding human rights violation are the complaints against police brutality. Although NHRC has powers to investigate the complaints against the police and is also independent of the police, there are reasons as to why another independent agency is required to investigate into police misconduct. Firstly, NHRC and SHRCs are overburdened as they handle all forms of human rights violations. Secondly, they don't enquire into all forms of police misconduct. Thirdly, their investigatory powers are limited, and fourthly, NHRC awards damages. However, awarding damages does not do complete justice in the case of complaints against police as the damages will be paid from the public money and the concerned police officer will not be adequately punished.

Effectiveness of the Remedies Available Against Police Misconduct

The constitution of an independent authority to monitor the investigations of complaints against the police goes back to 1970s. It can be said that when the other countries like U.K., Canada, and Australia were discussing the establishment of such a monitoring institution, even India was considering the possibility.

In 1977, the Government of India appointed a National Police Commission (NPC) to suggest reforms in the existing police set up. The National Police Commission submitted eight reports from 1979

to 1981. In the very first report of the National Police Commission, it suggested that an inquiry into the complaints against police must be acceptable to both the police and the public and therefore, the Commission suggested an arrangement where an inquiry will be conducted both by the departmental authorities and also by an independent authority outside the police. The Commission suggested that the complaints against the police should usually be looked into and disposed off by the superiors in the police but if it is a complaint alleging rape of a woman in police custody or a death or grievous hurt caused in police custody or a death of two or more persons resulting from police firing in the dispersal of unlawful assemblies, a judicial enquiry must be held by an Additional Sessions Judge who will be designated as District Inquiry Authority. The Commission also suggested for the establishment of Police Complaint Board at the State level.

Although the discussions about police reform in the line of police autonomy is very prevalent in the country. Scholars criticize that the police succumbs to the pressure from the executive and that they should function independently from the executive and should only be accountable to the judiciary.

In 1996 MrPrakash Singh, a retired police officer filed a writ petition in the Supreme Court[10] for police accountability and to implement the suggestions of National Police Commission in the Police Act, 1861 which was enacted by the Britishers with the main objective to crush dissent. The National Human Rights Commission impleaded itself as a party in the case. The NHRC strongly agreed with the suggestions of the National Police Commission as NHRC was of the opinion that implementing these suggestions would improve the human rights situation in the country.

The Supreme Court passed the judgment in 2006 and issued seven directives to the Central and the State governments to be implemented by them. Directive 6 deals with the establishment of an independent Police Complaints Authority at the state and district levels to look into public complaints against the police

10 (2006) 8 SCC 1.

officers in cases of serious misconduct including custodial death, grievous hurt or rape in police custody. These directives have not been implemented.

In 1998, the Ribeiro Committee was set up following the orders of the Supreme Court which recommended the setting up of Police Performance and Accountability Commissions a the state level, District Complaints Authority and also to replace the Police Act, 1861 with a new Act which will be public centric.[11]

In September 2005, the Government of India constituted a Police Act Drafting Committee with Soli Sorabjee as the chairman of the Committee to draft a new Police Act and accordingly the Committee drafted a new Bill which later becomes the Model Police Act, 2006. One of the features of this Bill was the constitution of a Police Accountability Commissions at the state level and at the district levels to inquire into public complaints against police.

In India, the recommendations pertaining to the establishment of an independent authority to monitor the investigations into the complaints against the police have been made by a number of commissions/committees and also by the Supreme Court in Prakash Singh vs Union of India[12] but the follow-up on these recommendations is very minimal.

The Second Administrative Reforms Commission (SARC) in its Fifth Report[13] analysed if the directives laid down in Prakash Singh is implemented in the Police Bill of Police Act Drafting Committee (PDAC), in the Kerala Police Ordinance which was promulgated on February 12, 2007 and also in the Bihar Police Act, 2007. Under sections 159 and 173 of the Model Police Act provided for the establishment of Police Accountability Commission and District Accountability Authority to inquire into complaints against the police.

The Police Acts of the States amended or replaced with a new Act

11 See the Report of the Ribeiro Committee on Police Reforms.

12 Supra note 10.

13 See 'Public Order', the Fifth Report of the Second Administrative Reforms Commission.

after 2006 provides for the establishment of State Police Complaints Authority.[14] The implementation of the same can seldom be seen in practice. The Bombay High Court on 21st April, 2016 while hearing a PIL asked the Maharashtra Government as to why the State Police Complaints Authority and the district level committees which were set up under the Bombay Police Act were not functional. The government replied that the SCPA was not functional because of lack of adequate infrastructure. Judges *A M Badar* and *Naresh Patil* opined that the committees should not only remain on paper but should also be functional. Again last month, a petition was filed by a father of two boys alleging that his boys were falsely implicated in a rape case in the Bombay High Court. The issue was heard by Judges *R V More* and *Shalini Phansalkar* and when the High Court questioned as to why the Committee is not yet functional, the Maharashtra government replied that the delay was caused because there have been some disagreements in the committee members over their salary. This matter is still pending in the court.

In another research into the working of the Police Accountability Authority undertaken by the Commonwealth Human Rights Initiative (CHRI) on Police Complaints Authorities in India: A Rapid Study to analyse the working of Police Complaints Authorities in India and the research concluded that the State Police Complaints Authority face structural as well as practical problems which impede their function and also lacks operational autonomy.[15]

In May 2008, the Supreme Court of India appointed a Monitoring Committee under the Chairmanship of Justice K T Thomas to monitor the implementing the directives laid down in the Prakash Singh case. The Committee submitted its report in August 2010 that practically no state has implemented the directive.

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14 Assam, Bihar, Chhattisgarh, Gujarat, Haryana, Himachal Pradesh, Jharkhand, Karnataka, Kerala, Meghalaya, Punjab, Rajasthan, Sikkim, Tamil Nadu, Tripura and Uttarakhand.

15 See Prasad Devika, 'Police Complaints Authorities in India A Rapid Study ' (*Commonwealth Human Rights Initiative(CHRI)*, 2012).<http://www.humanrightsinitiative.org/publications/police/PCA_Rapid_Study_December_2012_FINAL.pdf> accessed 6 December 2016.

Thus, it is evident that India, to some extent, is successful in getting an independent body to monitor the investigations of complaints against the police but is unsuccessful in getting them to function as well.

Comparison with Other Jurisdictions

It is pertinent to study the mechanisms of investigating complaints against the police in other jurisdictions like the United Kingdom, Canada, Australia, South Africa and the United States of America as these countries share many commonalities with the police system in India and also the governance structures.All these countries restructured their police governance system.

Great Britain-The Royal Commission on the Police was established in 1960 and was primarily entrusted to report on the methods of investigating complaints against police.[16] The commission undertook a research to understand the police-public relations and therefore the representatives from the police and from the legal profession were interviewed. The public was also interviewed. The representatives from the police were of the opinion that there was no deterioration in their relation but the representatives from the legal profession had a contrary view and were of the opinion that 'the traditional standing of police was in grave danger'.[17] The survey of the public revealed that 83% of those interviewed had great respect for the police, 16% of those interviewed had mixed feelings and merely 1% of those interviewed had 'little or no respect for police'.

The Commission suggested various measures for strengthening the complaint process against the police and many of these suggested measures were incorporated in the Police Act, 1964 (U.K. Legislation). One of the suggestions was to appoint a Commissioner of Rights, an independent authority to oversee the investigation of complaints against police. But when the Police Bill was being discussed in the Parliament, then Home Secretary, *Henry Brooke* rejected this idea of Commissioner of Rights overseeing the investigations against

16 See the Report of the Royal Commission on the Police, 1962.
17 Ibid.

the police. Brooke opined that appointing a commissioner of Rights would undermine the morale of the police service.[18] Thus the Police Act, 1964 entrusted the responsibility of investigating complaints against police to theChief Constable.

The Chief Constable may require someone from his force or a Chief Constable of another force to investigate the complaint and if it is found in the course of investigation that the officer had a committed an offence, then the investigation report will be forwarded to the Director of Public Prosecutions and the Director shall decide if charges should be levelled against the office depending upon the nature of the offence. If the offence committed is not criminal, then the Chief Constable has complete control over the investigation and the adjudication. The local police authority and the inspectors of constabulary (a unit directly responsible to the Home Secretary and constitutes former police officers) have to oversee the investigation by the Chief Constable. The officer against whom the complaint was made can appeal the decision of the Chief Constable to the Home Secretary. The national authority of the Police Department is the Home Secretary. He has certain powers over the Police Department. He can require a chief constable to submit a report on any police matter, he can appoint any person to investigate any matter connected with police, he can make administrative regulations for police and he grants monetary funds to the Police Department.

In 1972, the report of the Select Committee on Race Relations and Immigration stated that the immigrants had complaints against the police and that there was no effective mechanism in place to investigate their complaints against the police. So the Committee recommended the establishment of an independent tribunal to investigate the complaints against the police and suggested that the members of the tribunal should have judicial and legal experience.[19]

In February 1973, Philip Whitehead, a member of the House of

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18 See Parliamentary Debates, House of Commons, vol.685,26 November 1963, col. 94.

19 See the Report on Police/Immigration Relations by Select Committee on Race Relations and Immigration, 1972.

Commons introduced a bill to reform the way complaints against Police is investigated. However, then Home Secretary, Robert Carr requested Whitehead to withdraw the bill. *Carr* assured that the issue would be investigated and that an independent authority should be introduced in the ombudsmen line to oversee the investigation of complaints against police. On these assurances, Whiteheadwithdrew the bill and Carr established a Committee in 1974. The Committee considered the proposals of various stakeholders and conducted an empirical study of statistics of complaints and disciplinary proceedings. The Committee submitted its report that the investigation should remain in the hands of the police, and there should be minimum interference from the Director of Public Prosecutions in the investigation of the complaints against the Police.[20]

Meanwhile, the Commissioner of the Metropolitan Police of London, Sir Robert Mark has initiated changes within his Department in the investigation of complaints against the police. He shifted the responsibility of the investigation of the complaints against the police from the Criminal Investigation Department (C.I.D.) to A.10 Branch (now called as Complaints Investigation Bureau) which consists of approximately 90 officers of various ranks. Soon the A.10 Branch earned a reputation for impartiality in their investigations of complaints against the police.[21]

With the study of the Committee established by Robert Carr, the Parliament repealed the Police Act, 1964 and enacted the Police Act of 1976[22] which established the Police Complaints Board to oversee the investigation into complaints made against the police in an impartial way. The Board would consist of members who are to be appointed by the Home Secretary but excludes a serving or retired police officer of the United Kingdom Police Department.

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20 See the Working Group Report of England and Wales on Handling of Complains Against the Police, March 1974.

21 See the Report of the Commissioner of Police of the Metropolis for the year 1973.

22 See "The Police Act 1976", Halsbury's Statutes of England, 1179-94 (3rd. ed.).

This Police Complaints Board does not actually investigate the complaints but oversees the investigation carried out by the police as Police are the only people technically competent to investigate the complaints. If the complaint relates to a non-criminal matter, then the Chief Constable may proceed with the matter and furnish the copy of the complaint, investigation report, and an explanation of the charges preferred whereas if the complaint relates to a criminal matter, the Chief has to furnish the Board with the copy of the complaint, a copy of the investigation report, his opinion on the merits of the case, and the charges preferred. If the charges have not been made by the Chief Constable, then the Board may direct him to prefer charges which the Board specifies. Then there will be a disciplinary hearing before a tribunal to determine the guilt of the officer complained against. The tribunal shall consist of a Chairman, two members of the Police Complaints Board. The decision is arrived at by a simple majority and the Chairman decides the quantum of the punishment after consulting the other members of the Board. The officer complained against can appeal against the decision arrived at in the Tribunal to the Home Secretary. Thus in England, they have introduced an independent oversight committee to investigate the complaints against the police. The Police Complaints Authority replaced the Police Complaints Board in 1985 and this Police Complaints Authority was replaced by Independent Police Complaints Commission (IPCC) and is governed by the Police Reform Act, 2002.

The Independent Police Complaints Commission (IPCC) operates on four modes- (i) In case of serious offences, the investigation is carried out by the IPCC investigators and is supervised by the IPCC Commissioner, (ii) the investigation may be carried by the Professional Standards Department (PSD) of the Police under the supervision of IPCC, (iii) Investigations carried out by the Professional Standards Department (PSD) under their supervision but the investigation terms would be set by the IPCC, (iv) investigations into matters of non-criminal nature by the Police PSD but the complainant may appeal to the IPCC. Thus, this is how the United Kingdom now has an independent body to investigate the complaints against the

police.

Canada- In Canada, the Royal Canadian Mounted Police (RCMP) is the federal police and is governed by the Royal Canadian Mounted Police Act, 1959 presently. This Act provides for detailed provisions for conducting disciplinary proceedings but doesn't provide any provision for the public to file complaints against RCMP. But it is found in the Royal Canadian Mounted Police Administration Manual.[23] The Standing Orders provided in the manual provides that the complaints against RCMP members shall be investigated by the officer in-charge and if the complaint is of serious nature, then he shall intimate the same to his division commander. It is also his duty to inform the concerned RCMP member being investigated about the investigation. After the officer in charge conducts his investigation, he forwards the investigation report to his division commander who then takes the necessary disciplinary action. The investigation report along with the report of action taken is then forwarded to the Head Quarters. Since the police investigate the police, it raised some doubts regarding the impartiality of such investigations. Then the Solicitor General of Canada in 1974 appointed a commission to supervise the investigation of the complaints against RCMP members.[24] The Commission after seeking opinions from the public, RCMP members and also after consulting experts working in this field in various countries submitted its report. The main problem that was identified by the Commission with the RCMP was that it had a military semblance. The RCMP was constituted in 1873 to police the frontier. Although the 1873 Act is replaced by the 1959 Act, the Commission felt that a new citizen complaint procedure must be established. The Commission suggested for the establishment of a Federal Police Ombudsmen (FPO) to monitor the investigation process. The Commission also pointed out in its report some cases

23 See the Standing Orders in the Royal Canadian Mounted Police Administrative Manual, 1975.

24 The commission was called Civilian Review and Complaints Commission for the RCMP. The Commission was chaired by René J. Marin. The Report submitted by this commission is also called as Marin Report.

which were not investigated properly to emphasize the need for an independent authority.

Incorporating the recommendations of the Marine Commissions, the Royal Canadian Mounted Police Act was amended in 1986 and Part VII was added to the Act which provided for the establishment of the Royal Canadian Mounted Police Public Complaints Commission (PCC). The RCMP fought vigorously against the establishment of Public Complaints Commission (PCC) and succeeded in weakening the independence of PCC. When the discussions started in the Parliament, it was for the enactment of a separate statute establishing PCC but could only be incorporated as a separate chapter in the Royal Canadian Mounted Police Act. Currently, the PCC oversees the investigation of complaints against the members of RCMP in Canada.

Australia- In May 1975, the Australian Law Reform Commission (ALRC) submitted its report on complaints against police and its suggestions were incorporated in the Australian Police Bill, 1975 and was introduced in the Parliament but the Bill lapsed with the dissolution of the Parliament.

In 1976, the Ombudsman Act, 1976 was passed whereby the Commonwealth Ombudsman investigates complaints against the administrative actions of Australian Government agencies and officers. The investigation can be a suo-moto investigation as well.

In 1977, the Attorney-General again required the Australian Law Reform Commission (ALRC) to review its earlier suggestion and the ALRC submitted its report on Complaints against Police again (ALRC Report 9) in June 1978. In 1979, the Australian Federal Police Act, 1979 was enacted to amalgamate the Commonwealth forces and Australian Capital Territory forces as Australian Federal Police. In 1981, legislation was passed to deal with the complaints against the Australian Federal Police called the Complaints (Australian Federal Police) Act, 1981. This Act established an Internal Investigation Division of Police, a Police Disciplinary Tribunal and also a Commonwealth Ombudsman. This Act was amended

in 1994 to include all the members of Australian Federal Police by the Complaints (Australian Federal Police) Amendment Act, 1994. The Attorney General in March, 1995 required the ALRC to review the Complaints (Australian Federal Police) Act, 1981 as the Act was considered to be outdated and defective and accordingly, ALRC submitted ALRC Report 82 on 10th December 1996 and suggested for more availability of administrative review, individual liability for costs, and scope for alternative dispute resolution in cases of complaints against the police.

South Africa- A Commission of enquiry was appointed by the State President to enquire into an incident which occurred on March 21, 1985, at Uitenhage where people attending a funeral was killed and this Commission, popularly known as Kannemeyer Commission submitted its report on June 4, 1985, and suggested for the appointment of a police ombudsman. The Commission suggested when such an ombudsman is created to investigate the complaints against police officers, the public would be assured that there is a body to look into the allegations of police brutality. Moreover, the Commission suggested that the existence of ombudsman would prevent the incidents of police brutality. The Commission opined that the traditional remedy against the police brutality was unsatisfactory and supported this by pointing out the unrest in the country. The Commission also suggested that the internal administrative control did not meet the demands adequately.

The need for ombudsman was espoused by some lawyers in the country and there was an Ombudsman Seminar conducted by Mr *Monty Knoll*, President of the Association of Law Societies in 1982 which again strengthened the argument for the establishment of an ombudsman.[25] Accordingly, in 1991, an Ombudsman was appointed to investigate complaints against police misconduct.

United States- Police issues are local municipal issues in the United

25 Yvonne M burnes, 'To police the police: some thoughts on the appointment of a police ombudsman for South Africa' [1986] 19(2) The Comparative and International Law Journal of Southern Africa, http://www.jstor.org/stable/23247710last seen on June 27, 2017.

States of America and therefore, each municipality has devised its own mechanism to tackle the issue. The United States has experimented with various types of external oversight mechanisms and they have been broadly classified into four types by *Merrick Bobb* as independent monitors, independent investigators, civilian review boards and compulsory monitoring and reform headed by the federal government.[26]

Conclusion

In any society, some kinds of complaints against the police are inevitable. If there is an effective way to investigate the complaints against the police, it is one way to implement the right to remedy. The existing internal review mechanism has certain drawbacks, the police officer against whom the complaint is made may be well-versed with the criminal justice system and may be aware of the loopholes in the investigation mechanisms. Sometimes, the police do not investigate their immediate colleagues to avoid conflict of interest. In India, the political ministers exercise control over the police by virtue of the Police Act and they usually interfere in such investigations as it can be seen from the practice. Considering all these factors, various commissions/ committees suggested for the establishment of police accountability commissions and even the Supreme Court issued directives to the centre and to the states but these suggestions by the committees and the directives of the court have only been implemented on paper but not in spirit.The establishment of Police Complaints Authorities recently to monitor the complaints against the police in recent times is a welcome move. These agencies in other jurisdictions as discussed above

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26 Bobb Merrick, 'Civilian Oversight of the Police in the United States' (*Address to the Police Assessment ResourceCenter3*, 2003)

http://www.parc.info/client_files/Articles/1%20- %20 Civilian%20Oversight%20of%20the%20Police%20 (Bobb%202003).pdf, last seen on June 27, 2017 as cited in Shinar Adam, 'Accountability for the Indian Police: Creating an External Complaints Agency' (*Human Rights LawNetwork*, 2009) http://humanrightsinitiative.org/old/publications/police/npc_ recommendations.pdf last seen on June 23, 2017.

plays different roles and India can learn from their success stories. The Police Complaints Authorities should play a reactive and a pro active role and should focus on bringing an institutional change rather than only focussing on individual misconduct. Only if this happens, the public will have confidence in the law enforcement agency and the police will get cooperation from the public in their regular work and that will increase the law and order situation in the country. With the increasing number of incidents where the State governments request for BSF and CRPF forces to solve their law and order problems undermine the confidence of the State in local police.

Protection of Traditional Knowledge of India within the existing framework of Intellectual Property Rights with special reference to the North Eastern states of India

SwagataChangmai*

Introduction

Intellectual Property is the property created out of human intelligence and is intangible in nature. The owners of intellectual property rights are granted rights to certain intangible assets like music, painting, literature, inventions, symbols, marks, soundsetc which are the result of the creation of the mind.[1]The owner has the absolute right over the property and nobody else can use his creation without his prior consent and approval. Recent developments have taken place in the field of biotechnology, bio diversity and Traditional Knowledge. The Traditional Knowledge is always associated with the biological resources[2], which is to be preserved and protected from outside agencies from being utilised at the cost of the possessor of such knowledge[3] and cannot be separated from Indigenous people. The first international treaty to recognise the importance of Traditional Knowledge is the Convention on Biological Diversity (CBD)[4] which come into force in December 1994. The Convention on Biological Diversity states that "Traditional Knowledge includes knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles important for conservation and sustainable use of bio diversity and promote the wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable

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1 "What is Intellectual Property?" World Intellectual Property Organisation, available at: http:// www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf, last seen on February 22, 2017

2 Ibid.

3 Prof Basavaraju , "Intellectual Property Rights and Traditional Knowledge " 11 Journal of Intellectual Property Rights 274 l (2007).

4 The Convention on Bio logical Diversity (CBD),1992.

sharing of benefits arising from the utilisation of such knowledge innovations and practices".[5]But a trend of patenting this Traditional Knowledge of the indigenous people by converting this knowledge and manufacturing medicines and beauty products can be seen from the bio piracy cases. With the help of advance technologies, these multinational companies use this Traditional Knowledge in manufacturing drugs and beauty products and market them in higher prices. India has been a victim too in this regard. India is a hub of Traditional Knowledge and indigenous culture and ethnicity with vast agricultural and ethnic diversity based on cultural, traditional and indigenous spirit. Several known incidents like the Turmeric case[6], the Neem Case[7], the Basmati Case[8],Jeevani case[9] etc. have sown the disadvantage caused to holders of Traditional Knowledge.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) recognises Patents, Trademarks, Copyright, Geographical Indication, Undisclosed Information, Layout design of Integrated Circuits and Industrial Designs.

Most traditional medicines do not qualify for patent protection. An item has to be useful, novel and non-obvious to qualify as an invention. Traditional Knowledge also includes 'folk material' including folklore, folk music, and folk art inter alia. There have been several cases[10] of misuse, exploitation, mutilation, or dilution of these materials. Copyright has proved to be inadequate to protect various indigenous art forms. Copyright protection requires fixation and identification.

Indigenous people have tried to adopt Trade Secrets strategy to protect their TK in various incidents. But when the Traditional Knowledge is ancient as over the years and known through public use or when it is passed on from generation to generation, it is next

5 Ibid. Article 8(j).
6 The Turmeric Case, patent no 5401504.
7 The Neem Case, Patent no 046257 B1.
8 India US Basmati rice dispute, Case number 493.
9 The Jeevani Case, application number:959/MAS/96.
10 BulunBulun v. Nejalm Pty Ltd, Golvan, E.I.P.R. 346 (1992).

to impossible to keep such knowledge a secret.Collective marks can be used to protect handicrafts and cultural goods. Certification marks may also be used to identify standards of products derived from Traditional Knowledge and traditional medicine. Sometimes corporations use Trademark registration to exploit the products they derive from the Traditional Knowledge system and this is the major drawback here.This can work against indigenous peoples because they lose control of their signs and symbols to the registered proprietor of Trademark. Traditional craft items like hand- woven articles like carpets, cotton bed covers can also be registered for protection as an Industrial design[11]. Geographical Indications that help identify the place of origin of goods can be an indicator for a particular tribe or indigenous group by identifying the tribe or group to the consumer. This category can be used only to protect some forms of Traditional Knowledge and indigenous art which is yet to be exploited. Thus it reveals that TK is not fully and efficiently protected by any one category. The present legal regime in the field of Traditional Knowledge is inadequate and incomplete.

Indigenous Knowledge is a term much associated and often confused with Traditional Knowledge. But Indigenous Knowledge is a broader concept Than Traditional Knowledge . It is the repository of techniques; know how, skills, practices and beliefs accumulated over generations which help local communities to survive over generations. The rapid changes in the environment as well as economic, cultural and social changes pose threat of extinction to Indigenous Knowledge system.And now another important term is the Traditional Medicinal Knowledge. It is the knowledge relating to treating a disease or in the maintenance of health of human beings and animals.It is practised based on theories and beliefs. Indigenous people preserve this knowledge which passes from one generation to the other.

Traditional Knowledge in India emphasising the North

11 "Intellectual Property" Essay UK .available at :http://www.essay.uk.com/free-essays/economics/intellectual-property.php last seen on March 13, 2017.

Eastern region.

India is a hub for different flora and faunas and is considered as one of the major mega bio diversity centres in the world. India is a home to two bio diversity hotspots in the world. The Indo Burma region lies partially in the North Eastern India.The North Eastern region of India comprises of the state of Manipur, Mizoram, Nagaland, Sikkim, Arunachal Pradesh,Assam, Meghalaya and Tripura. The area is full of different varieties of flora and fauna.

Indian biological resources have been exploited severally. Western MNCs play a major role in this regard. Unawareness of the local people is one of the reasons as these indigenous people may not be aware of the consequences to be faced if a biological resource is exploited severally without adopting sustainable methods. With proper Research and Development,highlighting the concerned issues will be helpful to some extent. North East India is not spared from bio piracy issues. Valuable heritage is stored in North East India relating to Traditional Knowledge. The tribal people living in the hilly areas are still dependant on biological resources and traditional healing practices as they do not have much access to the modern technologies.

Different medical surveys and researchers have found that the uses of Traditional Medicinal Knowledge are trapped in remote areas of North East India. Only the names of the useful plants are found in most of the surveys while the uses remain hidden to the outside world. Screening and empirical research on such Traditional Medicinal uses may lead to the invention of some novel life saving drugs. Over exploitation of such useful plants should be strictly avoided in order to save them from becoming extinct. Various projects are being carried out to research the ethno medicinal uses and are dependent upon nature. Hence a meaningful study on this area is required to provide measures to the knowledge that belong to these communities.Traditional Knowledge includes rituals, songs, folklores, medicinal practices, agricultural practices, horticulture, painting, dancing, cultural practices ,chants, forestry that pass from one generation to the other generation among the indigenous

people.[12]

Some of such Traditional Knowledge practised in different parts of the North East India are briefly described below(State wise).

Mizoram

Mizoram is another state in the North East India which shares its international border with Bangladesh and Myanmar and interstate with Tripura, Assam and Manipur. The total area of the state is about 21,081sq km. The people of Mizoram are known as "Mizo". The state is inhabited by different Mizo tribes such as *Ralte*, *Pawi*,*Paite*, *Paite* and other tribes. The forests are usually evergreen and tropical evergreen in Mizoram.

Food Processing Techniques:

The people of Mizoram apply a different traditional food processing technique among themselves with the help of available biological resources. Some such examples are fermented sesame which they locally call it *Chhi-um*.This is used as a food additive from which oil is derived after soaking it. This oil is stored in containers for days for fermentation. It is used in cooking as well as added as a taste enhancer. Another item is fermented soya bean (locally as *Bekang-um*).The seeds of soya bean are fermented using sunlight and kept over fireplace for days. These seeds are then stored and consumed. Sometimes grounded seeds are also used in the preparation of a special type of tea.Sun dried *Roselle*[13] leaves are also used by thesecommunities in seasoning vegetables and meats. They also use a variety of pounded mustard seeds locally known as *tampui*which is wrapped with a special kind of leaf and then sun dried or fire dried. Small crabs are found in the waters of Mizoram. The people capture and kill them with hot water and then grind the crabs after cleaning. These are then fire dried and stored in closed containers for further consumption. Like this, *Taro leaves*, *Cow Peas* and *Voodoo Lily* are also fermented and sun and fire dried for future purpose. They also store meat (pork, chicken etc) by the

12 The Convention on Biological Diversity,available athttps://www.cbd.int/traditional/intro.shtml last seen on April 19, 2017.

13 Scientifically known as Hibiscus sabdariffa.

process of smoking over fire. It is done in such a way so that direct flame does not catch the meat but the heat and smoke cooks it. By this way they store smoked meat (*Sarep*).Also fermentation of pork fat is done to be used in the preparation of other food items later on. Sometimes, these food processing methods vary from place to place within the state as different communities have different Traditional Knowledge of food storage methods. Hence, these methods are very important as it is very useful in storing seasonal vegetables which are not available in all year round.[14]

Use of medicinal plants

A number of ethno botanical plants are found in Mizoram used in the Traditional HealingSystemamong the people. The local people collect and preserve these plants and use them to cure diseases and disorders. Like the boiled roots and leaves of the herb locally known as *Uichhuhlo*[15] is used in curing syphilis. The leaves of *Kawldai*[16] are used in treating bronchitis and diarrhoea. Juice of crushed leaves of *Bawltehlantai*[17] is applied for inflammatory glands against tonsillitis.The juice of *Buarze*[18]is used as a Anti-cancer agent and *Lambak*[19] as memory stimulator. Fruit of *Kawrthindeng*[20]is taken in case of Jaundice.Likewise there are 159 ethnomedicinal plants used as Traditional Medicinal system in the state of Mizoram. Also a number of anti – diabetic plants are found in this region like *Belthei,*[21]*Pang,*[22]*Tespata*[23] etc. and other herbs and shrubs. Extracts of these plants parts as per the instructions of traditional healers have reported to show disappearance of sugar in the urine

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14 P.B. Lalthanpuii&Ors,"Traditional food processing techniques of the Mizo people of Northeast India"15(1) Science Vision 39-45(2015).

15 Scientifically known as Abelmoschusmoschatus.

16 Scientifically known as Adhatodazeylanica.

17 Scientifically known as AeschynanthussikkimensisStapf.

18 Scientifically known asBlumealanceolaria.

19 Scientifically known asCentellaasiatica.

20 Scientifically known asDilleniaindica L.

21 Scientifically known asAegle marmelos(L). Corr

22 Scientifically known asBombaxceiba.

23 Scientifically known asCinnamomumtamala.

and helps in curing diabetes.[24]

Further,it has been found after a research[25] that a number of people (60%) living in the remote areas of Mizoram are still dependant on herbal medicine and they do not have much access to modern medicines. But due to degradation in the environment and other changes in the social and economic system, this Traditional Knowledge is eroding slowly. Before they become completely lost collaborative approach should be taken to record these ethno botanical information in a database. Sometimes even these tribal people are exploited by the modern societies and their resources are taken away to gain economic benefits. Research and Development should take place to invent useful drugs like anti-diabetic drug, using Plant derivatives with hypoglycemic properties found in folk medicinal system andTraditional Knowledge. This way they are forbidden from using their own natural resources. Policy makers and institutions should keep an eye on it to preserve this potential. Also for sustainable use of such medicinal plants, home gardening, herbal gardening and agro forestry should be encouraged.

Festival, culture and tradition :

The Traditional Knowledge of Mizoscan be traced from folksongs, myths and legendsas it isnot based on any text or scripture. They believed in worshipping nature "*Sakhua*" before the advent of Christian missionaries. Sacrifices and offerings to nature God "*Pathian*" were made .They believe in the existence of female deities in the natural environment. They call them *Khuanu*and *Lasi* which meant mother of nature and guardian of animals respectively. Hence, forests resources are believed to be under the blessings of theses deities and trees cannot be cut without their permission[26]

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24 Ramachandra Laha&Ors, "Indigenous uses of anti diabetic plants by ethnicinhabitant of Mizoram, Northeast India" 4(6) Journal of Medicinal Plants Studies 181-184 (2016).

25 Prabhat Kumar Rai&Ors," Ethnomedicinal Plant Resources of Mizoram, India: Implication of Traditional Knowledge in Health Care System" 14 Ethnobotanical Leaflets 274-305 (2010).

26 Hmingthanzuali, "Women's Indigenous Knowledge and relationships with forests in Mizoram" 13 Asian Agri History 129-146 (2009).

.This tradition helps to maintain the ecology and the environment in the state.

The Mizos celebrate a Traditional festival known as *Chap char Kut* after the completion of their *Jhum*cultivation which also includes popular traditional dances like *Cheraw ,Chheihlam,Sarlamkai*and *Khuallam.*

Weather Indicators:

The Mizo people also use their Traditional Knowledge in forecasting weather conditions like drought , flood or any other natural calamities like earthquake , storm or hailstorm. These predictions are sometimes immediate indicators (day) or they predict the coming months in the area. Such indications are taken from behaviours of birds, animals, plants, fish , reptile or any other such things. Cultural leaders and local elders make much accurate predictions. They believe that the roar of the *bamboo partridge*[27] during spring season brings rain immediately and when the *hen* or the*cock* goes out in the rain to search for food rain will not stop that day. Also when a group of corn field ants line up carrying their foodit , is believed heavy rain is coming. The *Field Cricket* collecting soil near its hole also signifies rain. When there is drought in the area, the local dwellers catch a particular type of fish *Nghavawk*[28]and carry it to the hilltop. Afterwards they open its mouth,put some salt into its mouth and place it facing east to call rainfall.Abundant blooming of plum flowers predicts good rain for the coming year.Thus these people use mostly living organisms as weather indicators. It has been found that the effectiveness of such indicators is nearly 70 %.Thus such Traditional Knowledge including bio meteorological should be explored ,studied and documented so that they are not lost to the world.[29]

Arunachal Pradesh

27 Scientific name is Bambusicolafytchii.

28 Scientific name is Channa Spp.

29 M.Chinlampiang, "Traditional Knowledge, weather prediction and bio indicators: A case study in Mizoram, North East India",10(1) IJTK 207-211 (2011).

Arunachal Pradesh is the largest state among the North Eastern states and shares its international borders with Bhutan, Myanmar and China. The state lies in the Eastern Himalayan province and is known to be the paradise of botanists. It is also known as the land of orchids. The floral diversity of the state is very vast homing different types of rare orchids.The state of Arunachal Pradesh has a population of nearly 110 tribes and sub-tribes where some of the main tribes are *Adi*, Galo,*Nishi*, *Monpa*, *Idu, Khampti , Khansa , Aka, Miji, Khawa,Singhpo*etc. The main source of livelihood of these people is forest resources where they invest their traditional knowledge and skills for their survival. Some of the major Traditional Knowledge of the state are as follows.

Traditional Knowledge of weaving:

The tribal women of Arunachal Pradesh have developed a significant art of weaving, dying and spinning using their traditional knowledge and thus combining ingredients together derived from biological sources. The women of Adi tribe of Arunachal Pradesh are skilled in *gekong- galong*, a type of traditional handloom which is also considered as a social status when one owns.Thishandloom requires ecological knowledge with years of experience .They produce it from a special type of silk-worm, using different varieties of indigenous cotton and thread and use organic colours to dye. They get the colour by harvesting leaves of *engot*, a shrub found in the forest of *morang*. The tribal people believe to have learnt the method of weaving from a spider from the *Singpho* folklore. Thus this traditional method of weaving is an important source of livelihood for these people which should be acknowledged, rewarded and promoted.

Enthozoology:

The *Galos*community residing in the Siang district of Arunachal Pradesh have rich Traditional Knowledge relating to Enthozoology. They believe in extracting required proteins and nutrients from insects. They use insects as food supplements .Hymenoptera, Hemiptera, Silkworm pupae, Bamboo worms, locust etc are such examples of edible insects. If a detailed Enthozoology research is

carried on with the help of their knowledge and a proper traditional management of insects, then this will help in maintaining the biodiversity. Indiscriminate exploration, habitat destruction, using of pesticides are leading to the loss of such insects. Insects help in balancing the ecology by pollination and bio mass recycling.Hence they are of immense value.[30]

Traditional Fishing:

The *Nocte* tribe of the state of Arunachal Pradesh practice a special type of fishing technique using their Traditional Knowledge known as *Bheta* fishing which is effective in hilly streams. They construct a fishing trap known as *Bheta* using bamboo, twigs, leaves, stones and stems to catch fish. This practice is also effective in rivers having scanty water. It has been seen that now-a day's modern people are using short cut methods to catch fish like using poisonous chemicals, dynamiting ,muroami which are highly destructive to the environment atlarge.These methods kills everything including the non targeted ones and their eggs. So, these types of Indigenous fishing practices should be adopted instead of the destructive processes.[31]

Endangered Orchids:

A large number of orchid species are found in North East India including those which are marked as endangered species by theInternational Union for Conservation of Nature (IUCN) Red List.However, the highest numbers of orchid species are found in Arunachal Pradesh. Some of the rare orchids found in the area are *Vanda Caerulea* and *Dendrobium Palpebrae*[32].All orchids are given protection under the Wildlife Protection Act .One cannot trade orchids except with special permission of the state. But still illicit trade of such orchids are going on in a rampant way which proves that the legal protection given is not enough. Orchids are traded branding them as hybrid and not as the exact species. Thus proper

30 Dagyom Kato,"Ethnozoology of Galo tribe with special reference to edible insects in Arunachal Pradesh" 8(1) IJTK 81-83(2009).

31 Rajdeep Dutta &Ors,"Bheta Fishing-A Traditional community fishing practice of Noche tribe of Tirap district, Arunachal Pradesh"12(1) IJTK162-165 (2013).

32 L.C De and D.R Singh, "Biodiversity, conservation and bio piracy in orchids-an overview" 4(4) Journal of Global Biosciences 2030-2043(2015).

Research and Development to find out the reality of the product is needed to so that this excuse no longer works.[33]Also protection in the form of IPR can be sought to combat this bio piracy.

Traditional Handlooms:

The people of Arunachal Pradesh uses indigenous organic products in their handlooms such as natural dye extracting from the barks of the trees, wild seeds, colourful bird feathers, goat hair, cane etc. Weaving of carpets is an important source of livelihood of the people (*Monpas*) of Arunachal Pradesh. Beautiful cane and bamboo products are also produced like cane cap, cane basket, cane furniture. The female folk of the *Wangho*tribe are skilled in creating a special type of grass necklace. The special thing about this necklace is that it can be beaded only ina season when the colour of the used plant is bright. [34]

Assam

The state of Assam is located in the south of the Eastern Himalayas comprising of the Brahmaputra and the Barak Valley. Assam is the major gateway of the North Eastern states and shares international borders with Bhutan and Bangladesh. The state is very rich is flora and fauna and endangered species like the one horned rhino, pygmy hog ,pink headed duck and foxtail orchids are found here. The state is rich biologically and culturally. Some of the famous Traditional Knowledge practices of the state are briefly mentioned below.

Muga Silk Industry:

Assam is known for the production of exquisite wild silks which are very rare in the world.The main types of silk produced in Assam are the *Eri Silk*, *Golden Muga* and *Pat* (Mulberry Silk).Out of these, the *Muga*Silk is a extremely rare silk and is considered as the pride of Assamese culture and tradition. This *Muga*Silk is produced only in Assam in the entire world and the Muga Silk culture is as old as the Assamese culture .It is believed to be introduced in the period between 1228-1828 -the Ahom ruling era. The Ahom rulers

33 Ibid.

34 Textile and Handicrafts ,available at :http://www.arunachalpradesh.nic.in/textiles.htm. (visited on 20/03/17).

established weaving and rearing of *Muga* Silk worm. The rearers use traditional methods to control pests and other predators. Main plants used for rearing of silkworms are *Som, Sualu, Digholoti* and *Patihonda*(Local Names).Proper season, hygienic condition, temperature and humidity are kept in mind while rearing. They select the best cocoon seeds by applying their Traditional Knowledge for rearing .Other plants are used as insect repellents. For reeling purpose, the cocoons are kept carefully in hot fir so that the pupae dies without damaging the outer shell. Then the cocoons are boiled in hot alkaline waters to derive the golden thread .This whole procedure, right from searching cocoon seeds till reeling, is quite laborious. Also this Traditional Knowledge is degrading day by day. Major reasons are de forestation; duplicate *Muga* look alike fabrics; disinterest of the younger generations in carry forwarding the knowledge; absence of organized cocoon market. To uplift this Traditional Knowledge, modernization of traditions through Transfer of Technology to the grass root level is required. Proper Research and Development should be done so that it becomes a high tech industrial activity.[35]

Traditional Knowledge related to ethno medicine:

Assam is also known for the traditional use of plants and animals as medicine.The *Gohpur* region of Sonitpur (Tezpur) district of Assam is famous for the use of ethnomedicinal plants. The rural people of*Gohpur*use their Traditional Knowledge in preparing medicines from plants. Like the juice of *Kehraj* in treating premature graying and hair fall, juice of *Jomlakhuti* in empty stomach to treat acidity, *Kharpat* in treating scabies, *Golnemu* in dysentery. Their medicine man locally known as *Ojha* carries this knowledge in treating a particular disease.

These people are also experts in preparing traditional medicine for animals. They have learned it from their ancestors as cattle rearing is one of the main livelihoods of these people. Common household

35 R. Phukan R, Chowdhury SN, "Traditional Knowledge and practices involved in Muga culture of Assam"5(4) Indian Journal of Traditional Knowledge450-453(2006).

livestock are goats, pigs, cows, buffaloes, hen and duck. Some of the treatments by using Indigenous Knowledge on cattle are : Applying the paste of leaves of *Ahom bogori*(local name of a fruit tree) mixed with naphthalene balls on maggot wounds of cows and goats to kill the worms, Juice of *Bhedailota*(a climber) to cure spleen enlargement of cattle, Leaf paste of *Biholongi* (a wild fern) in case of snake bite, Leaf juice of *Atlas* (a fruit) to kill parasitic worms inside the cattle. This Traditional Knowledge can be used in the field of veterinary. However this Traditional Medicinal Knowledge is gradually decreasing as people have become more dependent on modern medication. And in some cases, there is no one to carry forward this valuable knowledge. Hence, scientific documentation and conservation of plants is an essential constituent to preserve it.

Traditional Crafts of Assam:

The traditional handicrafts of Assam reflect the confluence of different tribes, communities and cultures in the state. One of the important traditional crafts of Assam is the traditional Masks which are locally known as '*Mukhas*'. These *Mukha*s reflects different folktales and myths that revolve around the people and are worn while performing in theatres (*Bhaonas*).These*Mukhas* are painted with vegetable and earth colours. Other important crafts are bamboo and cane products. Different decorative and household items are made out of bamboo stripes and canes. One such important traditional item is the *'Japi'*. Basically it is a headgear made from bamboo strips and dried palm leaves which the farmers wear during cultivation during sunny days.But it is also used as a decorative item which can be seen in almost every house in Assam.This Japi is decorated with colours and beads and thus it looks attractive. Handloom is another important handicraft of Assam which has already been discussed .Different *MekhlaSadors* (traditional wear) and the traditional *Gamosa*(a white rectangular piece of cloth) are the significant handloom products. Woodcarving is another important traditional craft of Assam. The craftsmen are known as *Khonikors* who beautifully engrave different decorative items by their artistic skills. Different wooden doors, windows, gates, tables,

chairs, showpieces are such items. Gauripur in Assam is famous for their traditional terracotta items. The potters are known as *Kumhars* and the *Hiras*. Pottery items such as the pitchers, pots, lamps, piggy banks, toys, small statutes of gods and goddess are some such items. Bell and Brass metal products are also famous in Assam. Traditional utensils are made out of such metals and which are beneficial to health. The *Horai* and the *Bota* hold great significance in Assamese culture. Other such items are the *Baan Baati*(a bowl),*Ghot*i (a jar),*Thal* and *Kahi* (plates).

Assamese traditional jewellery is also famous worldwide which is another important craft of Assam. *GaamKharu* (a bangle), *Golpotta* (a necklace), *Dug dugi* (a necklace),*Thuria* (earrings) etc are such examples. These jewellery are created out of their traditional artistic knowledge and are mostly worn in gold. The designs and patterns are very unique with attractive colours. So, these are the traditional crafts of Assam in brief.

Fishing techniques:

Some of the ethnic communities of Assam prefer to catch a different kind of fish known as the *Kuchia* locally which is a mud eel[36].The people believe this *Kuchia*to have therapeutic properties which is helpful in treating different forms of ailments like diabetes, anaemia,weakness and haemorrhoids.[37] The dried head of *Kuchia* is consumed to treat haemorrhoids. It is believed consumption of this fish builds bold cells in the body. The flesh part of the eel is taken to treat anaemia and diabetes. This fish lives inside holes in the shallow parts of lakes and paddy fields. The local people catch this eel with a special type of hand gear which are known as *Kosh*, *Jathi*and *Soli.*[38]These gears have their special features to catch the fish. Another method which the locals prefer to use is the use of Ichthyotoxic plants. Roots of such plants are kept in the openings of the holes which creates irritation to the fish due to

36 Scientifically known as Monopteruscuchia (Ham.)

37 Jyotish Barman, "Indigenous techniques in catching the mud eel, Monopteruscuchia (Ham.) in Goalpara District, Assam" 12(1) IJTK 109-115 (2013)

38 Ibid.

the toxin released .Then fish then comes out and are caught. The *Bodo* community uses a different kind of traditional hook to catch this eel. Even indigenous night lamps made from bamboo are used here along with other fish traps. Thus these unique and traditional techniques of these communities should be documented so that they do not get disappeared. These communities possess proper and good knowledge of different kinds of Ichthyotoxic plants. The therapeutic values of such fish would be very helpful in developing new drugs. If Benefit Sharing Arrangement is done properly with proper royalties, then thiscan develop these communities a lot.[39]

Pest controlling techniques:

The farmers of the North Bank plain have a special Indigenous Knowledge of controlling pests using natural substances. This pest controlling method is used in mainly four districts of Assam- *Tezpur, North Lakhimpur. Dhemaji*and *Mongoldoi*. It has been identified that these farmers use a total of 21 Indigenous practices in managing pests. Some common methods adopted are clipping of leaves, Mixing goat excreta with fertilizers, making bon fir near rice fields to distract bugs ,erecting bamboo poles in paddy fields so that birds come and catch the bugs, hand dead frogs so that their rotten smell drives the bugs out, pulling kerosene dipped coconut ropes to prevent worms.

Other methods include extraction or dried materials of plants like the dried Neem and Curry leaves, twigs and leaves of *Biholongi or Bihdhekia*(a wild fern).These indigenous methods used by the farmers is considered to be safe, bio degradable, less persistent and abundant in nature. If these practices and Traditional Knowledge are identified and properly documented, and adopted then the scope for various pest management will grow. These methods are cheaper than the costly chemicals used as pesticides which are also harmful to human health. This is also a reason that now a days human beings are more prone to deadly diseases like the cancer. If their eco friendly techniques are adopted widely, then it will result in the betterment of both farmers and health of people.

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39 Ibid.

Manipur

Manipur – 'the land of jewels' lies in the Indo Burma region of India bordering Myanmar (Burma) which is a hotspot for different medicinal plants. This North Eastern state is mainly covered with hills ranges and only 10 percent is plain. The plants found here are rich in anti-oxidants which increases metabolism in human beings and treat any deficiencies.

Medicinal Plants :

Some of these plants are locally known as *Heikru*, *Saheb-Lei*, *LeipungKhanga*, *Laibakngou*, *Lomba* etc. *Heikru* is used in treating piles, jaundice, bleeding gums, constipation and its dry fruit is used as a cough remedy.*LeipungKhanga* treats worms in children and its juice is taken in case of pneumonia. For treating cancer in human beings local people use the leaves and flowers of *Saheb-Lei.* The paste ofthe leaves of*Laibakngou* is used as a remedy for hair fall, dandruff, baldness and is also used in producing a local hair shampoo known *Chinghi*. These plants have different concentrations of elements which are helpful in treating different diseases. They have got these characteristics because they are grown in pollution free areas and the climatic condition is just perfect.[40]

In the eastern part of Manipur, there lies the *Thoubal* district where different ethnic communities live. They possess diverse Traditional Knowledge in alleviating various types of diseases. It is believed that they have possessed this Indigenous Knowledge from their forefathers through oral folklores. In some investigation by some researchers it is found that they even have the knowledge of curing diabetes the natural way. These communities use some plant species to heal the diabetic. They intake the leaves, fruit, seeds, root, flowers or bark of trees. Sometimes, they also mix them with different ingredients and treat the patient with their Traditional Knowledge.[41]

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40 NK Sharat Singh &Ors, "Trace elements of some selected medicinal plants of Manipur "1(2)Indian Journal of Natural Products and Resources 227-231 (2010).

41 MohdHabibullah&Ors, "Antidiabetic plants used in Thoubal district of Manipur, Northeast India " 9(3) IJTK 510-514 (2010).

For example, the *Loi*community mixes the tender leaves of *Stone Apple* (*Bel*) with milk to cure diabetes. The *Meitei* community drinks the boil extract of the bark of Monkey Jack Tree. Some of the important plants used by these communities in treating diabetes are :*Carambola, Ringworm Senna, Neem, Jobs tears, Indian Pennywort, Periwinkle and Horse Tail.* [42]

Likewise, there are 54 plant species which they use in treating diabetes. These communities also have herbal doctors (priests) whom they call *Maiba* or *Maibi*who also performs religious rituals ceremonies and prescribe herbal medicines. They have derived their Traditional Knowledge from their forefathers and this knowledge is passing from one generation to another .But now this Traditional Knowledge is declining as the younger generations do not show much interest in this traditional healing practices. Also there has been excessive extraction of herbal raw materials from the wild due to which the plant species are declining.[43]

In the Bishnupur district of Manipur, there is a village known as *Lumlngdong* where the *Chote*tribe inhabits. They are very rich in Indigenous Knowledge who believes that their ancestors originated from a cave. They follow different rituals in the form of music and folksongs. They are heavily dependent on natural resources using their Traditional Knowledge. They use different herbal medicines to cure ailments. They either use the plant as whole or different parts of the plant in preparing medicine. Their Indigenous Knowledge is carried orally by the local healers known as *Thimpu*. They also use different plants in preparing local alcoholic beverages during the fermentation process. This tribe uses certain unique pants which people barely knows. Some of the plants used in the preparation of this local alcoholic beverage are *Giant Taro*, *Job's tears*, *Hairy Fig*, *Banana plant*, *Teak*, *Rice*, *Miniature Date Palm,Little –leaf sensitive briars*.[44]

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42 H.Birkumar Singh, "Plants associated in forecasting and beliefs within the Meitei community of Manipur, northeast India"10(1)IJTK190-193 (2011).

43 Ibid.

44 All names of plants are English common names.

Some of the main ethno medicinal plants used are *Candle Nut* to cure kidney failure, *Spiny amaranth* to cure blood related issues, roots of *Statavar* for brain as memory tonic, *Pithraj* tree for liver and stomach complaints, flowers of silk cotton tree to cure female diseases, *Egyptian crowfoot* grass for healing small pox and fever and *Magballi* for snakebite. In this way, these people use their Traditional Knowledge in treating ailments.[45]

Thus, this *Chote* tribe is very rich in Indigenous Knowledge which is preserved in the form of folklore. But the problem is that they do not have any published or recorded. Their tradition has not been documented. Another problem is the population of this tribe which is meager. Hence, it is desirable to undertake detailed ethnobotanical studies in order to preserve their Traditional Knowledge as their Traditional identity is gradually degrading. So Research and Development should be done on these areas not only to conserve biodiversity and find potential uses of plants in the future but also to protect rights of the Indigenous people and their Traditional Knowledge of ethno botany.[46]

Weather forecasting plants:

Another important community of Manipur is the *Meitei* community who are very rich in Traditional Knowledge. But they use their knowledge in quite a unique way which is different from other communities. Apart from healing purposes, they use different plants to forecast weather and other natural calamities. They follow their traditional beliefs, folklore and other knowledge which have been passed down by their ancestors. Some of the examples of such plants used in forecasting weather and calamities are as follows:

The *Century Plant* or the *Agave* plant is used to forecast storm. The position of the flowers of this plant foretells the direction of the immediate storm. Another is the *Rumpf's fig* tree which helps in forecasting flood. Crows build nests on the branches of this tree. If they build nests on the top branches, then it is believed that the level

45 PurbashreeSanglakpam, "Ethnobotany ofChote tribe of Bisnupur district" 3(3) Indian journal of natural Products and Resources 414-425 (2012).

46 Ibid.

of flood water will be high and if nests are build on lower branches, and then there will be no flood. The *Deccan Hemp* tree predicts annual rainfall in the area. If it bears large number of flowers, then the rainfall will be high .And there is no or less flower, there will be no rainfall. Same goes with *Mango* tree. If it bears more flowers, then there will be heavy rainfall resulting in flood .*Bamboo* predicts famine in the coming year. This theory has also been scientifically proven. If *Bamboo* trees bear flowers, the *Meitei* people believe that rodents (rats) will increase which will damage the crops. *Staghorn fern*, a very rare fern, can predict immediate rainfall. If the leaves are dark then there will be immediate rainfall and the colour of the leaves remain dull then there will be no rain for the day.

Prediction of natural disasters through scientific methods is not very effective. To make it more fruitful, this Traditional Knowledge can be used in case of disaster management. This Traditional Knowledge may be used as a precautionary tool to minimise damages caused by disasters.

Kum dyeing:

Manipur is also known for practicing a special type of dye known as *Kum* dye where they use the extracts of plant leaves, flowers and barks. This Kum dye is of superior quality than the normal vegetable dye as the colour derived from Kum dye is much vibrant and long lasting. Mainly, the women of *Meitei* community of Manipur district use this *Kum* dye. The plant is locally known as *Kumma*which is grown throughout the year. But they collect the leaves during a specific period only (flowering time) to derive the best colour and the leaves are preserved to be used in the future. This traditional process of dyeing is one of the richest heritages of our country. Due to the development of synthetic dyers, this use of natural dye has become relatively low in the country. Natural dye is used only in Manipur, Nagaland and in some North Eastern regions. This is because very fewer efforts are taken in promoting and preserving this valuable knowledge of traditional dyeing practice of Manipur. There should be Research and Development work in these areas and steps should be taken to promote and create awareness of

availability to keep their Traditional Knowledge alive.[47]

Meghalaya

Meghalaya is one of the seven states in North East India which is regarded as the 'abode of clouds'. It is situated in the north eastern Himalayan region of India bordering Assam and Bangladesh. Meghalaya is mainly inhabited by the three tribes – *Khasis*, *Jaintias* and *Garos*. This state is very rich in bio diversity having different varieties of wild plants some of which are used in ethnobotanical studies. Certain unidentified plants also existed which the Botanical Survey of India later on identified with the help of locals. These tribes are highly dependent on wild forest resources and thus domesticated many wild herbs, shrubs and trees for medicine, fruits, vegetable, bio hedges, wood, bows and arrows, decorative and religious purposes. This can be used as a measure of low cost conservation of the plants which are of greater importanc.[48]Some of such plants are *Allium Hookeri, Citrus Latipes, DocyniaIndica, MyricaEsculenta*etc.[49]There are also certain wild edible plants used by these communities as they have vast Traditional Knowledge regarding the utilization of forest resources. The climatic condition and the geographical location lead to the repository of such wild plants. Utilization of such wild dibble plants will be an effective tool for the restoration of Traditional Knowledge system inherent in the tribal people. This can be achieved if programmes are launched by government for conservation of such resources.[50]

Tripura

Tripura is the third smallest state of India. It has only four districts –North Tripura, South Tripura, West Tripura and Dhalai. It is highly

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47 N Rajendro Singh &Ors, "Traditional Knowledge and natural dyeing system of Manipur-with special reference to Kum dye"8(1)IJTK 84-88 (2009).

48 RB Chhetri, "Trends in ethnodomestication of some wild plants in Meghalaya , North East" 5(3) Indian Journal of Traditional Knowledge 347(2006).

49 All are scientific names of plants.

50 Sawian Jasmine T, JeevaSolomonnadar, and others," Wild edible plants of Meghalaya ,North East India" 6(5) Natural Product Radiance 425(2007) .

rich in bio diversity and comprised of many tribal communities. Out of them the *Tripuri* and *Reang* tribes possess diverse indigenous medicinal knowledge. Various Ethno medicinal plants are used by them in the treatment of simple to critical diseases. Many plants which are rich in antioxidants are found in Tripura which plays an important role in human health. In recent studies, activated oxygen is found to be the cause of ageing, freckles, diabetes, cancer, tissue injury in human beings. Active oxygen is generated when human skin is exposed to Ultra Violet rays. Some of such plants rich in antioxidants are *L.glutinosa*,*Schimawallichii*,*Syzygiumgratum*, *Grewia nervosa*[51].Also an antioxidant serum named as 'Juice Beauty' is obtained from the *L.glutinosa*plant. Thus the tribals of Tripura have diverse Traditional Knowledge regarding ethno medicinal plants which can be applied in the formation of new drugs without disturbing their Indigenous Knowledge.

The use of 'Night Jasmine' in weather forecasting:

The people of Tripura use a flower, The *Night Jasmine*, scientifically known as *Nyctanthesarbor-tristis,* to forecast weather and prevent disaster .This flowering tree, locally known as *shuili* or *shinghara*,is also considered a sacred tree in Tripura. This helps them to prepare themselves with proper equipments in their agro forestry. They can save themselves from losses which can occur due to heavy rainfall. For eg, if they have left any agricultural item for drying purpose in some open area which may get destroyed if it comes in contact with water. Or if there are tiny saplings which need to be covered to save themselves from heavy rain or hailstorms, then these can be covered with previous climatic predictions. Those areas where agricultural activities are done, are mostly remote where modern electronic weather forecasting system is hard to perceive. These methods of forecasting weather using Indigenous Knowledge are based on theoretical and observational methods. These biological indicators fall into the category of observational methods where the plant or the animal believed to be the forecaster shows some changed behaviours. Researchers were inquisitive about the

51 All are scientific names of plant.

accuracy of this Traditional rain forecasting methods .They found out that in most of the cases (95%) the prediction was accurate and thus they validated this traditional phenological knowledge.[52] Thus, researchers found out that this phenological observation method is a valid and effective method. Early flowering of *Night Jasmine* with scabrous leaves predicts heavy rainfall, while early budding and slow flowering predict moderate rainfall. Also the flowers which emit a yellowish colour are used for dyeing purpose in those areas. Thus this Traditional Knowledge with the help of weather forecasting plants helps the farmers mobilize their fishing and agricultural activities resulting in increase crop intensity. Another tree which helps the Indigenous people in such weather forecasting is the *Golden Shower*[53].

Indigenous fishing techniques:

The locals of Tripura follow their traditional fish catching techniques with their indigenous devices like the special fish catching gears, nets, specially designed hooks and traps. These techniques are used by the fishermen since ages. Instead of adopting ill fishing techniques, people should adopt these types of traditional techniques so that the biological environment is nor destroyed. For this, these techniques should be made known to the world by way of documentation and R&D. And simultaneously protection in the form of law should be there to avoid misuse. Thus a law on protection of such Traditional Knowledge is sought.[54]

Problems associated in preserving this Traditional Knowledge

Positive protection and defensive protection are the two ways by which IP protection can be sought. In positive protection, IP rights are granted over the subject matter of Traditional Medical Knowledge

52 Sandeep Acharya, "Prediction of rainfall variation through flowering phenology of night flowering jasmine (Nyctanthesarbor-tristisL;Verbenaceae)in Tripura"10(1) IJTK 96-101(2011).

53 Scientific name isCassia fistula L**.**

54 A.D Upadhaya& B.K Singh,"Indigenous fishing devices in use of capture fishing in Tripura"12(1)IJTK 149-156 (2013).

which may help communities to prevent others from gaining illegitimate access to this knowledge or using it for commercial gain without equitably sharing the benefits. Whereas defensive protection tries to stop IP (Patent) rights from being acquired by third parties. It includes the use of documentation of Traditional Medical knowledge to preclude, oppose or invalidate patents on claimed inventions that are directly based on such knowledge.

The Convention on Biological Diversity provided voluntary guidelines for the Access and Benefit Sharing System (ABS). Article 8(j) of CBD talks about it that there should be equitable sharing of benefits for any profit arisen out of the knowledge derived from Traditional Knowledge. And such knowledge should be derived only after the prior consent of the TK holders. The components shall be used in a sustainable way. Involvement of TK holders is not mentioned specifically. India became a signatory to the Convention Biological Diversity in June 1992.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)is a concomitant of World Trade Organisation set up annexed to the General Agreement on Tariffs and Trade, 1994 by which WTO has been established. All the members of WTO are bound by the TRIPS Agreement. TRIPS provided for the applicability of basic GATT principles and other relevant international Intellectual Property agreements. One of the important provisions of TRIPS is in Article 7 which says that Intellectual Property should promote technological developments and hence there should be Transfer of Technology. TRIPS in Article 27.3(b) has made a provision for the member countries either to implement a patent system for the protection of plant varieties or to adopt their own *sui generis* system .Article 27(3) of TRIPS talks about IPR rights over living resources explaining the subject matter of patentability, and also at the same time has a provision for sui generis protection. Conflicts have arisen between TRIPS and CBD relating to private right vs. public right, rights of the indigenous community vs. rights of the multinational pharmaceuticals corporation and between rights of the commercial breeders vs. rights of the farmers .Another difference arises between

them when CBD says that national states have sovereign rights over their biological resources where TRIPS ponder that biological resources may be subject to Intellectual Property Rights. TRIPS does not have any provision requiring Prior Informed Consent for access to biological resources which may be subsequently be protected by IPR. .CBD is based on socialism which talks about the community at large and TRIPS is based on capitalism concentrating on individuals.

World Intellectual Property Organisation has taken several attempts to protect Traditional Knowledge .WIPO has drafted an Inter Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The main objective of this draft is to recognise the value of Traditional Knowledge and to promote respect for Traditional Knowledge systems to conserve and maintain these systems while at the same time meeting the needs of the Traditional Knowledge holders and contribute to their welfare. WIPO has also taken step in the documentation of Traditional Knowledge toolkit which will provide guidance in undertaking a TK documentation exercise addressing critical questions relating to IPR issues. This is to protect mainly the Traditional Knowledge and Traditional Cultural Expression (TCE).

The Biological Diversity Act, 2002is India's reaction to the Convention on Biological Diversity which is concerned about the rights of the states regarding their biological resources and provides for conservation, sustainable utilisation and equitable sharing of benefits. It extends to protection to Ayurveda and other indigenous medicines. It provides that no foreigner, non-resident or body corporate shall obtain any biological resource without previous approval of the National Biodiversity Authority.[55] The Act has also drawn criticism in that even an Indian citizen or company registered in India will have to obtain permission in order to utilize biological resources .The overall effect of the act remains to be determined. If the law is too restrictive it could hamper research with burdensome administrative procedures .However, it could protect

55 Hereafter NBA.

national sovereignty in biological resources, including Traditional Knowledge.[56]

India medicinal herbs are governed by two systems-the codified system and the uncodified system. The codified system includes the Ayurveda, the Siddha and the Unani system of medicinal knowledge which are codified in the books. But in north East India, the Traditional medicinal system is uncodified .Theses traditional medicinal system include complex rituals, beliefs and performance of magic. Another informal system followed in the North Eastern region is the secrecy regime .These Traditional Healing practices or mantras are kept secret among the healers. But sometimes expecting to apply some modern techniques to such practices, they get revealed to some people or corporations. They might claim patent out of any inventions from such knowledge and it becomes difficult to claim that patent when the practice was/isactually a secret among the healers. [57]

The Government of India has established this digital library where all Traditional Knowledge regarding the use of medicinal plants will be recorded so that the International Patent Officers can check a patent application if the invention involves any recorded Traditional Knowledge to avoid non original inventions. This Traditional Knowledge Digital Library system was approached by the Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homoeopathy-(AYUSH) along with Department of Indian System of Medicine and Homoeopathy (ISM&H) and Council of Scientific and Industrial Research (CSIR).[58]It was initiated in the year 2001.Traditional Knowledge Docketing System (TKDS) is expected to collect and store information regarding the place of the available Traditional Knowledge, the name of the community who possess this TK and the nature of the said Traditional Knowledge

56 Murray Lee Eiland, "Patenting Traditional Medicine"89 J. Pat & Trademark Office Soc'y45 (2007).

57 NeelotpalDeka, "Traditional Knowledge in North East India: scope for a sui generisprotection" 3(1)The Clarion92-97(2014).

58 "Ministry of Ayush", available at :https://en.wikipedia.org/wiki/Ministry_of_AYUSH last seen on February 22, 2017.

and community protocol (if any).[59]

Now, experts argue that sharing these knowledge with the Patent Offices will bring injustice to these communities as TKDL contains approximately 2,08,000 formulations based on Ayurveda, Unani, Siddha and Yoga which leaves a scope for misappropriation by making cosmetic improvements though India has signed an agreement with European Patent Office and US Patents and that all these database will be used for search and examination purpose only.The Patent Offices are obliged not to make any third party disclosure regarding the database. But no patent can be denied without disclosing the entire amount of coded TK which is related to the invention to call it a prior art. Hence, it becomes difficult for the patent offices to maintain the database as secret contents.The North East division of Indian National Trust for Art and Cultural Heritage (INTACH) has also attempted to document the Traditional Knowledge in the area before they get extinct.

Conclusion and suggestions

However, despite having such attempts to protect Traditional Knowledge, biopiracy cases are still reported even in recent years. Not including the whole of India and concentrating only on the North Eastern area some of such cases are-In January 2016,a person named Mr. Atkinson came from UK to India in search of rare medicinal plants in Sikkim.[60] He collected several epidemic species from the forests of Sikkim and tried to market them online. All these were done even without the permission of the State. He even encroached the reserved and protected areas and tried to bio pirated rare plants species like the rhododendron species including

59 T.Nandakumar, "Caution on classifying traditional knowledge under IPR", available at : http://www.thehindu.com/news/national/kerala/caution-on-classifying-traditional-knowledge-under-ipr/article7589338.ece last seen on February 22, 2017.

60 NirmalMangar, "Sikkim alerts tour operators to bio pirates: US and UK nationals collect seeds of plants without permission, says forest department" The Telegraph ,Jan.12,2016, available at : https://www.telegraphindia.com/1160112/jsp/siliguri/story_63395.jsp#.WNUzJW997IU last seen on February 22, 2017.

Decaisnea Fargesii, *Deutzia stamine* and *ElsholtziaFlava.*[61]This *DecaisneaFargesii*is commonly termed as dead man's finger and is considered an ornamental plant with bright blue colour bearing decorative fruits. *Deutzia stamine*is also an ornamental plantbearing pink and white flowers.From the State of Nagaland, *Ginseng* (panax and pseudo) is almost wiped out from the wilds. [62]Due to their therapeutic values bio pirates marketed them internationally (to MNCs) and hence the species is almost gone. Other medicinal plants which are smuggled from the states of Nagaland and Arunachal Pradesh are *TaxusBaccata* and *CephalluTaxus*. These plants are smuggled into the neighbouring country Myanmar in truckloads from Kohima and Phek districts to manufacture costly drugs.*Paris Cordofolia* is also stolen from Nagaland to manufacture drugs as the Nagaland variety is more productive.[63]The Traditional Medicinal knowledge related to such plantsis also stolen in the manufacturing process. Neither consent nor benefit is shared between the manufacturing industry and the communities. Hence such knowledge is exploited severely Even endangered animals are not spared. One of the main reasons of such bio piracy is the unawareness of the local communities to the outer world. They do not even know how they are being exploited. They do not know how to protect their valuable knowledge. Hence, a stricter law only to safeguard Traditional Knowledge is much required.

Collective rights of the communities of Panama have been recognised and this law is mainly based on Prior Informed Consent. The law emphasises that those who want to carry any Research and Development activity in the Traditional Knowledge system must get the Prior Informed Consent from the concerned community. Keeping this law in mind, same can be applied to the North Eastern states.[64]The Benefit Sharing Agreements should be

61 Ibid.

62 "Bio piracy rampant in Nagaland" Hindustan Times ,May 3,2008. available at :http://www.hindustantimes.com/india/bio-piracy-rampant-in-nagaland/story-iiym3bA2uV0y6k4Rjnj7tO.html last visited on March 23, 2017.

63 Ibid.

64 Neelotpaldeka, "Traditional Knowledge in North -East India: scope for a

implemented in such a way that the traditional communities that they become fruitful to them economically as well as socially. *Sui Generis* system should be implemented in such a way that is flexible enough to cater the needs of the county/place.A strategy which would include the government, economists, environmentalists, civil society, indigenous groups and other people would be effective towards maintaining a sustainable future where human rights will be recognised too. India should encourage more in the Research and Development of Traditional Knowledge .Stricter laws should be enacted in preventing bio piracy to ensure appropriate returns to traditional communities. Misappropriation should be strictly stopped. Proper documentation is necessary for the uncodified system of Traditional Knowledge prevalent in the North Eastern region. This will minimise unscrupulous capitalisation of such information. Traditional Knowledge and related material in these regions should acquire rightfully and good ethical reasons. Industries should engage them in bio partnership with indigenous communities and traditional healers. They should get benefits as participators in genetic research. And most importantly, public awareness should be created. Every policy, bills, rules etc should be thrown upon for public discussion and subsequent consensus. And most importantly spreading of public awareness is a must among the indigenous and local people. Awareness programmes should be established. Radios, Social Networking Sites, Seminars, Programmes, Televisions, showing Short Documentary Films, displaying Posters and Hoardings can help here.

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sui generis protection" 3(1) The Clarion 92-97 (2014).

Concept of assigning legal identity to natural elements: Tracking recent trends and its implications

Arbina Dey*& Priyambada Datta**

Introduction

The rising social consciousness regarding the need to move towards sustainable development and to preserve the environment has brought about an interesting development in the field of Environmental law. Taking cognisance of the deplorable state of the environment at the hands of man, several jurisdictions across the world have started to extend legal personhood to the environment and its elements. Recently, New Zealand, by way of legislation, became the first country in the world to grant personhood to its river.[1] The river Whanganui along with its other physical and metaphysical elements will now be a legal person. Few days after this occurrence, the High Court of Uttarakhand also followed suit, and held rivers Ganga and Yamuna, along with all its tributaries as legal persons coupled with rights, duties, and liabilities. The two judge High Court Bench in Mohd. Salim v. State of Uttarakhand[2], used the jurisdiction of *parens patriae* to declare the Ganga and the Yamuna along with their tributaries as living entities. Further, in Lalit Migliani v. State of Uttarakhand[3], the court taking account the Mohd. Salim judgment accorded it to several other environmental elements.This, coupled with rights of nature granted by the government of Ecuador along with Bolivia prior to these events, definitely show a unique method of approach taken towards the

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1 E.A.Roy, New Zealand river granted same legal rights as human beings, The Guardian (16/03/17), available at https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-humanbeing, last seen on May 21, 2017.

2 W.P.PIL No. 126 of 2014.

3 W.P.PIL No. 140 of 2015.

environment.[4] As this phenomenon still lays at a nascent stage, the implications of this phenomenon are uncertain and yet to be concretely understood.

Tracing the positive outcomes of ascribing personhood to environmental elements

Assigning legal personhood to elements of the environment paves the way for a shift from the traditional theory of property rights over the environmentto the acknowledgment of how other cultures perceive the environment. Although it is symbolic in terms of its significance, the emergence of such developments in the field of environmental law is positive. It moves away from the age-old European conception of environment as a resource that needs to be utilised for the benefit on mankind. Rather, it recognises the presence of the environment separate from the use it provides human beings, to being an entity that has inherent rights on account of its own existence.[5]

The previous conceptualisation of the environment as property allowed individuals to establish their ownership by "taking" and exercising "control" over it.[6] Property rights, in essence, allow for the owner to take whatever liberties it wants with the object it owns, as he/she exercises dominion over it and it is not of consequence to any other person. However, this approach when taken for the environment has been problematic. This has mainly to do with the fact that unlike other forms over which one can impose ownership, the environment cannot be broken up into little packets to be used by individuals in an independent manner.[7] As a characteristic, the elements of the environment belong to the "natural commons" and

4 Debjani Bhattacharyya, Being, River: The Law, the Person and the Unthinkable, Humanities and Social Science, available at https://networks.h-net.org/node/16794/blog/world-legal-history-blog/177310/being-river-law-person-and-unthinkable, last seen on May 21, 2017.

5 Id.

6 Carol M. Rose, Given-ness and Gift: Property and the Quest for Environmental Ethics, (1994). Faculty Scholarship Series. Paper 1814. available at http://digitalcommons.law.yale.edu/fss_papers/1814, last seen on May 22, 2017..

7 Ibid.

are intrinsically linked to one another in the form of a system.[8]Wanton use of the environment by individuals hoping to extract as much benefit as possible may not lead to palpable problems on a micro level but lead to catastrophic consequences on a large-scale macro level. Recognising the inherent rights of the environment allows for the environment to have rights to sustain itself beyond the approach of human consumption and requirements.

In the case of the Whanganui river in New Zealand, the long drawn legal battle between the Crown and the indigenous Maori tribe ended with a victory for the latter by way of a legislation holding the river as a legal entity.[9] The purpose of such a move was twofold. Apart from establishing a unique environmental jurisprudence, it also recognised the Maori tribe's theory of the Whanganui being its ancestor, which is distinct from the crown treating it as a natural resource that they exercise control over and utilise for the betterment of humankind.[10]

The change in attitude of the approach towards environment is a much-needed change in light of the potent environmental concerns that have been cropping up in the recent past. In the Mohd. Salim judgment, courts extended legal personhood to rivers Ganga and Yamuna under the context of illegal embankments on the river Ganga along with improper utilisation of land and water resources. The court referred to such a circumstance as "extraordinary", warranting judicial intervention. This move will stop the indiscriminate utilisation of the environment and its elements at the cost of its own sustenance and allow for a symbiotic relationship between human beings and the environment. Arming the environment with legal personhood establishes rights that do not allow human beings to utilise the environment and its goods by harming it in the process.

Although it may seem ludicrous to consider a river as a "person", the

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8 See William Ophuls, Ecology and the politics of scarcity: prologue to a political theory of the steady state, 147 (1977).

9 Supra 1.

10 Ibid.

law has in the past accorded personhood to corporations, deities, trusts, charities and the like. The purpose for such extension of rights is mainly for convenience, to assign rights and duties to such non-natural entities and to ensure efficient method of enforcing them. It also allows for the protection and wellbeing of such entities which have a proclivity of being misused by individuals for their own interests. This is particularly relevant for the environment and its elements.

Joseph Raz in his article had come up with the concept of capacity theory of rights where he argued that in order for holding a right something has to be of ultimate non-derivative value.[11] This means that it has to be intrinsically valuable apart from its instrumental value, which is, the use it provides to human beings. As the current shift in the approach towards environment has moved from the inherent existence of the environment sans human beings' requirements, it is only fitting that the environment be granted rights for its sustenance and well-being.

By granting rights to the environment, anyone who violates the said rights of the environment can be prosecuted directly. This was not the case before where in order to sue the perpetrators of environmental damage, a public interest litigation had to be filed against the State to stop environmental depletion at the hands of individuals. It would also be difficult to hold the perpetrators to account as the articles in the constitution that provide rights to the environment, namely Article 48A and 51A, are under Directive Principles of State Policy and Fundamental duties, neither of which are enforceable in the court. Often times, it required individuals advocating for the environment to show how they have suffered harm due to the degradation of the environment.Post these developments in environmental jurisprudence, the environment and its elements can sue the violator of its right in its own name directly.

As the ability to hold perpetrators accountable in environmental damage has become much more direct and simpler, what follows is a more efficient way in which the funds allocated for the betterment

11 Joseph Raz, On the Nature of Rights, 93 (370) MIND 194, 204(1984).

of the environment can be utilised. For instance, in Mohd. Salim, the court used the concept of *in loco parentis* to provide a "human face" to the rivers. The concept of *in loco parentis*, formulated in the 18th century by Sir Blackstone in English common law provided for delegation of parental duties to others for the benefit of the child.[12] It was mainly in the context of children being put under the authority of school teachers and the like. The doctrine allowed persons who were *in loco parentis* to take necessary steps for the well-being of the child. However, it also assigned duties on the persons to ensure no harm was caused and their well-being was maintained. A breach in their duty made them liable to legal action, in various form such as the loss of a job, payment of compensation, punitive punishment etc.In the context of the environment, this ensures that the individuals who have been placed under this concept cannot escape accountability if there is any mismanagement on their part. This is crucial in terms of the sustenance of the environment as in several occasions, the funds allocated for rejuvenation of natural elements are not efficiently utilised. To illustrate, there was massive mismanagement by the authorities of the funds provided for the cleaningup of river Ganga. Implementation of the concept would allow the authority figures to be held accountable for the way the funds allotted to the environment are utilised.[13]This would lead to better or more efficient fund utilisation for the betterment of the environment.

Legal complications that arise out of the development

With the shift in perspective steered in Indian environmental law jurisprudence, by extending legal personhood to rivers and effectively bringing them under the ambit of juristic persons,

12 William Blackstone, Commentaries vol. 1, *453, as cited in Todd A. DeMitchell, The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students, 2002 BYU Educ. & L.J. 17 (2002).

Available at: http://digitalcommons.law.byu.edu/elj/vol2002/iss1/3.

13 Armin Rosencranz & Dushyant Kaul, It Will Take More than a Prime Minister to Clean Up the Ganga, 1 March, 2017, https://thewire.in/113069/is-a-clean-ganga-too-much-to-ask-for/.

capable of possessing and enforcing a set of rights, one relevant concern remains to be addressed. We are still to figure out, how such a shift will play out with regard to effective resource utilization by the government. The earlier perception about rivers— as a gift of nature or as a property handed down to us to be exploited extensively for our own benefit, had a lot to lend to the type and number of activities, aimed at successfully utilizing them that the rivers were subjected to. Numerous multipurpose hydel-power plants cropping up every day, rigorous river mining activities, construction of canals for commercial and industrial usage, development of recreational centres and parks offering activities like river rafting, coasteering,etc. are some of the practices employed by the government to channelize maximize resource benefits from the rivers. The new challenge posed by the High Court judgment to this simplistic, and often detrimental, treatment of rivers as mere property has now begun to disrupt multiple arenas surrounding the issue. And in light of that, it definitively imposes a question mark on the fate of the aforementioned effective resource utilization practices undertaken by the government.

The rivers now being akin to a person, have a right to object to the carrying on of such activities, on the ground that they are violative of their right to peaceful existence. It does lend direct support to prominent campaigns like the Narmada Bachao Andolan, toiling endlessly against erecting dangerous massive structures that aim at extracting benefits out of the rivers, at the cost of exposing it and its immediate ecosystem to systemic risks. In other words, it acts as a direct check against disruptive government practices motivated by overutilization and recklessness towards the rivers. However, on the offside, it does subject the government to a lingering threat that many of the developmental activities, which it might undertake to effectively tap the potential resource benefits out of the river, can be thwarted on the ground that they have a right against being violated for commercial purposes.

We must acknowledge the fact that the decision was partly motivated by ecological concerns— to be accurate, with the understanding that

the rivers must be conferred upon with a standing, to ensure their own preservation and right against exploitation. In light of this, it is not far-fetched an argument to make that in the times to come, they can most certainly contest being subjected to certain resource utilization activities undertaken by the government. Barrier or dam constructions for extracting renewable energy, or artificial diversion projects to facilitate proficient sharing of water, for instance for irrigation, or fishery, or developing recreational centres for river sports are some of the activities that the government has in the past, and perhaps will in the future, employ to adeptly reap the potential benefits offered by the rivers—revenue wise or otherwise. Some of them, admittedly, do put the rivers' ecosystems at a potential risk, for example, in cases of extensive river side mining, or extreme diversion leading to complete disruption of its ecosystem, therein this new advancement in ideology plays out as an excellent check. On the other hand, some of them are practically indispensable for the government to earn revenues, and do not pose a considerable risk to the river system, and it is here that the potential risk of straitjacketing such activities into "disruptive" and offering collective resistance to them, lies. For example, what happens to the right of the river to flow unimpeded if the construction of a dam is needed to prevent flooding. Broadly put, this might plant extraordinary powers in the hands of few radical environmentalists, which might lead to a situation wherein they use it to fuel their own ideological ambitions, rather than real environmental concerns.[14] Therefore, listing out activities, and labelling them as safe from the effects of this advancement, and careful exercise of judicial discretion while deciding cases brought under the same, assumes great significance.

Another major issue that the judgments readily give rise to is, the convenience with which the judges have tried to drape religious and communal agenda with ecological concerns. The judgments find repeated use of phraseology such as—

14 Wesley J. Smith, Ganges River Declared a Legal Person, available at https://www.evolutionnews.org/2017/03/ganges-river-declared-a-legal-person, last seen on May 15, 2017.

> "Rivers Ganges and Yamuna are worshipped by Hindus. These rivers are very sacred and revered. The Hindus have a deep spiritual connection with Rivers Ganges & Yamuna. According to Hindu beliefs, a dip in River Ganga can wash away all the sins. The Ganga is also called 'Ganga Maa'. It finds mentioned in ancient Hindu scriptures including 'Rigveda'."[15]

In the case of Lalit Migliani v State of Uttarakhand as well, Justices Alok Singh and Rajiv Sharma have made references to the importance of the rivers to the Hindu community in the following words—

> "To millions of Hindus, it is the most sacred, most venerated river on earth. According the Hindus belief and Mythology to bathe in it is to wash away guilt, to drink the water, having bathed in it, and to carry it away in containers for those who may have not had the good fortune to make the pilgrimage, to it, is meritorious. To be cremated on its banks, or to die there, and to have one's ashes cast in its waters is the wish of every Hindu."

Also, the judges have sought to draw support for the grant of juristic personhood to the Ganga and Yamuna, from cases such as *Ram Jankijee Deities & others v State of Bihar & others*[16] drawing an analogy between Hindu deities and the rivers. In fact according to a leading newspaper report, a Supreme Court Advocate went on record to say that "For the first time the Court has gone out of the four corners of a temple, and actually made a river, the idol."[17] This reflects the height of confusion that exists even in the legal circle, with respect to the court orders. Have the rivers been accorded

15 Mohammad Saleem v State Of Uttarakhand And Another, 2017, Writ Petition (M/S) No.2 of 2017.

16 1999 (5) SCC 50.

17 Vishakha Saxena, Ganga Yamuna declared human entities: What exactly does this order mean?, Indiatoday, available at http://indiatoday.intoday.in/story/ganga-yamuna-human-entity/1/908905.html, last seen on May 17, 2017.2017.

the legal status of a person as independent elements of nature, or as other Hindu idols, lies at the heart of that confusion. Though the judges then hastily moved to make references to environmental issues, here and there, it almost seems that the purpose of according the rivers with such a status lay in acknowledging their roles in the spiritual lives of the Hindus. What stems from such statements is a question that needs to be answered before we push for the implementation of the new principle. The question which we are then exposed to is, whether the judgments are dipped in misplaced sentiments, indicating a shift from being environmentally spirited to being communally tainted, and only catering to a particular sect of the population.[18] What could have been one of the greatest leaps in Indian environmental jurisprudence is muffled by references to the "holiness" of the rivers being protected. The judgment then effectively becomes self destructive in the sense that what it seeks to achieve is essentially thwarted by the way it has sought to achieve the same. References made to how holy and spiritually significant the rivers are to the Hindus puts an implicit disincentive for the other segments of the population to do their bit in preserving them. Hence, if the judgments are to be seen anything as a major breakthrough, paving the way for other similar developments to follow in environmental law, there is a requirement of clarifying and restating the rationale behind such a stance, so that the efforts in protecting the rivers are saved from being misguided.

Many scholars have rightly pointed out that these judgments have engendered more questions than answers, more problems than solutions. Another issue that it leaves untended is the issue of tax. An inevitable, if not immediate, question that would arise from this ruling is whether the rivers would now be considered taxable entities. Given the fact that the judgments have backed themselves using rulings that impute legal personhood to deities, we must inevitable fall back upon the same when tasked with the question of holding the rivers taxably assessable. In the landmark case of *Jogendra Nath Naskar v CIT*[19] the Supreme Court expressed

18 Supra 4.

19 1969 AIR 1089.

its opinion on this issue and went on to lay down that there was no principle in law which explicitly or implicitly forbade, holding a deity liable under the Income Tax Act. The Hindu deities, thus, are taxed on the revenues they earn and properties they hold, through their *shebaits* or temple trusts. This leads us to the conclusion that these rivers as legal persons should be liable to be taxed under appropriate statutes, for they do have multiple avenues that generate income. However, choosing the appropriate authority that would finally bear the taxpaying responsibility could be the most staggering part to deal with. Rivers are not endemic and restricted to any particular state, and as such there could be multiple revenue generating projects spread over more than one state, on the same river. The Uttarakhand High Court has appointed the director of the leading conservation mission *NAMAMI Gange*, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand as persons *inloco parentis*, in other words as legal parents of the two rivers, which technically makes them the only responsible authorities in a tax dispute, even if the revenue generating activity is being carried out in a different part of the country. This seems contrary to logic, almost absurd, and could not have been the intention of the courts, hence making it absolutely impending that the responsible authorities foray into this issue and clarify the position before a major dispute breaks out.

Immediately then, it follows from the above discussion that the high court judgment appears to be partly faulty on another account as well. It seems to ignore the consequences of assigning one state with the responsibility of inter-state rivers like Ganga and the Yamuna, and consequently the ruling strikes directly at the issues of *federalism* and *sovereignty*. How can the court arbitrarily task the Chief Secretary and the Advocate General of one state with overseeing the preservation and legal maintenance of a river that winds through not only a number of states but also different countries. The Ganges not only cruises through a number of Indian states, but has tributaries coming in from Nepal and Bangladesh. In such a scenario, we must scrutinize the propriety of having the officials of Uttarakhand represent the other states, and more

so, the other countries. We cannot overlook the fact that such a situation palpably affects the federal relations between states, and intervenes with the sovereignty of countries on the matter. It makes one wonder then, whether this sort of a ruling backed by half-baked logic exacerbates rather than extinguish the many contentious water disputes in India, such as the Cauvery River dispute between Karnataka and Tamil Nadu.

Further questions that arise aspects of the development

This inclusive step is not without its share of vagueness and unanswered questions. One stark aspect of the new development is the confusion that engulfs what constitutes the duties of these environmental features. As per the Hohfeldian perspective, every right has a corresponding duty attached to it.[20] This has also been stated by the Uttarakhand High Court, where it used the words "having the status of a legal person with all corresponding rights, duties and liabilities of a living person". In the judgment, the court mainly catered to the rights that the rivers have that cannot be infringed upon, however the corresponding duties that the rivers can be held accountable for have not been elaborated upon in this judgment.

The environment can provide several resources to human beings that are high in utility. If they are to have duties towards other beings, will that duty be in the form of providing services to people that it has been doing for several centuries? The question lies whether the environment can be called up to perform duties in the form of providing hydro-electricity by allowing the construction of dams on its beds.[21] If it fails to perform its duty, can it be held liable for its non-performance?

Another possible way of examining the duties of rivers can be seen

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20 Kevin W. Saunders, A Formal Analysis of Hohfeldian Relations, 23 Akron L. Rev. 465 (1989-1990).

21 Ashish Kothari & Shrishtee Bajpai, Can the Ganga have human rights?,The Hindu (01/04/17), available at http://www.thehindu.com/sci-tech/energy-and-environment/can-the-ganga-have-human-rights/article17750148.ece , last seen on May 25, 17.

from the lens ofwhat harm or injury it can cause other persons who have rights and duties of their own.It is unclear whether the environment can be embroiled in cases of criminal liability. This is in light of the fact that corporations, which also possess legal personhood, can be held criminally liable for their actions. For instance, if the river Ganga floods and causes widespread loss of life, destruction of crops, housing, et cetera, can the people affected by the flood sue the river?

This is especially pertinent in terms of the defence of tortuous liability called Act of God or Vis Major. An Act of God is when legal injury is caused to individuals due to acts that not under the control of individuals or unavoidable.[22] Recognising environment and its elements as "persons" would wipe out the exception of Act of God from torts. Both cannot exist or operate at the same time as it would be paradoxical to hold a river as a person who has rights and duties and to say that the act of the river cannot be held accountable as it was an Act of God.

Even if it is accepted that the river had a duty towards the people and is in fact liable, how does one hold rivers or for that matter, any element of the environment, liable? In the case of the river Ganga, are the human faces of the river, namely, the Director of NAMAMI Gange, the Chief Secretary and the Advocate General of Uttarakhand, to be held liable in place of the rivers?If the answer to the above question is indeed affirmative, who decides the manner of the procedures to follow?

Another problematic aspect is with regard to identification of the perpetrators of environmental degradation. This is due to the difficulty in sufficiently establishing causation of the act that the supposed perpetrator committed and the harm caused to the environment in consequence.[23] The harm caused to the environment, especially

22 Chirag Balyan & Lalit Kumar Deb, River in a 'Court of Law' – Legal issues pertaining to its personality, Centre for Policy Analysis, available at http://www.cpadelhi.org, last seen on May 29, 17.

23 Dina Shelton, Nature as a legal person, Vertigo, la revue électronique en sciences de l'environnement [online], special edition (22/09/15), available at http://vertigo.revues.org/16188, last seen on May 30, 17.

the long-term ones, are made up of small harmful contributions of several individuals taken together. Something that is difficult to identify as well as to make the said individual accountable.

Yet another significant question that pops up while tracing the practical implications of the decision is whether the court implicitly directs the Advocate General of the state of Uttarakhand to act against the state government, in case, it is the one to blame for an alleged harm done to the rivers. India's controversial river-linking project brainchild of the Narendra Modi government, which involves massive diversion of the Ganga and the Brahmaputra, to the water scarce western and central part of India through construction of dams, reservoirs, and canals may be one such scenario where a conflict of interest is likely to arise.[24]

Conclusion

While attempting to sketch out the two Uttarakhand High Court judgments, we usher in a completely new era of the nature and law interface. Laying out the details that were missed and listing out the practical repercussions of the same, we come to several conclusions, and certain doubts that linger around the issue remain. For instance, will the judges' sudden stand on inclusion of rivers in the definition of a "juristic person" cause an unprecedented upward rising trend in radical environmental rights jurisprudence? In fact, this is almost perceivable inter se the two judgments. While the Mohammad Salim judgment named two rivers as persons, Lalit Migliani goes a step beyond that to name a host of other natural elements such as "glaciers, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls"[25] as legal persons, and thus expanding the personhood principle, quite indiscriminately. Another problem that will follow from such a trend is that the Public Interest Litigation (PIL)

24 Omair Ahmad, A court naming Ganga and Yamuna as legal entities could invite a river of problems, Scroll, available at https://scroll.in/article/833069/a-court-naming-ganga-and-yamuna-as-legal-entities-could-invite-a-river-of-problems, last seen on May 15, 2017.

25 Supra 3.

jurisprudence will suffer an indescribable dilution, possibly to the extent that *expediency in disposal*—the primary factor for which it was engineered, will be a distant dream.

Also, the above discussion on the effect this advancement has, on issues of federalism and sovereignty, points to us a major flaw on the way this advancement has worked out in the Indian context. Unlike in the case of New Zealand, which has a comprehensive legislation in place to deal with the matter, tracing out in detail the procedure to follow in case of eventualities, the Indian scene has developed overnight by a judicial act, missing out on much specificity that is essential for the smooth application of the nature-personhood principle.

Therefore, though we must appreciate such judicial activism which leans towards acknowledging and establishing more and more environmental rights, the current situation demands, we take this new development with a pinch of salt and rally for a legislative reform that handles the matter in a more sophisticated manner, and braids it with more details that it requires. With the Uttarakhand government taking the issue upto the Apex court, the final ruling on the subject and further directions are awaited, nonetheless, the events to ensue are surely interesting from an environmentalist's as well as a lawyer's perspective.

Seeking possibilities of distinction between negative and positive rights

Naimitya Sharma*

Introduction

Positive rights at the level of state are somewhere similar to second generation rights which includes within its sphere socio-economic claims of right to healthcare, housing, education, employment and adequate standard of living. All second generation rights might not be positive rights, as there could be a situation where the assertion of socio-economic rights means that the State does not interfere in the already established sphere of subsistence of people of a particular area or community. Socio-economic claims that translate into State intervention for fulfilment can be thought of as positive rights. The first generation rights which are negative rights and have corresponding duties that demand omission of action are thought at times as more important as compared to positive rights which are thought as expensive and demanding. But in general, if the point of a right is to ensure that a certain choice can be exercised, then actually facilitating the exercise may sometimes be as important as not obstructing it.[1]

There are some scholars who argue that the distinction between positive and negative rights is not clear. Prominently Stephen Holmes and Cass Sunstein argue that all rights are positive in nature as it takes effort on the part of state to enforce negative rights. More specifically they argue that "(t)he financing of basic rights through tax revenues helps us see clearly that rights are public goods: taxpayer-funded and government-managed social services designed to improve collective and individual well-being. All rights are positive rights".[2]

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1 Jeremy Waldron, 'Rights' in Robert E. Goodwin, Philip Petit and Thomas Pogge (eds.), A Companion to Political Philosophy, Oxford, 2007, p. 749.

2 Holmes, S., Sunstein C., The Cost of Rights: Why Liberty depends on

At a different level, Henry Shue argues that all rights have three duties in common, which are protection, avoidance and aid. Shue further says that the distinction between positive and negative is not clear.

> "The common notion that rights can be divided into rights to forbearance (so called negative rights), as if some rights have correlative duties only to avoid depriving, and rights to aid (so called positive rights), as if some rights have correlative duties only to aid, is thoroughly misguided…it is duties and not rights that can be divided among avoidance, aid and protection. And this is what matters – every basic right entails duties of all three types…the very most 'negative'-seeming right to liberty, for example, requires positive action by the society to protect it and positive action by the society to restore when avoidance and protection both fail."[3]

Here one can see that the argument of Shue is based on the understanding that it is duties that can be of different nature and not rights. He is of the opinion that the duties can be of avoidance, protection and aid. Shue looks at basic rights of two kinds, security and subsistence and both these rights having three kinds of duties associated with them. Sandra Fredman also enumerates three kinds of duties associated with both socio-economic and civil rights.

> "As recent analysis has shown, both civil rights and socio-economic rights give rise to a cluster of obligations: the primary duty whereby the state should not interfere with individual activity; the secondary duty whereby the state should protect individuals against other individuals; and the tertiary duty to facilitate or provide for individuals. Known as duties to respect,

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Taxes, W. W. Norton & Company, New York, 1998, p. 48.

3 Henry Shue, Basic Rights: Subsistence, Affluence, and US Foreign Policy, Princeton, 1980, p. 53.

> protect and fulfill, these duties are now expressly enshrined in the new South African constitution, and the International Covenant of Economic, Social and Cultural rights (ICESCR)."[4]

In the following pages, I argue that these conclusions that the distinction between negative and positive rights is not robust can possibly be off the mark. There are instances (as imagined also by Shue and Fredman) of rights where correlative duties have components of both negative and positive character. For Shue all rights have these duties, for Fredman all rights have these duties but duty of non- interference is primary. For Homes and Sunstein all duties and thus rights are basically positive. In the following pages an attempt has been made to look at this categorisation of duties into positive and negative, and, primary and secondary.

Duties: key to distinction between positive and negative rights?

One can enter this debate by thinking about a right with the help of Shue's understanding which is largely within the ambit of negative liberty. He says that a moral right provides, a) rational basis for a justified demand, b) that the actual enjoyment of a substance be, c) socially guaranteed against standard threats.[5] To ascertain the kind of duties associated with rights and thus their nature one needs to look at the source of the moral rights, which lies in the standard threats. Standard threats could be of two types. One, where the source of threat is clear. This is the case when these standard threats can be located either in the society or in the state. Two where the standard threats have multiple origins, or are systemic. The first kind of standard threats which are inflicted by people around the claimant and the source of origin of these threats is clear, gives rise to need of a duty where everyone around

4 Sandra Fredman, 'Human Rights Transformed: Positive Rights and Positive Duties' inOxford Legal Studies Research Paper, no. 38, August 2006, p. 3.

5 Shue, Op. Cit.

the claimant is expected to not interfere in the pursuits of the right holder. As the source of the threat can be pin pointed, the duty of non-interference can be effective in curbing any infringement. But with second kind of threats, which have multiple sources of origin or are systemic in nature, duty of positive action is required to ensure that the right holder gets his share of justified demands if the right is to be respected. The duty of positive action would come into place as the source of threat is not clear and thus its mitigation is not possible or would not be complete in the sphere of non- interference character of negative liberty. And when the source of the threat is systemic, getting created by present regimes of laws or rules or social arrangements, any positive action which works either as arising from the duty of non-interference or works within the present regime of negative liberty would not be the appropriate response to the threat.

When standard threats are inflicted by known sources or people around the right holder the duty of non- interference can be thought of as having two components,

- non-interference/avoidance in the pursuits of the right holder
- non-interference generated protection/aid

Non-interference generated protection/aid could be any positive action that tries to work within the purview of negative liberty and thus tries to either contain interference or provide aid after interference. The idea is that the duty of non-interference gets transformed into a duty of protection/aid. This point is further explained with the help of Waldron's analysis of Homelessness below.

In his analysis of homelessness, Waldron argues that to do anything one wish to do, a place to do that work is required. Given the private property rule, if one is not free to be at a place, one is not free to do anything at that place. A homeless who is not free to be at any place is not free to do anything.

> "For the most part the homeless are excluded from all the places governed by private property rule… (and) increasingly in the way we organize common

> property" with rules that ensure limited access to these common property, "we have done all we can to prevent people from taking care of these elementary needs (such as need to use toilet) themselves, quietly, with dignity, as ordinary human beings"[6]

The remedy suggested by Waldron in this case is creation of public toilets. He says "the generous provision of public lavatories would make an immense difference…and it would be a difference to freedom and dignity, (and) not just a matter of welfare…the homeless have freedom in our society only to the extent that our society is communist.(common property wise)"[7]. I raise this issue here to see if the right to access to common property is a negative claim or a positive claim. The issue of homelessness also raises the claim for a place to live. I also raise this issue to see if a claim to access to common property by homeless is the same as the claim to a place to live. Both these claims arise out of a) the need of the homeless to have a place to do what he wants to do and b) the working of property rule which ensures 'a'.

The duty component in case of homeless can be,

- Positive/Protective action in the form of creation of common property like toilets and shelters
- Aid for house or aid to enable the homeless to buy/rent a house.
- Non-interference in pursuit of a private house.

It is clear that alone '3' does not ensure a house for the homeless. '1' would ensure access to toilets in the vicinity of where the homeless goes shelter to sleep in the night and protection against vagaries of weather. However, Freedom to be at a place at anytime one wishes to and do as one wishes to would not be ensured by '1'. What '1' provides is protection against the interference created by our property rule. '1' represents a protective duty generated out

6 Jeremy Waldron 'Homelessness and the Issue of Freedom' in UCLA L. Rev., vol. 39, 1991-1992, pp. 302-21.

7 Ibid.

of the non-interference duty (against systemic forces that ensure homelessness) that should have been met. '1' is located in the space of negative liberty, and is providing a charitable aid, a consol for the homeless for his state of affairs. If the pursuit of the positive liberty/freedom of the homeless is to be respected the primary duty of aid which ensures positive liberty is not '1', although '1' is also a positive action. The primary duty of aid is represented by '2'. Even if we ensure '1', the need of '2' would still remain. This distinction between these two positive actions helps in understanding the nature of positive claims. '1' is a positive action, but it is primarily a negative duty. '2' is what ensures positive liberty and thus is the appropriate positive duty. This analysis helps in understanding that there could be two different positive actions (and maybe many more in different cases), interferences in a situation, and both might have different effects on positive liberty of the individual. The duty to provide community toilets and shelter here does not promote positive liberty of the homeless and thus is not the ideal duty. This indicates towards multiplicity of positive duties and also towards a possibility that a particular positive action might not be promoting positive liberty. The positive action that promotes positive liberty is the one that can be thought of as the most desirable.

When standard threat has unknown source or the origin is systemic and thus the helplessness that is caused or would be caused will require positive action, the duty would again have two components,

- Aid at the point of helplessness
- Protection to ward-off helplessness in the future

To see how this distinction would help us in understanding particular rights, let us try and work out the nature of right to food, which according to Shue would be a subsistence right. The right to food would have three components of duties,

- Aid in the form of food or aid to enable a person to get food
- Protection against falling into a situation where there is not enough food

- Non-interference/avoidance in anybody's quest for food

It is evident that there are both positive and negative components in the right to food scenario. One could agree with Shue that the distinction between negative and positive is not well founded. But, a look at what are the primary duties with respect to right to food would make it clear that the contentious distinction might very well have some basis to it. The primary duty in right to food is positive in nature, as without performing the duty 'a': Aid in the form of food or aid to enable a person to get food, all right to food claims cannot be met. The negative part of duty namely 'c' is not specific to right to food, but is an overarching duty related with negative liberty, which can possibly be thought of as consisted in the desire of rule of law. And as performing only 'c' would not feed the right claimants, 'a' and 'b' can be thought of as primary duties. As these are positive in nature, right to food can be termed as primarily positive in nature. One could argue that performing 'a' alone would not ensure that food would be ensured for the claimant as interference in the quest of food is still open. But, in response it can be argued that without 'a', 'c' alone cannot ensure right to food, moreover, it should be understood that the matter of access to food lies in negative liberty space to the extent of performance of 'c'. The inability of a large number of people to have the resources to access food takes the right to food claim into the positive liberty space. It is a matter of right which is location, context specific. The need of 'c' is now contingent upon performance of 'a', i.e. the need of non-interference would arise, when after aid claimants have food to access.

While we have some basis to look beyond Shue's claim that there is no distinction between positive and negative rights, one can further strengthen the argument by pointing out the pure cases of positive rights. Right to food had some negative duties as well. The negative liberty space is quite overarching and a lot of positive rights would have one component of negative duties in them. But there are instances where negative duties are completely absent. They are cases where the standard threats are either systemic or natural. This could be instances of natural disasters, medical emergencies

etc. In case of a earthquake the primary duty is that of aid, so is the case with an accident victim's claim to emergency medical care.

It is not just the case that positive rights only have negative duty component in them. Even when negative liberty space is quite pervasive, we have instances of negative rights where a part of component of the duty is positive in nature. To clarify let us look at the example of right of expression. The components of correlative duty could be,

- Avoidance/non-interference in expression or pursuit of expression
- Non-interference generated protection/aid against any interference
- Pure aid against any disability to express oneself

Here performance of 'c' alone cannot ensure right of expression as even when a person is given aid to be able to express one self, he/ she could be interfered upon.

With respect to 'b', it seems that it is a secondary positive component of a primary negative duty as it arises out of the duty of non-interference. Onora O'Neill calls it a second order obligation which has to be allocated to some institution of law enforcement to ensure that the right is enforced.[8]

It can be ascertained that 'a' and 'b' with a primarily negative nature of duty make the right of expression primarily a negative right. And it is also seen that any positive action which is to protect a negative right and is seen as important for enforcement of negative right might not actually be related with positive right. It is actually a second order duty which exhibits itself as a positive act. The difference between positive duty of a positive right and positive duty related with negative right is that the former is for ensuring positive liberty and the latter for negative liberty marked by non-interference. The

8 Onora O'Neill, 'Dark side of Human Rights' in International Affairs, vol. 81. no. 2, London, 2005, p. 428.

positive action in form of law enforcement is to ensure that the negative liberty of the individual is not tampered with.

I further take up two more examples where one has a component of negative duty and other is purely positive. These are right to healthcare and right to medical care in cases of emergency. The right to healthcare could have following components of duty,

a) protection against externalities that diminish stock of health

b) Aid in the form of healthcare facilities or for enabling access to healthcare facilities

Here 'a' represents the negative component of duty and 'b' represents a positive component. Even if 'a' is ensured, 'b' might be required, as protection against externalities that diminish stock of health is not foolproof and there are other sources also which create instances where health care is required. It is clear that 'b' is the primary duty and thus the right to healthcare is primarily a positive right.With respect to right to medical care in cases of emergency, the duty set might look like,

a) Aid in the form of medical care instantly

b) Protective duty to diminish occurence of medical emergencies

Again, 'b' alone would not ensure that 'a' is not required. Aid in the form of medical care is the primary duty and thus right to medical care is a positive right.

If we extend the same analysis to a claim to well functioning traffic signals, we can see that this claim generates a primary duty of aid and not of non- interference. Everybody driving on the road seek some mechanism through which it can be ensured that at a crossing of roads, the traffic is smooth. The primary thing here for a third party is not to sit back and perform non- interference with the traffic movement, but is to intervene and ensure smooth run. This primary aid duty is visible when there is a traffic jam in a hilly area or in a city. Authorities primarily have to aid and guide the traffic flow to ensure a smooth run. Following this logic, primary duty of aid to ensure that helplessness in the form of traffic jam

is averted ensures that traffic management or smooth functioning traffic lights are a positive claim.

Conclusion

The point been attempted here is that with respect to Shue's distinction between subsistence and security rights and the claim that there is not a clear distinction between positive and negative rights, one needs to see that positive actions in the case of security rights arise out of the primary duty of non-interference. To ensure that no body interferes with a person's security, the state provides aid. The primary duty here is not aid, but non-interference. Thus there is a clear area of negative rights that are lying out there.

On the other hand with respect to subsistence rights, the three kinds of duty that Shue enumerates, namely aid, protection and avoidance, work to ensure that a particular person doesn't reach a situation where she might not have means of subsistence. If that person reaches that situation, the duty then would be of aid, of enabling. The duty of avoidance, protection is carried out to ward off this situation; these duties arise from the primary duty of interference or of aid. If helplessness is in present, it is met with aid; if it is prospective it is warded off through protection and/or avoidance.

To establish that there are distinct positive and negative rights is important to ensure that the negative rights which were largely founded to keep the state at a distance, retain their place and positive rights make their place as an instrument to pull out claimants from situations of helplessness which might not be resolvable anymore in the negative liberty space with the help of non-interference or non-interference generated positive claims, and whose resolution might be important for ensuring the positive liberty of the claimant.

There are two more important lessons that need to be recalled. The example of the negative right to expression reveals that there is difference in a positive action which is for enforcement of law that protects a negative right and a positive action which is for promotion of positive liberty. The positive duty undertaken by

State of protection of negative liberty is distinct from the positive duty say of making provision of food articles for the hungry. This difference beckons us to look into the conception of positive liberty and negative liberty. The second learning is that two positive actions might bring a different kind of impact on the liberty of an individual. The provision of toilets and shelter for homeless gives them a limited liberty space, while the provision of a house might give them a wider liberty space. One positive action might be more desirable compared to the other. These two learning point out that there is a strong link between positive rights and positive liberty and thus it can be argued that positive rights are not just instrumental in better utilisation of negative rights but are possibly also a source of positive liberty themselves, thereby being valuable intrinsically.

At last there seems to be a clear category of negative rights, and there seems to be a clear distinction between the positive duty within the negative liberty space and a positive duty pertaining to a positive liberty space. On the basis of these findings one can possibly look beyond the claims that all rights are positive or all rights have both positive and negative duties.

From Maestro to Ayyasamy: The Journey of Arbitrability of Fraud

Girish Deepak*& Almas Shaikh**

Introduction

Arbitration in India has gained popularity since the incorporation of the UNCITRAL Model Law, 1985 by means of the Arbitration and Conciliation Act, 1996, ("the Act"). However, ever since this Act was promulgated, the Supreme Court has been struggling with the dilemma of surrendering its jurisdiction in favour of private dispute resolution methods and balancing the impact this would have on the administration of justice. These deliberations have manifested themselves in the form of a two sided attitude of the Supreme Court towards the practice of Arbitration and recognizing the powers it vests in Private Tribunals thus constituted.

This approach is evident in how initial judgments by the Apex Court, subsequent to the Arbitration Act 1996 such as Bhatia International v. BulkTrading S.A. and Anr.[1] Venture Global Engineering v. Satyam Computer Services Ltd.[2] and ONGC Ltd. v. Saw Pipes Ltd[3] made Court interference in Arbitration matters easier by increasing judicial overreach. However, over time this approach eroded in favour of a more pragmatic and accepting outlook towards arbitration, once Courts realised that this could finally be the solution to the unending backlog of cases. This shift in position of the Courts was exemplified in the judgment of Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Ltd.[4] (or BALCO).

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1 AIR 2002 SC 1432.
2 AIR 2008 SC 1061.
3 (2003) 5 SCC 705.
4 (2012) 9 SCC 552.

The date of this landmark decision, 6th September 2012, has since been termed the *de facto* beginning of India's pro-arbitration movement. While the Legislature has furthered this movement with the recent Amendment,[5] Courts clearly continue to struggle with the idea of arbitration and the endless fields of law in which it could possibly be applied. The question on every Judge's mind is where to draw the line in such a scenario.

This very pertinent question of jurisdiction of Arbitral Tribunals is formally termed as Arbitrability. This essentially deals with the core issue of the extent to which the Arbitral Tribunal can derive power from the contract agreed between the parties and the validity of any such reference. While most of the issues of the Jurisdiction of Tribunals are fact specific, given the nature and scope provided for arbitration by the contracting parties, there are some areas which have been barred from private adjudication itself.

This has resulted in the issue of subject matter jurisdiction of an Arbitral Tribunal being hotly debated in the Arbitration community due to its potential ramifications on the Autonomy of Parties and the limits it imposes on Arbitration as a form of effective dispute resolution. This debate manifests itself on the rivalling forces of Freedom to Contract which is the foundation pillar on which the field of arbitration itself is based, against subject matter restrictions by Courts under the veil of this being contrary to Indian public policy.

This very question is sought to be answered in this paper, in the context of arbitrability of fraud. This choice of the authors rests upon the fact that while most issues of arbitrability are to an extent settled, this particular issue has led to several conflicting judgments by the Hon'ble Supreme Court merely in the past six years.

Arbitrability in India

The Arbitration Act of 1996, which is the governing statute of arbitration in India, provides minimal guidance in the issue of arbitrability. The provisions of § 8 and § 45 which were meant to

5 The Arbitration and Conciliation (Amendment) Act, 2015.

deal with the Court's power to rule on arbitrability, in the context of domestic and foreign arbitrations respectfully are worded very broadly. As a consequence, the Courts have had to intervene and interpret various issues, at the cost of significant time and money of the parties, the very thing they wished to avoid by choosing arbitration in the first place.

Position prior to Ayyasamycase

The Court first established its position with respect to arbitrability comprehensively in the landmark judgment of Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.[6] In this case the Court essentially sought to define jurisdiction on the basis of the conflicting principles of *rights in personam*and *rights in rem*.

P.J. Fitzgerald has tried to define and differentiate between these rights.[7] A *right in rem* is an interest against the world at large, i.e. it avails against an open or indefinite class of people; a *right in personam* is an interest protected solely against determinate or specific individuals. This classification is necessary in arbitration to distinguish whether the matter being adjudicated relates only to the parties to the contract, or a larger audience. Due to the concept ofprivity of contract,[8] which mandates that a third party is not entitled to sue under the contract, only the former is allowed.

As per these principles the Court decided that:

1. According to§7 of the Arbitration and Conciliation Act which defines an arbitration agreement, an arbitration clause is an agreement in the sense of §2(e) of the Indian Contract Act.
2. Arbitration, as a field, could only apply to cases of *rights in personam* as arbitration itself was a creature born out of contract, its power being restricted between the parties. Thus, arbitration could not adjudicate on the rights of others, i.e. *rights in rem.*

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6 AIR 2011 SC 2507.

7 P.J. Fitzgerald, Salmond on Jurisprudence 235 (12 ed. Universal Law Publications) (2004).

8 Tweedle v. Atkinson, [1861] EWHC J57 (QB).

The decision of this case had great implications on the arbitrability of fraud as Courts attempted to classify it either as a *right in rem* or a *right in personam.* The chain of cases began with Maestro Engineers v. N. Radhakrishnan[9], in which the Apex Court took an authoritative stand and declared fraud to be an inarbitrable subject due to its complex nature, requiring the same to be adjudicated by Courts. This decision received harsh criticism and was held to *per incuriam*by the subsequent decision of Swiss Timing v. Organising Committee, Commonwealth Games[10]. However this decision was of a lower bench and since it was rendered under §11 of the Act, lacked precedential value.

This led to confusion once again as to the nature of fraud and its arbitrability. This was partially resolved in the case of World Sports Group Mauritius v. MSM Satellite,[11]where the Supreme Court clarified that fraud was indeed arbitrable in the context of foreign arbitrations under § 45 of the Act. This decision however disregarded the *Swiss Timing* decision even though it was rendered in the favour of the position taken by the Court.

Despite this, domestic arbitrations, conducted in India, were still barred to adjudicate upon matters of fraud.

Criticism of the N Radhakrisna*n* case

The judgment in N. Radhakrishnancompletely ignored the principle of *kompetenz – kompetenz*which recognises the inherent power of the Tribunal to rule on its own jurisdiction and powers, given support by § 16 in the Act. In this light it was held that the role of Courts under § 8 was too restricted to decide on a preliminary basis whether a valid agreement existed and then make a reference to the Tribunal. Thus, the role of the Court under § 8 was to merely play a supportive role while leaving the actual adjudication of Arbitrability to the Tribunal. This is further supported by the *Doctrine of Separability*, as per which even if the agreement containing the arbitration clause is itself *void ab initio,* the arbitration clause,

9 (2010) 1 SCC 72.
10 AIR 2014 SC 3723.
11 AIR 2014 SC 968.

taken in isolation, constitutes a separate agreement and will hence survive. This leads inevitably to the conclusion that in applications under § 8, unless for overwhelming public policy constraints, a reference to arbitration must be made so that the Tribunal may decide upon the issue and determine its own jurisdiction.

Furthermore, the Radhakrishnan judgment had failed to consider the viewpoints brought forth by the *ratios* of Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums[12] andP. Anand Gajapathi Raju v. P.V.G. Raju (Dead),[13]both of which emphasised on this perfunctory role played by Courts and the mandatory nature of § 8 which made it essential that once an arbitration agreement is established the matter must be referred to arbitration without fail. This decision has unfortunately been termed as judicial overreach and has not been followed or cited with approval in any subsequent matter, a fact which is supported by it being a § 11 matter, which has no precedential value in terms of SBP Ltd. v Patel Engineering Ltd.[14]

Post- Ayyasamy caseposition

When things stood so, the Supreme Court was led to create a distinction between *fraud simpliciter* and *serious allegations of fraud,* in an attempt to resolve this conundrum, in the case of Ayyasamy v. Paramasivam[15]. This distinction became important due to fraud, as a means to avoid arbitration contracts. This was done by creating, at times, even meritless allegations of fraud in matters which could potentially be referred to arbitration, merely in the hopes of delaying the inevitable outcome in by counsels with a weak case.

The approach adopted by Ayyasamy *case* was indeed laudable as they upheld the right of parties to adjudicate on simple issues or mere allegations of fraud even by means of arbitration, reserving only the serious cases for Court adjudication. This distinction was based on the need for more prudent and careful examination in

12 (2003) 6 SCC 503.
13 (2000) 4 SCC 539.
14 (2005) 8 SCC 618.
15 AIR 2016 SC 4675.

cases of serious allegations of fraud, which the Court believed was outside the purview of arbitral tribunals.

The Court however erred in this regard, as while the argument that standard rules of evidence are not followed in arbitration is very well sustainable, there is already ample provision in the form of § 27 of the Act which allows for Court assistance in taking of evidence.[16] Thus, it is not exactly necessary that Courts intervene at the slightest hint of fraud in any dispute between parties, who by agreement had chosen an alternate forum in Arbitration.

Comparative analysis with other jurisdictions

The stance of the common law systems, i.e. both English Law and the US, with regard to arbitrability of fraud has evolved from one of wary restriction to acceptance over the decades, which is similar to the treatment witnessed in India but slightly ahead of the curve. It is thus imperative for one to understand the stance taken by these jurisdictions so as to enable a similar growth in the Indian jurisprudence on arbitrability of fraud.

The English Arbitration Act, 1950 was not open towards the idea of arbitrability of fraud by the tribunals. It provided that the court could revoke the authority of a tribunal to deal with the claims of fraud and determine those claims.[17] But later, in the 1996 Arbitration Act, a major shift was seen as the Arbitration Tribunals in England were given substantive jurisdiction to consider and rule on issues of fraud.[18]

This prodigious change was brought about through various case laws that presented themselves before the Courts. The argument of Doctrine of Separability[19] was brought about in the case of *Heyman* v. *Darwins Ltd.*[20] In this case, it was held that the arbitration clause would survive the repudiatory breach by one of the parties. The *ratio* further sought to differentiate between

16 The Indian Arbitration and Conciliation Act § 27 (1996).
17 The English Arbitration Act § 24(2) (1950).
18 The English Arbitration Act § 107(2) (1996).
19 The English Arbitration Act § 7 (1996).
20 [1942] 1 All ER 337.

the primary and the secondary obligations which arose out of a contract, the primary obligations being to follow the agreement and the secondary obligation to remedy any losses and applied those principles *ipso facto*to arbitration.

The liberal attitude of the court was expanded in the case of Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance.[21] This case brought forth the fallacies in the *ratio*of the earlier case. Although the question of fraud or initial illegality was capable of being referred to arbitration, if the validity of the arbitration clause itself is attacked the issue cannot be decided by the arbitrator.[22]

A recent case which affirmed this position was Fiona Trust & Holding Corpn. v. Yuri Privalov&Ors.[23]It held that arbitration agreements which speak of disputes "arising out of" or "arising under" the contract must be given a liberal interpretation. This case equated bribery to fraud, and held that unless such bribery relates directly to the arbitration clause, the clause would survive and would be eligible to be decided upon by arbitrators.[24]The House of Lords reiterated this position in the Premium Nafta Products Ltd. v. Fili Shipping.[25]

In the American legal system also, it was seen that from the 1950s to the current scenario, an evolution of attitude took place with regard to arbitrability of fraud. The law which governs the American position is the Federal Arbitration Act.[26] It looked into the arbitrability of allegations of fraud and stated that the kind of fraud perpetuated has no bearing on the ultimate arbitrability of the dispute.[27]

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21 [1993] 1 Lloyd's Law Reports 455.

22 *Id.*

23 [2007] 2 Lloyd's Rep 267.

24 Herbert Smith Freehills, Fiona Trust v Privalov – the English Court of Appeal strikes a blow in favour of arbitration, Lexology (Jan. 31, 2007), http://www.lexology.com/library/detail.aspx?g=e2a24044-8288-4875-8f7e-8f7d7b8d6eb3 last seen on June 27, 2017.

25 [2007] UKHL 40.

26 The United States Arbitration Act, 9 USC § 1 et seq. (1925).

27 R. M. Perez & Associates v. Welch, 960 F.2d 534, 534 (1992).

In 1957, the NY Court of Appeals held in the Wrap-Vertiser Corp v. Plotnick[28]that an arbitration clause was not separable from the contract. But this outlook changed drastically and in favour of empowering the arbitrators. The various courts, including Circuit Court[29], Court of Appeals[30] and even the Supreme Court[31], held that an arbitrator could decide all issues of fraud that fall within the ambit of the subject matter of the arbitration agreement as long as the making of the agreement itself is not befouled by it. Both US Federal Law and the case laws have thus aligned themselves, more or less, with this position.

Hence it is conspicuous that the common position in UK and US is that the allegations of fraud can be dealt with by arbitration, unless the tribunal asks itself as to whether the alleged fraud goes to the validity of the arbitration clause itself.[32]

All these cases, both in US and UK, looked into the dual principles of *Kompetenz-Kompetenz*and *Doctrine of Separability*. Another theory that has been cited in support of the survival of the arbitration clause under fraud allegations is the principle of estoppel. This doctrine states that if the parties had agreed to resolve the disputes through arbitration, then they were estopped from going back on their words.[33]

This principle, quoted initially to reinforce what parties have already contractually agreed, has since been further expanded to

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28 143 N.E.2d 366 (N.Y. 1957).

29 Robert Lawrence Company v. Devonshire Fabrics, Inc, 2d Cir 1959; Weinrott v. Carp, 298 N.E.2d 42 (N.Y. 1973).

30 MW Kellogg Co. v. Monsanto Chemical Co. (NY App Div 1959); Stellmack Air Conditioning & Refrigeration Corp v. ContrsMgmt Sys of NH Inc. (NY App Div 2002).

31 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 US 395 (U.S. S.Ct. 1967); Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440 (U.S.S.Ct.2006); Southland Corp. v. Keating, 465 U.S. 1 (1984).

32 Philip Clifford, Oliver Browne & Marc Suskin, Convergence between English and New York Law, 2 Global Arb. Rev. 34, 34-35 (2013), https://www.lw.com/thoughtLeadership/convergence-english-and-new-york-law-fraud.

33 *In re* East Meadow Sanitation Serv., Inc., N.Y.L.J., Feb. 25, 1958, p. 13 (Sup. Ct.).

even apply to third parties which seek to gain benefits of a contract.[34] Thus, if a party sees to obtain any benefit under a contract, it cannot subsequently escape from obligations under the same such as the obligation to arbitrate disputes. This principle would be equally applicable in the case of fraud, where once parties agree to arbitrate such matters, they should not be allowed to later renege on the same.

Oil Platforms Solution

In the case of arbitrability of fraud, it is clear that while a distinction is to be drawn between serious allegations of fraud and fraud *simpliciter*, there is a lack of a clear procedure laid down by Courts on how to accomplish that. One possible solution, which has been discussed by Scholars is the adoption of a prima facie test for jurisdiction, similar to the Oil Platforms Test, as propounded by Justice Higgins in her opinion in the *Oil Platforms Case*.[35]

As per this procedure, the Petitioners' version of the facts (in this case the person alleging the fraud) would be accepted *pro tem,* i.e. without being contested, and on that basis the Court would ascertain whether it has the requisite jurisdiction to address the issue. In the case of fraud, especially where there is a need to create a distinction between serious and simple allegations (a tool to evade arbitration), this could present a structured procedure to establish jurisdiction. The Court would thus essentially accept the Petitioners' version of the facts and then proceed to decide whether they constitute serious or simple allegations of fraud, accepting jurisdiction only in the former case.

It is necessary to emphasise that as a matter of principle, the Court in the Ayyasamy case has not held that a mere allegation of fraud will exclude arbitrability. The burden must lie heavily on a party which avoids compliance with the obligation assumed by (i.e.to submit disputes to arbitration) to establish that the dispute is not

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34 *In re* Kellogg, 166 S.W.3d at 739.

35 Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6) (separate opinion of Judge Higgins).

arbitrable under the law prevalent. In each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. It is only where there is a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out in N. Radhakrishnan may come into existence.

Though in theory, the principle of the Oil Platforms case seems applicable, the same cannot be said to be useful in practicality in the Indian scenario. As previously mentioned, it is possible for the parties to dress up facts and prima facie make it appear to be serious cases of fraud. In such a situation the rationale behind this principle will be negated.

Therefore, it is better for the courts to rely on the principle of estoppel and ensure that if the parties have once agreed to approach the Arbitral Tribunal, they must do so.

Critical analysis

A bare perusal of the UK and US laws pertaining to arbitrability of fraud shows that there is no real obstaclepreventing arbitrators from looking into these issues as long as it doesn't involve questions regarding the validity of the arbitration agreement itself. But in India, throughout the decisions, issues of fraud have been swaying between arbitrable and non-arbitrable, until the Ayyaswamycase settled the matter.

While this latest judgment is indeed well intended and *prima facie* seems like the most elegant solution, the result has only been more uncertainity in the arbitrability of fraud. This arises from the lack of a clear definition of serious fraud and its distinction form fraud *simpliciter*, which in the words of the Court is better left to a case to case basis adjudication as it was impossible to create an exhaustive list. Another area of concern is mixed questions of serious fraud and fraud *simpliciter* as this issue would naturally fall under Court dominion in accordance with the dicta of Sukanya Holdings Pvt.

Ltd. v. Jayesh H. Pandya and Anr.,[36]which specifies that when issues are partly arbitrable and partly non-arbitrable, there can be no bifurcation.

Conclusion

Although since *BALCO* a clear pro-arbitration stance has emerged, the Judiciary must move past their personal prejudices even further and recognize that arbitration is without a doubt the only way out from the clogged up judicial system. This system in fact has the potential to be even more efficient in dispersing justice, where issues involving specific expertise are involved. The qualifications of arbitrators could especially ensure that their understanding of specific issues of fraud could exceed those of judges themselves. One such example could be in financial misappropriation cases, where the expertise of an accountant could be invaluable if mixed with that of a retired judge, ensuring both legal and financial compliances.

However, the position as it stands today is that there has merely been a shift from the question *"is fraud arbitrable?"* to *"what is serious fraud?."* This has practically only changed the terminology. While the Ayyasamy decision states that matters relating to fraud can be arbitrable, an unnecessary distinction is made between fraud *simpliciter* and serious fraud. This plants a seed of doubt in the mind of the judiciary as to where should the line be drawn between the two types of fraud. An unwarranted amount of energy would be spent distinguishing between these categories, which only acts as a deterrent to the advancement of arbitration in India as well as a burden on an already overworked judiciary.

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36 AIR 2003 SC 2252.

Sustainable Development Goal andEradication of Poverty: Issues and Challenges

KumariNitu*

Introduction

The Sustainable Development Goals(SDGs) were a step ahead in the direction of poverty alleviation. When the Millennium Development Goals(MDGs) were on the verge of its completion, the international community took the vision of Sustainable development to protect the environment from further exploitation and to preserve the resources for future generations. The proper management of the available resources to fight against poverty was also on the agenda. Earlier the focus of sustainable development was on environment alone but soon it was realised that social and economic problems if remains unsolved can pose a great challenge to the environment. Social and economic problems such as poverty are not only the cause but also the consequences of many problems. To have a holistic idea ranging from growth to sustainable development, the journey from growth to development and then to sustainable development has been dealt so that the true intent of the 'sustainable development' can be reflected out.

Difference Between Growth and Development

The reason for incorporating the difference between growth and development is to emphasize on the fact that why the word sustainable development was chosen to represent the need for future developmental process and not sustainable growth. Growth means to grow in size whereas development means to expand.[1]This

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1 Harman E. Daly, *Towards some operational principle of sustainable development*, 2 Ecological Economics 1,6 , (1990), available at: http://s3.amazonaws.com/academia.edu.documents/32257912/herman_daly_.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=149027225

implies that growth is vertical phenomenon whereas development is horizontal process. Growth is also viewed in context of quantitative increase whereas development is increase in quality.[2] The basic difference between growth and development indicates the intent behind the adoption of sustainable development goals and not sustainable growth goals. Growth implies increase in size by adding or accumulating material things but then again that may lead to unequal distribution of wealth. Development on the other hand focuses on realization of potential.[3] There is no certainty about the existence of material wealth but once a person realizes his potential, he becomes a driving force in development. So, the whole idea of development is to retain the quality so that it can last long even with the exigencies of the time.

With respect to the first goal under the SDGs which is to eradicate poverty in all its forms and everywhere, it needs both growth and development to fight against poverty in the long run. Though economic growth is very much needed but to think that growth alone will suffice is not true completely.[4] Unequal growth may lead to accumulation of wealth in few influential hands and the rest of the population who are not capable enough will be left behind. The society will then revert to the era where the survival of the fittest concept prevailed. This is an era of democracy and every person has an equal right over their resources. If not a luxurious life, they should not be deprived of the basic necessities of life which the concerned government should make them available. Development on the other hand will take into consideration everyone since it is not a vertical phenomenon and will cover all within its horizontal ambit. It ensures equal distribution of resources and wealth to all without distinction.

0&Signature=v6hHUi2SuGzYA8SE7D8IAKq9JaI%3D&response-content-disposition=inline%3B%20filename%3DCommentary_TOWARD_SOME_OPERATIONAL_PRINC.pdf, last seen on April 23, 2017.

2 Ibid.

3 Ibid, at 4.

4 Ibid, at 6.

Difference Between Development and Sustainable Development.

The idea of development has a wider connotation than that of growth (as stated above). It implies that the policies of the nation which affect millions of people should be accessible to all and not only to few elites who are in position to avail the benefits of the government.[5] Development should be for all. However the process of development failed in taking everyone and specially the poor within its ambit and whatever development was made, it had its inclination towards exploitation of resources to make the lives of the present generation better. This led to the vision of sustainable development so that the future of both the present and next generation can be secured. The problem of over exploitation of resources and narrow scope of development gave birth to the concept of sustainable development. Development did not mean growth in terms of economic increments and rise in GDP alone rather it had a wider connotation which was added later on.[6]It was realised that even the rich countries like Europe, North America and Japan have failed to ensure equity and social justice within their respective States.[7] The objective of development in economic terms was to solve the issues of livelihood across the world but there were high inequalities despite the economic progress made by various countries.[8]

With the advent of time, various scholars started working in the direction of widening the concept of development. In this regard, the work of Mahbub Al Haqamong others in the late 1970's has been instrumental.[9] They broadened the concept of development by including education, nutrition, health, sanitation and employment

5 Jonathan M. Harris, *Basic Principles of Sustainable Development*, G-DAE Working Paper No. 00-04 Tufts University1, 9(2000), available at: http://ase.tufts.edu/gdae/publications/working_papers/Sustainable%20Development.pdf, last seen on 22/4/2017.

6 Ibid.

7 Ibid, at 6.

8 Ibid, at 11.

9 Sanjay Baru, *MahbubulHaq and Human Development: A Tribute,* 33(35) Economic and Political Weekly 2275, 2279 (1998), available at: http://www.jstor.org/stable/4407121, last seen on April 23, 2017.

for the poor.[10]Apart from this, development came with its own list of repercussions which harmed the environment at large. Hence, the quest for having a harmless development became strong. This led to the acceptance of the concept of sustainable development which could protect and preserve the environment and save it from further degradation and secure it for the coming generation for their better survival as well.[11]

The concept of sustainable development assures that whether the present pattern of development is worthy of being carried forward and passed to the next generation.[12] If it is not, then it is neither development nor sustainable.[13] The development discourse till date has been dominated by the western model which perpetuates and aggravates the inequality and focuses more on modernization than on anything else.[14] But the time is ripe now for a discourse which can view development from the eyes of poor, underdeveloped and developing worlds whose only aim has been to fulfil their basic needs of life such as food, clothing, shelter etc. Education, health, sanitation is their second priority, though it is equally important.

History of Sustainable Development

There was already a demand for sustainable development owing to the indiscriminate economic growth. Researcher started raising concern that whether the kind of life style being lived by people in our era is good enough to be passed to the next generation.[15] In other terms, whether there will be enough resources left to be passed on to the next generation to live the same lavish life as effluents are living now or will they be left with something on the earth to survive owing to the increasing pace of depletion of resources.[16]

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10 Supra 5.
11 Supra 5.
12 Ibid, at 8.
13 Ibid, at 21.
14 Ibid, at 18.
15 UNDP, *Rio+20 Sustainable Development Summit* (2012), available at: http://www.undp.org/content/undp/en/home/presscenter/events/2012/June/rio-20-sustainable-development.html, last seen on 22/4/2017.
16 Ibid.

It also focused on the indiscriminate allocation of resources. It was indiscriminate in the sense that it led to accumulation of wealth in one hand and deprived others to even basic necessities of life.[17] People living in least developed countries lack all basic amenities of life while the developed ones are having in abundant.[18] But then again being a developed country does not assure that there is no poverty as the same has been proved by Arjun Sengupta in his mission report to United States of America.[19] Inequality in allocation of resources is evident not only among nations but within nations as well.[20] A development process which is not sustainable brings more dearth and miseries than prosperity.[21] This is evident from the fact that even though the world has made unprecedented economic growth, more than 700 million people are still living under the aegis of extreme poverty.[22]All these factors led to the evolution of a sustainable pattern of development which can not only strive for a life style that can ensure sustainability for future generations but at the same time should reduce the growing inequalities both within and among nations.[23]

The term sustainable development first came out as a synthesised version from the conflict of ideas between environment and development which arose during the United Nations Conference on Hu-

17 Supra 5.

18 T. Strange and A. Bayle, *Sustainable Development: Linking Economy, Society and Environment,* OECD, (2008), available at:https://books.google.co.in/books?hl=en&lr=&id=IgbWAgAAQBAJ&oi=fnd&pg= PA 8&dq=sustainable+Development:+Linking+Economy,+Society,+ Environment+(Oecd+Insights&ots=IBEZ7U-XEq&sig=f3rKGV9n_ UUDWwr90cC8Jb4XZOk#v=onepage&q=sustainable%20 Development%3A%20Linking%20Economy%2C%20Society%2C%20 Environment%20(Oecd%20Insights&f=false, last seen on 17/4/2017.

19 Arjun Sengupta, *Extreme Poverty and Human Rights: A Mission Report on the US*, 42(14)Economic and Political Weekly1298,1307 (2007).

20 Supra 18.

21 Ibid.

22 Ibid, at 23.

23 Ibid, at 24.

man Environment held in Stockholm in 1972.[24]It then came to be used by the International Union for Conservation of Nature and Natural resources(IUCN) when it presented the World Conservation Strategy in the year 1975.[25] Though it was used in the context of conservation of natural resources to achieve sustainable development, it paved the way for sustainable development to be used in a wider perspective. It then again came to be used in the year 1982, in the Stockholm Plus Ten Conference, Nairobi which initiated the proposal to establish a World Commission on Environment and Development.[26] The commission to develop sustainable development in environmental context was formally established in 1983 under the chairmanship of Gro Harlem Brundtland in 1983.[27]The commission submitted its final report in the year 1987 wherein it mooted the term "sustainable development" in concrete terms.[28] In June 1992, Rio Conference on Environment and Development came up with 900-page document known as Agenda 21which included in its chapters an initiation towards sustainable development[29]. It was again reiterated by the United Nations Conference on Sustainable development to make the idea of sustainable development a reali-

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24 Umberto Pisano et.al.,*The Rio+ 20 Conference 2012: Objectives, Processes and Outcomes*, 25 ESDN Quarterly Report, (2012), available at: http://www.sd-network.eu/quarterly%20reports/report%20files/pdf/2012-June-The_Rio+20_Conference_2012.pdf, last seen on 23/4/2017.

25 S. M. Lele, *Sustainable development: A Critical Review,* 19(6), World Development 607-621 (1991), available at: https://edisciplinas.usp.br/pluginfile.php/209043/mod_resource/content/1/Texto_1_lele.pdf; last seen on 23/4/2017.

26 Supra 24.

27 Ibid, at 8.

28 H. E. Daly, *Towards some operational principle of sustainable development*, 2 Ecological Economics 1,6 (1990), available at: http://s3.amazonaws.com/academia.edu.documents/32257912/herman_daly_.pdf? AWS AccessKeyId=AKIAIWOW;(YYGZ2Y53UL3A&Expires=1490272250&Signature=v6hHUi2SuGzYA8SE7D8IAKq9JaI%3D&response-content-disposition=inline%3B%20filename%3DCommentary_ TOWARD_SOME_OPERATIONAL_PRINC.pdf; last seen on 23/4/2017.

29 Supra 18.

ty.[30] The term sustainable development was also mentioned in the Copenhagen Declaration(1995) which called on for the need of sustainable and equitable development.[31]Despite a number of conferences and summits reiterating the concept of sustainable development time and again, the desired results were not manifest because of the lack of commitment on the part of the national governments for proper implementation of the plan of action.[32] Hence, the World Summit on Sustainable development was convened in the year 2002 in Johannesburg to strengthen and refresh the commitments made by the countries of the world for sustainable development.[33]

Definition of Sustainable Development

Sustainable development means the development that meets the needs of present generation without compromising the ability of future generations to meet their own needs.[34]

The definition focuses on the ability of the future generations to meet their needs, but to assure the same is not an easy task to achieve. It is not something which should be given to them as a matter of grant rather they have to earn it. The essence of sustainable development is that opportunities for development should be indiscriminate. If the people are given proper education, health facilities and life without any distinction then only they will be able to stand in competition with others to earn their livelihood on their own. There is also the necessity to ensure that the things which people have earned continue to exist so that they may be enjoyed. If there are no resources what will they survive on.[35]

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30 Supra 15.

31 Patrick Macklem, *Global Poverty and the Right to Development in International Law* (2013), available at: file:///C:/Users/Kumari%20Nitu/Downloads/fulltext_stamped%20(1).pdf, last seen on 2/5/2017.

32 Supra 26.

33 Ibid, at 38.

34 A/42/427, *Report of the World Commission on Environment and Development* (1987), available at: http://www.sswm.info/sites/default/files/reference_attachments/UN%20WCED%201987%20Brundtland%20Report.pdf, last seen on April 23, 2017.

35 Supra 15.

Sustainable development has a wider perspective and is not confined to the environment or resources alone. It includes within its ambit the legality of the policies also which can affect the credibility of sustainable development. So, the unprecedented and mismanaged development is also under the concern of sustainable development. Unplanned development has neither benefitted the nations nor the people residing within these nations. A developed country cannot sleep over economic growth it has made. There are more things to worry about such as the prevailing poverty among their masses. They need to rethink upon the policies that have led to unequal and discriminate economic growth. They cannot have relief assuming that since they are developed and rich, extreme poverty is not going to affect them. This is not the end of the story, people effected by extreme poverty gets their repercussions in the form of violent activities such as rioting, looting to fulfil their necessities and the worst form of deprivation is terrorism which is haunting every nation whether developed, developing or underdeveloped.

Manifestations of Sustainable Development

As stated above, sustainable development is more than preservation and protection of environment and resources. The other manifestations of sustainable development are as follows:

a) It is about integration: The development can ensure sustainability only when it is integrative. Integration means it should be inclusive and should include and benefit every stakeholder from the widest possible range whether nation or people and try to eliminate discrimination not only within nations but among nations as well.[36]

b) It is about distribution of economic gains to all and not to a few.[37] Every person whether poor or rich, contributes to the economy of a nation. This is done either through direct or indirect taxes or through the labour which he/ she provides in the service of the nation despite of the low wages paid to them and unshattered by the huge scams made by the rich and the effluent politicians.

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36 Supra 18.

37 Ibid, at 28.

c) TheBrundtland report describes it as unstatic and an ever-growing process[38] that will keep on adopting itself according to the requirement of the times and nations. It is a process whereby the nations could think of all the possible means to implement the best suited policies according to their circumstances pertaining to sustainable development.

d) It is a conceptual framework which tends to present an outline of an idea that can be more holistic and inclusive.[39] It has the potential to change the current policy on which the world at present is being run so as to bridge the gap of inequalities. The Johannesburg Plan of Implementation tends to work towards this by focussing on environment preservation and economic development simultaneously. But to go into the debate that which among the two is important is to get mislead and miss the value and importance of both the issues. Their importance can be assessed from the fact that every problem starts with people as the cause and end with people as the victim.[40] So it is very necessary to preserve the well-being of both environment and the people simultaneously.

e) It is an end goal[41] and more precisely should be the ultimate goal of all the nations otherwise the idea of one earth will not seem to be feasible. It was mentioned categorically in the Brundtland commission report that even though the world is not one but we should always remember that the earth is only one and it is high time that we should act in a manner that will have least possible damage.[42]

Earlier the focus of sustainable development was on environment alone but soon it was realised that social and economic problems if remains unsolved can pose a great challenge to the environment. So, the ambit of sustainable development was widened to include the issues of social and economic development as well.[43]In a nutshell, sustainable development includes everything within its ambit including people, environment, eradication of poverty, women

38 Ibid, at 32.
39 Supra 18 at 37.
40 Ibid, at 29.
41 Ibid, at 52.
42 Supra 34.
43 Supra 24.

empowerment, prevention of conflict and other vital components which can make life sustainable.[44]

Sustainable Development Goals

The sustainable development goals were enacted to act as a follow up to the Millennium Development Goals. It was not enacted to replace the MDGs rather it was built on the edifice of the MDGs.[45] It was meant as a way forward after the time period for MDGs came to an end.[46] It was only the time period that came to an end and not the spirit on which the MDGs were built.

The sustainable development goals owe its origin to the United Nations Conference on Sustainable Development. The preparation for it has started long back in the year 2012 when the then Secretary General of the United Nations Mr. Ban Ki Moon appointed a high level global sustainability panel. The panel issued a report recommending that it is high time for the nations of the world to adopt a set of goals to achieve sustainable development.[47] The objective was to yield a set of goals universal in nature which can at least work and produce an answer to the social, economic and environmental problems faced by the people. The idea soon acquired the appropriate ground for its growth because the world was already craving for sustainable development.[48] While under the MDGs it was more of a assistance from the developed countries to developing countries, this time the world has realised that it is mutual cooperation and coordination that is necessary to save the world from distortion. The pressures

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44 Supra 15.

45 Global impact, *The UN Sustainable development goals: Background*, available at: http:/charity.org/sdgs-background, last seen on May 4, 2017.

46 D.Griggs, *Sustainable development goals for people and planet*, 395 Nature305,307(2013), available at: https://sustainabledevelopment.un.org/content/documents/844naturesjournal.pdf, last seen May 4, 2017.

47 J.D. Sachs, *From Millennium Development Goals to Sustainable Development Goals*, 379 The Lancet 2206,2211 (2012), available at: http://www.grips.ac.jp/forum/IzumiOhno/lectures/2015_Lecture_texts/S16_From-MDGs-to-SDGs-Lancet-June-2012.pdf; last seen May 4, 2017..

48 Ibid.

on natural resources wereeffecting the people both at the national and global level, so the cooperation became inevitable.[49]Moreover, it was also contended that the present era is marked not with the challenges of what the rich countries should do for the poor but what all the countries should do on their part to save the world from global challenges such as poverty, natural disasters etc.[50]and therefore mooted the idea of common but differential responsibility.

Under the SDGs, there was an implied commitment to finish what has been initiated under the MDGs. Under the SDGs, the adoption of all the 17 goals was meant to be interconnected. It meant that the success of one goal will pave the way for the accomplishment of other goals. [51]

The United Nations Conference on Sustainable Development (UNCSD) popularly known as the Rio+20 conference came out with an international agreement "Brundtland Commission Report" which entailed the idea of the Sustainable Development Goals.[52] The goals were meant to direct the world in achieving the all-embracing idea of sustainable development post 2015.[53]The Rio+20 was a platform to make the idea of the goals a reality.[54]It was adopted on 25thSeptember, 2015 by the General Assembly Resolution 70/1 titled "Transforming our World: The 2030 Agenda for Sustainable Development".[55]

Transition from MDGs to SDGs

The MDGs were meant mainly for countries which were under-developed and poor and reposed the responsibility on the rich

49 Ibid, at 2206.
50 Ibid, at 2208.
51 UNDP, *Sustainable Development Goals- Background on the Goals*, available at: http://www.undp.org/content/undp/en/home/sustainable-development-goals/background.html, last seen on May 4, 2017.
52 Supra 45.
53 Ibid
54 Supra 15.
55 A/RES/70/1, *Transforming our World: The 2030 Agenda for Sustainable Development* (2015), available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1, 14/5/2017.

countries to help them out by technological and financial aid, solidarity and assistance. The SDGs on the other hand talks of common and differential treatment. It means that everyone should contribute in attaining these goals depending upon their capabilities.[56] Poverty which was a problem prevalent in poor countries alone is now a myth and studies have shown that even developed countries are affected by the prevailing poverty in their territory.[57]The MDGs made a great success in each goal that it had to achieve. But there was still the need to do something so that what has been initiated should be continued and finished successfully and do not get lost in the wake of several changes going around the world.[58] The preliminary note to the SDGs state that while remarkable achievement has been done in the direction of goals mentioned under MDGs, there is still more that needs to be done. The data on poverty and hunger shows that there are still considerable percentages of people who are still living under the aegis of poverty.[59]MDGs paved the way by incorporating these priorities into the format of eight goals and the lacunas in achieving the MDGs were then incorporated under the SDGs.[60] Hence SDGs are the forerunner of MDGs and not a replacement to it. The MDGs had their own saga of success which cannot be undermined.[61] The MDGs were instrumental in reducing the number of people living in extreme poverty, child mortality and health related issues such as malaria and other endemic diseases by almost half. The only drawback of these achievements is that such progress has not been even.[62] In the least developed and in the poor countries, the pace of

56 Supra 48.

57 Arjun Sengupta, *Extreme Poverty and Human Rights: A Mission Report on the US*, 42(14)Economic and Political Weekly1298,1307 (2007).

58 Supra 51.

59 UNDP, *Sustainable Development Goals: 17 Goals to transform our world*, available at: www.un.org/sustainabledevelopment/poverty, last seen on May 4, 2017.

60 Supra 48.

61 Ibid, at 2206.

62 E.Solheim, *Successful modernization of Aid*, OECD Insights(2014); available at: http://oecdinsights.org/2014/12/17/successful-modernization-of-aid/, last seen on May 4, 2017.

the development has been slow and they have not benefitted from the assistance rendered to them.[63]The SDGs on the other hand caters for an even progress, so that those left out can also be covered under the welfare programmes carried by the various organs of the United Nations in the way of eliminating miseries from the world.

Despite much success of the MDGs, there was need for an agenda which is more sustainable and viable and can reach out to the poorest among the poor. The SDGs were hence designed to go further than the MDGs in a more broader perspective.[64] It should not only address poverty but also the root causes of poverty and which can come up with policies and ideas that can map a development plan that works for all.[65]More countries as stakeholders were involved in the SDGs as compared to the MDGs.[66] MDGs were signed by 189 countries while SDGs was signed by 193 countries. MDGs had 8 goals, 21 targets and 60 indicators. SDGs on the other hand had 17 new goals, 169 targets and 230 indicators. This is also a reason that sustainable development is defined to include all its manifestations ranging from a conceptual framework, a process to an end goal.[67]

SDGs: The Way Ahead

The loopholes pointed out after the assessment of the MDGs provide us with ways which can be meted out for complete success of SDGs.[68] For example, the voluntary nature of the financial and political cooperation on the part of the nations has led to partial success of the MDGs and this has not been addressed in the SDGs as well. The following are the prerequisites for effective achievement of the SDGs:

- One of the prerequisite for the success of SDGs is the cooperation from the States both at the political level and the financial level.

63 Ibid
64 *The UN Sustainable development goals: Background*, Global impact, available at: charity.org/sdgs-background, last seen on May 4, 2017.
65 Ibid.
66 Ibid.
67 Supra 18.
68 Supra 51.

For successful accomplishment of SDGs, cooperation is needed at the global, national, regional and individual level. There is need to involve the private sectors and the various actors of the civil society to mobilize cooperation and coordination at the political as well as financial level.[69]

- The voluntary nature of funding is also an issue to be addressed.[70]
- The period for achievement of SDGs which is 15 years in wholesome is also a long and cumbersome process. There is nothing wrong in the time period but within that time period only there was the need to fix some target periods in fraction. It could have eased the achievement of some target areas within the time frame and it would have been convenient also to plan and act accordingly. [71]

Poverty under the SDGs

The Brundtland Commission report which was instrumental in framing of the SDGs had its focus on poverty as the overarching problem to be addressed. It stated that poverty is one such problem which is both the cause and effect of all other problems in line mainly the destruction of environment without which the whole notion of sustainability will go into the limbo of oblivion.[72] The elimination of poverty is mentioned under the MDGs and the same has been reaffirmed in the SDGs showing the importance of the issue. Since it is the cause and consequences of all other problems it has been placed on the top of the goals.

Earlier the focus of sustainability was on environment alone but soon it was realised that the protection of environment and sustainability was closely linked with poverty and inequity.[73] The change in attitude towards poverty to be the prime focus of sustainability was driven by the causal relationship between poverty and environment

69 Supra 48.
70 Ibid, at 2208.
71 Ibid, at 2206.
72 Supra 34.
73 Supra 5.

degradation. Increased poverty was now being directly proportional to increased environmental degradation. Displaced and poor people put direct and increased pressure on available resources such as marine, forest and land for their survival.

Under the Rio+20 summit on Environment and Development, the focus was to pursue action on four areas pertaining to social and economic domains and combating poverty was one of them.[74] Combating poverty was always on the forefront of the international discussions because it was causing innumerable damage to the environment and hence widening the social and economic rift. The Rio Declaration contained 27 Principles which though had a legal touch but were non -binding in nature. On the contrary, it wanted the Governments to lay down their commitments towards the protection and safeguarding of the environment as well as to look into the development needs of the poor.[75] The other concerns under the Rio+20 Conference was to raise global concern for eradication of poverty.[76] It was also reiterated that apart from the three pillars of sustainability viz., environment protection, social equity and economic development on which the edifice of sustainability was built, prime focus should be given to eradication of poverty.[77] Unless and until the livelihoods of the poor are improved, it will not contribute to sustainable development.[78]With respect to poverty it is very much necessary that policies which are specific in nature should be carved out so that it becomes convenient not only for proper redressal but for implementation as well.[79] This will even make the allotment of resources to be used in a more useful manner.[80]

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74 Supra 18.
75 Supra 24.
76 Ibid, at 6.
77 Ibid, at 17.
78 Ibid, at 11.
79 Eric Solheim, *Successful modernization of Aid*, OECD Insights(2014); available at: http://oecdinsights.org/2014/12/17/successful-modernization-of-aid/, last seen on May 18, 2017.
80 Ibid.

Poverty

Poverty is generally defined as a "condition characterized by severe deprivation of basic human needs including food, safe drinking water, sanitation, shelter, health care, education and information. It depends not only on income but also on access to services".[81]

Poverty in most of the cases has been defined as the denial of necessities of life such as food, shelter and clothing. But more specifically it has been related to the earning capacity or the purchasing power of the people. For example, MDGs as well as the SDGs a person living on $ 1.25 a day is considered poor. The aim of the goals is to reduce and eradicate poverty respectively. It also cites that though there has been progress in the developing countries the issue of poverty remains the same. The uneven progress is manifest in the report of the World Bank group in its 2017 Atlas of Sustainable Development Goals.[82]The uneven nature of progress and the ignorance of the vulnerable section of the population have been cited as one of the concerns under the eradication of poverty.

Earlier income was the sole determinant of poverty however, with change in time the traditional criterion for determining poverty has also undergone change.[83] Now, income is one of the factors. To give poverty a more human approach and to supplement the income factor to poverty, the Human Development Report (HDR) has come out with Human Poverty Index(HPI). There are three indicators of Human Poverty Index.[84] First is the life expectancy, second is the literacy and third is the living standard which is again measured considering the three variables of health, water and nourishment

81 United Nations, *World Summit for Social Development: Chapter 2- Eradication of Poverty* (1995), available at: http://www.un.org/esa/socdev/wssd/text-version/agreements/poach2.htm, last seen on May 18, 2017.

82 World Bank, *Atlas of Sustainable Development Goals 2017: World Development Indicators* (2017) Washington, DC: World Bank.

83 James Gustav Speth, *Poverty: A denial of human rights*, 52(1) Journal of International Affairs 277 (1998), available at: http://www.jstor.org/stable/24357823, last seen on May 18, 2017.

84 N. Krishnaji, *Human Poverty Index*, 32(35) Economic and Political Weekly 2202,2205 (1997), available at: http://www.jstor.org/stable/4405793, last seen on May 18, 2017.

of children less than five years of age. The most affected human right in the realm of poverty is the right to life.[85] The right to life however does not mean mere animal existence.It includes full graces of civilization. The reality of right to life under poverty can be imagined by the following illustration: In sub-Saharan Africa and in other least developed countries one third of the population cannot expect to live beyond the age of 40. The World Health Organization (WHO) in this context released a report entitled "World Health Statistics 2016: Monitoring Health for the SDGs".[86] In this report, they have shown some increment in the life expectancies around the world but at the same time also states emphatically that despite of the gains the inequalities among nations and within nations still continue.[87] In 29 high income countries, the average life expectancy of new born is 80 years or more, while those in 22 low income countries especially those in sub Saharan Africa have an average life expectancy of less than 60 years.[88] In 1990's the average life expectancy of people in Africa was less than 40 years and in 2016 it is less than 60 years. But this is nothing as compared to the improvements made in the life expectancies of developed countries. The report also states that many countries are still far from getting the universal health coverage.[89] These countries are mainly from the African and Mediterranean region. It is ideally said that out of their whole savings, people should spend at least 25 percent of their income on health facilities.[90] But such an expectation from poor people is too much to ask for because it is out of their capacity to do so.[91] People who wish to get their basic necessities fulfilled as the prime concern cannot think of spending a considerable amount of their income in health services. It is only when the illness affects

85 Supra 83.

86 World Health Organization, *Statistics 2016: Monitoring health for the SDGs*, News Release, available at: http://www.who.int/gho/publications/world_health_statistics/2016/en/, last seen on May 12, 2017.

87 Ibid.

88 Ibid, at 78.

89 Ibid, at 88.

90 Ibid, at 90.

91 Ibid, at 10.

their work that they think of availing health services otherwise their poor condition does not allow them to even think beyond their livelihood.

Another criterion of poverty measurement, as per the human poverty index, is the literacy rate. The literacy rate in the poverty affected areas of the world is considerably low as compared to the developed one but the condition of poor among the poor countries is even worse. Literacy and poverty are mutually dependent on each other. Literacy is a force which can help eradicate poverty through awareness, while on the other hand poverty itself is a factor for low literacy. The demand at present is of more educated and skilled labour and employees because the job requirements are concentrated more on knowledge and skill.[92]Knowledge and skill is also a factor to ensure the existence of labour in the market.[93] If a person wants to earn his own living through his own initiatives and ventures then it is literacy only which will ensures his sustainability.[94] Hence, literacy provides wider opportunities and scope throughout the life and drives out a person from the vicious circle of poverty. A report published by the Canadian Literacy and Learning Network stated that adults with higher level of literacy skill are more likely to work and earn more while illiterate person will work about the same hours but will earn less. When literacy is viewed in context of poverty then it does not mean to include access to primary education alone but includes education which can assure a good living. It should arouse awareness among the poor so that they can get the required information about the welfare works being taken up by the Government and can even avail of the same. Even if there are programmes and policies for poverty alleviation by

92 Scott Murray and Richard Shillington, *From poverty to prosperity: Literacy impact on Canada's Economic success* (2011), available at: http://files.eric.ed.gov/fulltext/ED565183.pdf , last seen on May 20, 2017.

93 Supra 92, at 12.

94 Mary Kellet, *Children as Researchers: what we can learn from them about the impact of poverty on literacy opportunities?* 13(4), International Journal of inclusive education, 395-408 (2009), available at: http://www.tandfonline.com/doi/pdf/10.1080/10236240802106606; last seen May 20, 2017.

the concerned government, the implementation becomes difficult because people either do not have knowledge of those schemes or do not have the knowledge to avail of the same. Literacy in form of awareness and information can help remove these obstructions for greater success of poverty alleviation programs.

The effect of poverty on literacy is equally important. Poverty is a crucial socio-economic factor which hampers literacy. Children from a socio economic advantaged background have more opportunities to get literate as compared to that from the disadvantaged sections.[95] The dropout rates of the children from schools' due to poverty bears testimony to the fact that poverty obstructs literacy. Children from poor background are compelled to work so that they can earn for themselves and for their family. The concept of school going does not fit into the daily requirements of their life. The poverty of social exclusion which bars the children from non-effluent classes to mingle with the effluent children is also a factor for low literacy rate. Hence, poverty along with its manifestations is catastrophic for literacy. Poor people neither get the required amount of education nor the opportunities to continue with the education due to their socio-economic background. Socio economic factors such as housing, health care, accessibility to schools and congenial environment plays a very important role in access to education.[96] Most of the factors stated are not available to the poor and to talk of education and literacy to them in the absence of all the basic facilities of life will be a gross ignorance of the reality in which the poor lives. Poverty is one force which obstructs not only the education to be availed by all but also the academic achievement attached to it.[97]

The third criterion of human poverty index is the standard of living and this is determined by three variables viz. health, safe water and nutrition of the children less than five years of age. The criterion for

95 Ibid, at 396.

96 N.G. Wamba, *Poverty and Literacy: An Introduction* 26(3), Reading and Writing Quarterly 189,194 (2010), available at: www.tandfonline.com/doi/abs/10.1080/10573561003769533, last seen on May 18, 2017.

97 Supra 96, at 190.

a standard of living is very traditional and needs to adapt itself as per the present requirements of the time.[98] It must cope up with the untraditional problems as well. Deprivation is multi-dimensional and the human poverty index leaves unaddressed a huge range of variables which could have been instrumental in determining the standard of living.[99] For example, apart from the traditional variables of health, water and nutrition, there are other factors such as deprivation of gainful employment, deprivation in education, deprivation of basic human rights including equality before law and justice, gender disparities, political non-participation, non-information etc. whose availability can make a good life.

Article 55[100] of the United Nations Charter talks about ensuring a higher standard of living and a good living is not about health, water and nutrition alone but includes all the left-out variables mentioned above.

It is also a general perception that the countries with good economic growth have no issues of poverty as such. But this is not correct. Even the developed countries such as the United States of America, Canada etc. are facing the problem of poverty. The developing countries such as China and India whose economy is increasing with a pace are also not finding the way out to eradicate it. The reason which is common to both the categories of countries despite of their economic positions is the uneven progress and the lack of effective policies for target areas. For example, some of the parts of a nation are well off while the other regions are not so. The situation is same within the nations. Within a country, areas with different sections of population are discriminated on the ground of gender, race, caste, ethnicity etc. So, the need of the hour is to have a

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98 Amartya Sen, *The standard of living: lecture I, concepts and critiques* in Geoffrey Hawthorn(ed.) Standard of Living, Cambridge University Press UK ((1985), available at: https://books.google.co.in/books?isbn=0521368405, last seen on May 4, 2017.

99 N. Krishnaji, *Human Poverty Index*, 32(35) Economic and Political Weekly 2202,2205 (1997), available at: http://www.jstor.org/stable/4405793, last seen on May 18, 2017.

100 Charter of United Nations 1945.

uniform pattern of development and the focus on the target areas. The economic prosperity will not suffice there is need for social security as well.

Suggestions

When we talk about eradication of poverty, the greatest obstruction in the way is the lack of international legal instrument to fight against it. National legislations vary from State to State and since poverty is a global problem, we need a uniform and universal legislation to deal with the issue. There are of course some major instruments at hand such as the United Nations Charter[101] which talks about international cooperation to deal with socio-economic problems, Universal Declaration on Human Rights (UDHR)[102] which lays down the basic necessities of life, International Covenant on Civil and Political Rights[103], International Covenant on Economic, Social and Cultural Rights[104],the Declaration on the Right to Development[105], several resolutions of the General Assembly on poverty etc. But the problem is that they have not been looked in such manner to be a strengthening legal force against poverty. If they are not deemed as hard and binding law with relation to eradication of poverty, then it will be very difficult to eradicate it since the problem at hand depends on the sweet will of the States. Although a number of authors have tried to link the issue of poverty with the Human

101 Charter of the United Nations (1945), available at: https://treaties.un.org/doc/Publication/CTC/uncharter.pdf, last seen on May 18, 2017.

102 Universal Declaration of Human Rights, available at: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf, last seen on May 18, 2017.

103 International Covenant on Civil and Political Rights, available at: http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf, last seen on May 18, 2017.

104 International Covenant on Economic, Social and Cultural Rights, available at: http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf, last seen on May 18, 2017.

105 A/RES/41/128, *Declaration on the Right to Development* (1986), available at: http://www.un.org/documents/ga/res/41/a41r128.htm, last seen on May 18, 2017.

Rights and the Right to Development discourse and several United Nations resolutions have been adopted addressing the issue of poverty at the international level, no effort has been made to enact an international legislation to eradicate poverty.

The MDGs and the SDGs has been enacted by the United Nations to fight against poverty by attaching target and indicators with each goal and by fixing the time limit within which the goal needs to be accomplished. Eradication of poverty though placed at the top of the SDGs has not been addressed properly. There have been policies and plans at the national and international level but no concrete law to deal with the issue. At the international level, the UDHR at least shows some hope but then also it depends upon the political will of the States to transform such rights into concrete, binding and enforceable law so that poverty can be eradicated from its roots.

Poverty is not only a problem but is also a root cause of other problems. For instance, the other goals mentioned in the SDGs cannot be achieved unless and until one does not eradicate poverty. A poor person with an empty stomach cannot think of education, health care etc. which are the subsequent goals in SDGs. Once poverty is eradicated, then this to a certain extent paves the way for achievement of other goals.

Despite of much work and legislative enactments regarding right to food, water, health and education,the issue of poverty remains the same. All these services need to be clubbed into one whole to address the issue of poverty. The rights are there but are scattered in the form of right to health, food, water etc. Anti-poverty measures should be an amalgamation of the rights which leads to a standard life. When one gets rights in a fragmented manner, the aim of the right is lost.

The lack of wealth on the part of a poor State is no more a ground to relieve the State of its responsibilities. The World Bank and several other national and international organizations are working in this direction to provide adequate fund to eradicate poverty.

Even countries who are rich in resources are facing the problem of poverty. The lack of proper management of the resources to utilize it in proper manner is the problem. For example, Africa which is so rich in natural resources has still not come out of the web of poverty. Majority of 53 countries of African continent are caught in a downward spiral of poverty and corruption.[106] United Nations recognized in its 2030 Agenda on Sustainable Goal that work, employment and decent work is a key to achieving sustainable development goal and a key to ending poverty.[107]

Conclusion

The SDGs should aim to achieve not only the task which has been left incomplete by the MDGs but should also make sure that the population which was left unaddressed in the MDGs should have the necessities of life. It should also make sure that the people who have been pulled out from poverty should not slip back into the same fate. Since poverty has various manifestations, the basic thing which needs to be addressed is that they should at least have the minimum necessities fulfilled. This should happen not as a matter of charity but as a matter of human rights enshrined in every being on the earth.

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106 V. S. Mehta, *Over the Barrel: Divided, volatile world ahead*, Indian Express, 9 (New Delhi, 4/7/2016).

107 G. Ryder (International Labour Organization (ILO) Director-General), *Interview with ILO Director-General: India's success vital for End of Poverty initiative to succeed*,Indian Express, 4 (New Delhi, 12/7/2016).

The tale of refugee jigsaw puzzle and its missing link: perusing the right of compensation for host states under refugee law

Ashwin Upreti*

Examining the status quo: a skewed refugee law?

The treatment of refugees across the globe has invited varying degrees of appendages rangingfrom discrimination[1] to genocide.[2]As humanity lays witness to the largest refugee crisis across the globe ever recorded; it is time for the body of international refugee law to confront certain uneasy questions which attack its very being as well as challenge its basic tenets.The issues facing international refugee law are "multi-dimensional and complex".[3]This paper, however, limits its reach to a singular purpose, i.e., reflecting on the right of states hosting refugees to gain compensation from the state of origin, i.e., the state from which refugees originated.

In his seminal paper on refugee outflows in 1980's, Lee had strongly advocated for the necessity of a compensation regime to be inducted within framework of the Refugee Convention.[4]He made a case for states generating refugee outflows to be held liable for reimbursing costs which the host states bear on account of receiving such refugees and catering to their well being.[5]Intensive

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1 Fact Sheet No.20, Human Rights and Refugees, U.N. Office of the United Nations High Commissioner for Human Rights, 10, available at www. ohchr.org/Documents/Publications/FactSheet20en.pdf, last seen on23/09/2017.

2 Ibid.

3 Ibid.

4 Luke T. Lee, 'the Right to Compensation: Refugees and Countries of Asylum, 80AmericalJournal of International Law 566, 576 (1986).

5 Report of the U.N. Ad Hoc Committee on Statelessness and Related Problems containing the text of the draft Convention relating to the Status of Refugees and the Protocol thereto relating to the Status of Stateless Persons, including commentaries, 16 January, 1950 - 16 February 1950, E/1618, E/AC.32 and Corr., available at http://www.unhcr.org/ protection/statelessness/3ae68c280/ad-hoc-committee-statelessness-

discussions held during the course of the Refugee Convention tell us that while liability of state of origin to compensate was discussed, no conclusive consensus was reached between nation states.[6]The regime of 1951 Refugee Convention was given a mixed reception with many states avoiding it,[7] while some states chose to take upon them a sizeable amount of responsibility.[8] For any state to consent to a regime which only parcels out responsibility and invites huge investment of resources contingent on circumstances which does not remain in their control is a difficult idea. Much more difficult is its enforcement. As time passes the spirit of goodwill, finite resources and even stability of states playing good Samaritan, is put to test.

With the advent of the world's most devastating refugee crisis ever recorded, discussions already remain plentiful on how the regime of refugee rehabilitation could be made more representative. As the debate gains steam, one of the most important stakeholders in the entire debate seems to have been lost sight of, i.e., the state through which refugee outflows have been generated in the first place. The role of the state of origin in the current regime has shockingly taken a backseat. As a result, we observe a very fragile legal framework whose breakdown is a lurking dangerwhich the global community faces each day. It is thus pertinent to confront the compensation question once again.

This paper seeks to address the same. At a time when the head count of refugees experiences a massive increment in various parts of the world, it becomes relevant to reflect upon Lee's suggestions and examine as towhat purpose they hold for dealing with the

related-problems-status-refugees-stateless.html, last seen on September 29, 2017.

6 I. Jennings, Some International Law Aspects of the Refugee Question, 20 BRIT. Y.B. INT'L L. **113** (1939).

7 M. Kagan, Shared Responsibility in a New Egypt, A Strategy for Refugee Protection, 11 (1st ed., 2011).

8 Amnesty International**,** Tackling the global refugee crisis: Sharing, not shirking responsibility, available athttps://www.amnesty.org/en/latest/campaigns/2016/10/tackling-the-global-refugee-crisis-sharing-responsibility/, last seen on June 13, 2017.

massive crisis we are engaged with as of today.

Examining the current framework of International Law in practise and theory inter alia the state of origin

The creation of refugees under the 1951 Convention relating to Status of Refugees, 1951 and its 1967 protocol is not wrongful by itself.[9] The only obligation which arises for the state of origin is to merely cooperate internationally[10] and the same cannot extend to legally bind a state to provide compensation. The primary means for attribution of responsibility has been codified in the Draft Articles,[11] which have further been adopted by the UN General Assembly.[12] Though not codified under a treaty, many of its provisions are in fact codification of the existing customary international law as recognized by the ICJ[13]as well as other institutions.[14]

The draft articles subject states to provide reparations for "internationally wrongful acts".[15] The claim for reparations currently requires an internationally wrongful act[16] to have been committed by a state as held by PCIJ[17], municipal courts[18] as well as international courts.[19] Further, the same act must have brought legal injury to the

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9 G. Goodwin-Gill, the Refugee in International Law, 3 (3RDed., 1996).

10 Convention Relating to the Status of Refugees, Preamble, 189 UNTS 137/ [1954] ATS 5, 28/7/1951, available athttp://www.unhcr.org/4ca34be29.pdf, last seen on June 13, 2017.

11 U.N. General Assembly, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. Document A/56/10, (3/08/2001), available at http://www.refworld.org/docid/3ddb8f804.html, last seen on June 13, 2017.

12 Ibid.

13 LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, ¶48 (June 27).

14 P. D.Greiff, the Handbook of Reparations, 451, 47(1st Ed., 2006).

15 Supra 11, Art. 1.

16 Supra 11, Art. 31.

17 Chorzow Factory Case (Germany v. Poland), 1928 PCIJ (ser. A) No. 17 (Sept. 13) 34.

18 FibrosaSpolkaAkcyjna v. Fairbairn Lawson Combe Barbour Ltd., 1942 UKHL 4 (1942).

19 Velasquez-Rodriguez v. Honduras, INTER-AM.CT.H.R. (ser. C) No. 4 (1988).

other state which claims such reparations.[20] Further, the claim for compensation must base itself on definitive grounds, as confirmed by ICJ[21], ITLOS[22] and arbitral awards[23], without leaving any scope for presumptions.

The regimes of Refugee Convention and other instruments as well do not recognize expressed responsibility of states towards non creation of refugees rather only aim at securing protection once a refugee crisis has arisen.[24] Thus, an obligation to not create refugees prima facie itself is not mandated, consequently leading to a framework which only deals with the situation post a refugee crisis has occurred, which in itself has its own discrepancies.[25] Given the same, no framework has been created to recognize and enforce obligations of a state from which refugees originate. Further, the ambit of protection of the Refugee Convention lies limited to such people as have been provided refugee status.[26]

Besides the Refugee Convention, Temporary Protection and Stay Arrangements (TPSA's) have been provided for. Temporary as the name suggests, these arrangements leave it to the whims and fancies of the states to accept people fleeing persecution. The grant of these belies at the instance of the host state whose machinery can deny such a right and cause refoulment even in cases where eminent harm may so accrue. Thus, by according temporary arrangements no obligation of the state arises to continue to host

20 Supra 11, Art. 36.

21 Armed activities on the territory of the Congo (DRC .v. Uganda), 2005 ICJ 168, ¶246 (Dec. 19).

22 The M/V. "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), 37 ILM 360 (Oct. 27, 1997).

23 Rainbow Warrior Case (New Zealand v. France), 82 I.L.R. 500 (1990).

24 International Law Commission, Summary Record of 2793rd Meeting, Diplomatic Protection, (ILC Yearbook 2004-II) U.N.Doc. A/CN.4/ SR.available at http://legal.un.org/ilc/documentation/english/ summary_records/a_cn4_sr2793.pdf , last seen on June 13, 2017.

25 Supra Note 9, at 7.

26 U.N. High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1979), ¶12, 2011 ed. , HCR/1P/4/ ENG/REV. 3.available at http://www.unhcr.org/4d93528a9.pdf, last seen on June 13, 2017.

people. In a strict construction of law, if the host nation evicts such people no refoulment would arise as their refugee status was not determined, however it must be noted that in reality minus refugee determination the danger of refoulment always lurks for people granted TPSA's. The TPSA's do not prejudice obligations of the state as under the Refugee Convention.[27] They are in reality an implicit recognition of the failure and loopholes of the Refugee Convention, whose application has been defeated; therefore giving rise to a provisional compromise.

The reason for such a facility arising is disinclination of the states to consent to the existing refugee rehabilitation regime which remain skewed in its proportion of responsibility and burden. If at all there has to arise equity, the first entity liable to contribute must be the state under whose guardianship refugees remained. It is therefore implicit that the creation of refugees, which draws nexus with state action, be made attributable to and subject to compensation from the state of origin. The treaty laws however do not provide directly for any claims arising as against maintenance of refugees; rather to the contrary only impose obligations upon the host state. The obligation, if any which could be loosely gathered, is that of cooperation by the state of origin.[28]

In practice, states have therefore refrained from accepting refugees, since this may give rise to obligations without any guarantee of aid from international organizations or other nations.[29] Such a tendency has led to every state maintaining a different policy and accordingly deviating from assistance of refugees.[30] This not only defeats the letter and spirit of the law, but also evades from providing a cogent solution to the refugee deadlock.

Making sense of Lee's assertions: a case for building

27 U.N. High Commissioner for Refugees, Guidelines on Temporary Protection or Stay Arrangements, 1,2 (2014), available at http://www.unhcr.org/5304b71c9.pdf, last seen on June 13, 2017.

28 Supra 10.

29 Id.

30 Supra 19.

right to compensation for Host States

Does each human deserve a minimum standard of basic treatment which is non derogable in nature or humans being degraded to mere animal existence would suffice? If the choice of answer is the former then law must engage in provision of obligations to ensure the same. Various international instruments have forwarded similar view concerning refugees.[31]However, unfortunately with differing political status different legal rights ensue. This would lead us to pursue a hierarchy where political attribution of asylum, citizenship and refuge would determine the engagement of differing legal rights and their fulfilment. Besides this regime, there also lie pockets of communities without any political association and suffer as a result from consistent persecution. The reason for such communities arising is the lack of acceptance by nation states of the international framework for refugee law as well as hindrance to provide aid through domestic law.

In the Barcalona Traction Case, when the Court refered to an obligation ergaomnes for minimum standards of human condititons to be so supplied, the applicability of the same remained incumbent not upon any pre requisites; but rather it sought to set in absolute terms a protection for all.[32]Suprsingly however, the existing situation has clearly outlined the inadequacy of contemporaneous international law to deal with situations where basic human conditions are required to be provided for. The scope of aid is indeed in international law unequal in representation and frugal in its supply.[33] Also, it vastly remains contingent upon political considerations. While citizens take the top of the pyramaid, other politically recognized such as those granted asylum or refuge go lower down and further the lowest rung is formed by such who remain incapable of securing political asylum, and are leftin fend for aid.

While nations remain lax in their policies towards rehabilitation

31 For detailed discussion see: Lee, p. 538.

32 Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) 1970 ICJ 1 (Feb. 5).

33 Supra 8.

of the refugees, so does the law. The very basic obligations like non refoulement which are regarded to be a part of customary international law stand breached,[34] as governments plan on evacuating thousands of refugees and thereby leaving many vulnerable to persecution from the same land which they fled.[35] The ruin of refugees can be attributed to the behavioural aspects and choices of the state, however they alone are to not to be blamed. As refugee crisis grips Asia, Europe, Middle East and the Americas, we find gaps in international legislation being exposed more and more. One such omission is the responsibility of states which create refugee flows.

Lee advocated for responsibility of the state of origin for its fundamental duty towards the people residing in its territory. He asserted that protection of residents within a territory is a sacrosanct obligation of the states and on breach of the same exodus, if any, so results the state of origin must be liable to pay for the same.[36] As per Lee,making states of origin liable to pay compensation for rehabilitation of refugeesensures that the primier entity responsible for its people, now turned refugees, is brought to task.[37] It is essential to note at this juncture that while states can be held liable for their wrongful acts,[38] creation of refugees by acts or omissions by itself does not amount to an internationally wrongful act.[39]

The attribution of responsibility by itself is a complex task. It requires credence not only to the question of who is the perpetrator

34 UN Executive Committee (ExComm) on the International Protection of Refugees, Conclusion No. 6 (XXVIII) Non-Refoulement, (28th Sess.) ¶ (a) (1977), available at http://www.refworld.org/pdfid/4b28bf1f2.pdf, last seen on June 13, 2017.

35 Human Rights Watch, TortureArchipelago: Arbitrary Arrests, Torture, And Enforced Disappearances In Syria's Underground Prisons Since March 2011, (ed. 2012), available at https://www.hrw.org/sites/default/files/reports/syria0712webwcover.pdf, last seen on June 13, 2017.

36 Supra 4, at 553, 564.

37 Supra 4, at 555, 558.

38 Supra 11, Art. 1.

39 Supra 9.

of a refugee crisis but also many other variables.The liability to pay compensation can rest upon a myriad of factors such as the role of state itself in the emergence of the refugee outflows in the first place; economic capacity of the host state as well as the state of origin; the conditions prevailing in the state of origin and the host state; whether the host state itself played a role in perpetrating the crisis; role of non state actors etc amongst other factors could hol-drelevancefor such determination.

Addressing the responsibility of states for creating refugees has two esssential imperatives. Firstly, it leads to cognisance of persecution and its economic consequences being shared and thus allowing host states to tackle refugee inflows more effectively. Secondly, it leads to a chilling effect on the state of origin from creating refugee generating policies given that its consequence would have diplomatic and legal, besides economic, consequences. Further, such a compensation regime goes a long way since it doesnot require "citizens" but rather "refugees" to stake claim.The same has consequences in favour of communities, such as Rohingyas from Myanmar, who have struggled for legal staus in their homeland and even abroad.Given that refugees can be citizens as well as residents struggling to gain essential political rights within a state provides enough leeway to accord protection to peculiarly placed who remain stateless and whose condition forces them to flee.

Also, the situation to address this concern is much more relevant than ever before. The question was previously addressed at a time when rules of state responsibility were in the stage of preparation. Post the adoption of draft articles and recognition of their principles as even amounting to customary law, perhaps it is only but relevant that compensation regime for host states be discussed. Be it noted that there do lie significant precedents of refugees themselves being awarded compensation,[40] the same does not hold true for host states.

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40 See also**:** Luke T**.** Lee**,** The Cairo'DeclarationofPrinciples of International Law on Compensation to Refugee, 87 American Journal of International Law157 (1993).

Examining the potential role of compensatory mechanisms in refugee crisis

The principle for compensation lies embedded in the maxim "*De Jure Belli ac Pacis*" meaning that fault creates obligation to make good the loss.[41]The principle can be made capable ofapplication in cases of refugee flows, which accrue due to recognized internationally wrongful acts, so committed by the country of origin.[42]The consequences of refugee outflows, i.e., the maintenance of refugees, their financial support, ensuring to them basic amenities etc. becomes an obligation of the host nation due to the failure of state of origin to safeguard its people. Such a tendency requires that the economic burden so becoming incumbent upon the host nation be relieved and further be made subject to compensation.It is therefore eminent that host nations and their expenses be provided for.

Evidence suggests that the entry of refugees, besides giving rise to obligations, creates huge fiscal implications on the economy, even to the extent of jolting growth and future development for host nations.[43] The states therefore refrain from catering to refugees primarily due to massive financial implications; no guaranteed assistance of states or organisations and no incentive for acceptance internationally or otherwise. Therefore, refugee migrants qualify as burdensome population who in most cases are paid little heed and compete even for availing of minimal resources.

The missing link to the entire refugee law regime remains to be the non-participation of the entity which was primarily responsible for upkeep of its citizenry, which is the state of origin.No responsibility

41 Hugo Grotius, De Jure Belli AcPacisLibriTres,12 (1st ed. 1949, translated in English).

42 Velasquez-Rodriguez v. Honduras, Inter-American Court of Human Rights,Annual Report of the Inter-American Court of Human Rights (1988) 35.

43 For more discussion see: IMF Staff Discussion Note, The Refugee Surge in Europe: Economic Challenges, SDN/1602. See: https://www.imf.org/external/pubs/ft/sdn/2016/sdn1602.pdf last seen on June 13, 2017.

to compensate is perhaps one of the gravest omissions in the entire body of refugee law, whose repercussions are felt globally, which could include varied effects ranging from short term burden on hoststate's economy[44] to even continuing persecution by the state of origin itself.[45]

In words of Lee himself, "*There is, ingeneral, an inverse relationship between voluntary repatriation and compensation;namely, the greater the opportunity for refugees to be repatriated, the less the need for compensation, and vice versa. Thus, stressing the refugees' right to compensation may well induce the country of origin to create conditions conducive to voluntary repatriation.*"[46] A compensation regime could therefore be capable of creating an ecosystem of balanced responsibility sharing framework, as between states. A legal guarantee to host states for reimbursement of expenses towards refugees could go a long way while a law which imposes mandate for maintenance and makes uncertain any external aid would perhaps create a chilling effect for states from accepting refugees within their border.

The very incidence of refugee migrancy is premised upon persecution and therefore it is eminent that the states failure to safeguard its citizenry from persecution berecognized as wrongful; subjecting it to compensation and continued aid from state of origin. Additionally, provision of basic human rights being an obligation ergaomnes must be made enforceable against global community and a way to equitably share the burden of refugees must be devised.

The applicability of objective liability principle is yet another avenue which can be flagged to justify compensation from the state of origin,[47] irrespective of their arising any internationally wrongful act.[48] This obligation has also been recognized by jurists in cases of

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44 Ibid.

45 Supra 4,at 533.

46 Supra 4, at 566.

47 I.Brownlie, Principles of Public International Law, 275-285, (7th ed., 2008).

48 International Law Commission, 'International Liability for Injurious Consequences arising out of acts not prohibited by international law', UN doc. A/36/10, 334ff (1981).

exodus as well.[49]

Evincing a model for compensatory claims and their adjudication

The question of compensation and its modicum of enforcement is another issue which raises complex problems. While Lee had himself refrained from addressing this question,[50] he presupposed a mode to make good wrongful acts. We find the current model for compensation within the sphere of state responsibility premised on wrongful acts.Such a model for compensation however cannot be made applicable entirely on cases of refugee compensation claims. This is primarily due to the state of origin at most times itself suffering from massive humanitarian implications and unable to sustain itself, therefore giving rise to an anomaly where the state of origin even if held to be at wrong, may not be able to provide any assistance. Thus, responsibility sharing mechanisms to be enforced cannot be straight jacket but rather pervasive upon the nature of situation existing in the host state as well as the state of origin.

To therefore hear such claims we require [a] a specialized body for adjudication of compensation claims for refugees and [b] a set of binding rules which lay down the first principles of law. The rules would be meant to provide enforcement measures as well as ensuring that no departure from basic tenets is made, thereby leading to a positive countermeasure for host states. To deal with mitigating circumstances and ensuring adequate and just remedy, the specialized body must do the need full. This will assist in maintaining a delicate balance between the burden on the host state and the liability of the state of origin.

Lee, though, considers the existing machinery to be sufficient.[51]In context of what Lee had suggested, while indeed existing machineries

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49 Transboundary Harm inInternational Law Lessons From the Trail Smelter Arbitration,254 (R.M. Bratspies& Russell A. Miller, 1st ed. 2006).

50 Supra 4, at 533.

51 Supra 4, at 562.

as he mentioned back then do exist, like the ICJ or pacific means of dispute resolution, we find that these institutions by themselves have not presented a promising future to institutionalizing adjudication of refugee compensation claims, which is a complex exercise requiring specific expertise in multiple facets.

The justification for a specialized body lies in the fact that refugee claims must require specific expertise due to manifold complexities and its widespread requirement. The working model of already existing bodies like the United Nations Compensation Commission could serve as the guiding model for such a body's establishment and working.

Intricacies of refuge and compensation:Is giving of refuge or compensation a legal question or political?

We find that currently the acceptance of refugees remains a function of political considerations largely, rather than legal. The issues surrounding refugees perhaps have been dealt more broadly in political settings rather than legal. Thus, one would lie injeopardy as to whether grant of refuge and compensation are a question which should be answered through legal instruments or merely left to function politically.

Two dominantly prevalent theories concerning law and politics were propounded by Hans Morgenthauand ElihuLauterpacht. While Morgan gave the theory propounding that all which is left of politics and its residue forms the law,[52]Lauterpacht held the exact opposite view propounding that politics is the residue of all that is left by the law.[53] Indeed, jurists would be tempted to give credence to the latter view. However, realists would necessarily find themselves somewhere in between. Understandably, this controversy has

52 For further discussion see: Morgenthau, Hans J, and Kenneth W. Thompson. Politics among Nations: The Struggle for Power and Peace, 34 (2nded.1993).

53 For further discussion see:M.Koskenniemi, Lauterpacht: The Victorian Tradition in International Law, 2 European Journal of International Law 215,262,263 (1997).

no straight jacket answer and shall probably remain a bone of contention between various quarters of academia.

This controversy remains relevant to the present day body of international refugee law, concerning the issue of compensation. For if granting of refuge is a political question it would necessary imply that the mandate of the U.N. Security Council and its sister concern, i.e., the United Nations General Assembly is supreme and sacrosanct. The resolutions of these organizationsonly motivate soft law, and are not always subject to compliance or even animus for compliance by concerned states.[54]

On the other hand, if the question of refuge and compensation is legal in nature, it would necessarily imply that a regime of enforceable mechanism for claims can be set forth and accordingly states be made obliged to comply. There is no simple answer to this controversy. The rights of fleeing must indeed be backed by a well recognized legal framework, however answers to questions of choice, to provide the extent of shelter; kind of amenities; scope of action on principles of responsibility sharing mechanisms are largely based on political considerations.

Modern international law has come to recognize the "minimum standards" test, where certain minimal provisions of livelihood remain a duty of all.[55] Abundant jurisprudence confirms the same. Without doubt, facilitation of basic human rights is an obligation under customary internationallaw, to which no derogation must ideally be afforded.[56] It is on such footing that the consideration of compensation as a legal facet must be recognized.[57] For without

54 M. D.Öberg,The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ, 16 European Journal of International Law 5, 905 (2005).

55 Supra 32.

56 See: U.N. Human Rights Committee, On the question of non-discrimination, General Comment No. 18 of the in UN doc. HRI/GEN/1/Rev.5, available at http://ccprcentre.org/page/view/general_comments/27792, last seen on June 13, 2017.

57 Supra 11.

such expressed recognition, the entire machinery of international refugee law as well as human rights law fails in its primary objective, i.e., granting minimum standard of livingfor a person to lead a life of dignity. While the scope and extent of aid could indeed be allowed to become a political question, minimum standards must lie non-derogable in nature and be made an enforceable legal obligation.

Concluding remarks: compensatory regime for a more representative refugee rehabilitation law

The current refugee law largely remains focused on addressing a singular issue, which are the rights guaranteed. Without cognizance of how these rights must be guaranteed and what means can be employed to effectively maintain a balanced regime of refugee rehabilitation and welfare, efficacy of the law remains a pressing concern. TheSyrian crisis, the issue of Rohingyas and many other instances of refugee flows have exposed the fact that without there being a regime which accounts due stakeholdership of all concerned there cannot be complete justice. To have a regime which only imposes responsibilities on host state without addressing liability of the state of origin at all, there arises a setup whose ability to counteract emergencies remains highly doubtful. It leads to the state of origin being unaccountable to the international community.

It is true that a refugee crisis at times leaves the state of origin itself in turmoil;however the same can be accounted for in assessing the quantum and form of reparations. What however cannot be excused is the recognition of state's role and the duty of care it owes towards its people. Safeguard from persecution upon people and its extinguishment are a role, at the first instance, of the state. Its derogation must be considered a breach of duty and made subject to reparations. One of the first principles of law remains to be making good the harm suffered for a wrongful act. To recognize this principle in the area of refugee law would be a step towards a more inclusive system of refugee welfare.

The lack of engagement of domestic jurisdictions with refugees, for

purposes of institutional support and provision of basic livelihood, remains primarily due to many nations with massive refugee populations choosing to remain or remaining otherwise without any obligations within their municipal laws or even international law. Such a tendency leads to sustained loss of legitimacy of the identity of refugees in such jurisdictions. Without obligations, the refugees lie at whims of the host nation with little or no assistance. To confront the same, the state of origin must be inducted within the scheme of refugee rehabilitation. The problems faced by refugee law are abundant and no single quick fix can be resorted to. Addressing the different means of responsibility sharing mechanisms remains one such compelling subject.The refugee law has met with incidence of compensation already, though limited, inter alia refugees through resolutions[58] and juristic views.[59] However, the debate concerning compensation for host states has faded into oblivion without much consequence. It is time for all concerned stakeholders to resurrect the same.

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58 Supra 4, at 535.
59 Ibid.

Competition Commission of India v. Coordination Committee of Artists and Technicians of W.B. Film and Television, AIR 2017 SC 1449

Vidhi Madaan Chadda*

The year 2017, has contributed significantly towards the development of the competition law jurisprudence in India. Earlier this year the Supreme Court of India gave its judgment in Competition Commission of India v. Coordination Committee of Artists and Technicians of W.B. Film and Television.[1]The said ruling is set to have an overarching effect, as it is the first substantive order by the Apex Court in the arena of competition law in India.[2] The Supreme Court, has opined on the two vital questions of 'relevant market delineation' and 'nature of enterprise', besides delving into the scope of the jurisdiction of the Competition Commission of India (hereinafter, CCI) under section 3 of the Competition Act, 2002 (hereinafter, Act). Further, being the first verdict of the Supreme Court, it shall serve as a binding precedent for the cases to follow.

Brief facts

The factual matrix as drawn in the present case, suggests that the informant was a broadcaster and telecaster of the regional television serials in the States of eastern India including the State of West Bengal who brought the complaint (concerning a contravention of section 3 of the Competition Act, 2002) before the CCI. The Informant alleged that he, under an agreement was assigned the rights to dub (from the original language) and telecast 'Mahabharata', a

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1 AIR 2017 SC 1449.

2 Competition Commission of India v. Steel Authority of India Limited, (2010) 10 SCC 744, was the first decision given by the Supreme Court since the enforcement of competition law in India. However, the said case did not particularly decide upon any of the substantive issue, rather it clarified the scope and power of the CCI while passing the prima facie order.

television serial in Bengali in two television channels. Such telecast was not palatable to the Eastern India Motion Picture Association (hereinafter, EIMPA)[3] and Committee of Artists and Technicians of West Bengal Film and Television Investors (hereinafter, Coordination Committee)[4]. These associations' disallowance was on the pretext that such television serials which are originally produced in some other language are then dubbed in Bangla would invariably adversely affect the original producers as well as the artists and technicians in West Bengal.[5]

In order to make sure that the said dubbed television serial is not telecasted, the two associations i.e. EIMPA and Coordination Committee wrote letters to two television channels namely, CTVN+ and Channel 10. These letters were to threaten the said channels of agitation and non-cooperation by EIMPA and Coordination Committee in case the dubbed serial is telecasted. Under the said circumstances, in all possibilities the two channels would have succumbed to the threats of the associations. Upon receipt of such facts and position the informant (proprietor of Hart Video) went to the CCI with the complaint of the alleged collusive arrangement amongst the associations in contravention of the provisions of the Act leading to the said foreclosure.

Background of the Case

CCI upon receipt of the said complaint, formed a *prima facie* opinion as regards the existence of an anticompetitive agreement. The direction was given the Director General (DG) for carrying out aninvestigation in the instant case. The report of the DG opined the relevant market as 'film and television industry of West Bengal' and concluded that the actions of threat of non-cooperation upon the telecast of the dubbed serial on the part of EIMPA and Coordination

3 It comprised of certain producers in the East India.

4 It comprised of the artists and technicians of film and television industry in West Bengal.

5 They further apprehended that dubbing also deters production of such television serials in Bangla as presently public had the option of watching serials dubbed in Bangla from other languages.

Committee are foreclosing the competition by hindering the entry of participants in the market, hence violates section 3(3) (b) of the Act.

The order of the CCI was split in 6:1 decision, wherein the majority order was premised on the findings of the DG. The majority held that the collusive acts (letters and agitation) of EIMPA and Coordination Committee undoubtedly pressurized the television channels to refrain from telecasting the dubbed serials. The majority further stressed that both EIMPA and Coordination Committee did not fall within the purview of 'enterprise' as per the Act[6] and hence the chance of abusing their dominant position[7] could be completely ruled out.[8]

The dissenting member, in the minority order pointed out that the DG erred in defining the relevant market. Here he stated that DG's definition of the relevant market was too broad as it did not cater to the broadcasting or telecasting of the television serial, which was the main concern in the instant case. Thereby, the minority order defined the relevant market as 'broadcasting of T.V. serials dubbed in Bangla language' and found that both EIMPA and Coordination Committee was not the active players in the said relevant market. Hence the question of theexistence of anti-competitive agreement violating section 3 of the Act does not arise and associations were not liable. Further, the said order pointed out that the pressure exerted by these two associations vide the demonstrations, agitations etc. were the tactics resorted to, normally by the trade unions and in no way be regarded as economic pressure which could restrain the channels from telecasting the serial.[9]

The Coordination Committee then appealed to the Competition

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6 Section 2 (h) of the Act defines the term 'enterprise'.

7 Section 4 of the Act prohibits abuse of dominant position by an enterprise.

8 CCI Order dated 09.08.2012 available at http://www.cci.gov.in/sites/default/files/162011_0.pdf, last seen on September 29, 2017. It is pertinent to point out here that the CCI in its majority order does not refer to 'relevant market' as such but states that the competition is adversely affected in the 'market' generally.

9 CCI minority order dated 09.08.2012 available at http://cci.gov.in/sites/default/files/162011D_0.pdf last seen on September 29, 2017.

Appellate Tribunal (hereinafter, COMPAT) against the majority order of the CCI. The COMPAT preferred to be on the side of the minority order and disagreed with the majority decision. The narrower definition of arelevant market given by the dissenting member was followed and the Coordination Committee was not found to be a player in the said market. Such finding let to the culmination that there existed no contravention of any provision of the Act by the Coordination Committee, hence their appeal was allowed.[10]

Aggrieved by the said order of the COMPAT, the CCI went on appeal to the Supreme Court.

Issues framed by the Supreme Court

The Supreme Court post considering the submissions of the respective parties and undergoing the orders previously passed by the CCI and COMPAT, formulated the following two issues to be determined:

- What is the relevant market for the purposes of the inquiry into the impugned activity of the Coordination Committee?
- Whether the action and conduct of the Coordination Committee are covered by the provisions of section 3 of the Act?[11]

Section 3 under the Act prohibits any agreement with respect to production, supply, distribution, storage, acquisition or control of goods or provisions of services which causes or is likely to cause an

10 Co-ordination Committee of Artist and Technicians of West Bengal Film and Television Industry v. Co-ordination `Committee of Artist and Technicians of West Bengal Film and Television Industry and others., Appeal No. 131 of 2012 available at http://compat.nic.in/Attachments/JudgementList/4244_03.04.14%20Appeal%20No.131%20of%202012.pdf, last seen on April 24, 2017.

11 Competition Commission of India v. Coordination Committee of Artists and Technicians of W.B. Film and Television, AIR 2017 SC 1449, at para 26. Further it is incumbent to state that the Supreme Court categorically did not delve into the possibility of abuse of dominant position by the Coordination Committee as the said was previously ruled out by the majority view of the CCI. Hence it limited its determination to section 3 i.e. anti-competitiveness of the impugned acts of the Coordination Committee.

appreciable adverse effect on competition within India. The section further provides that any agreement in contravention of this provision shall be void.

The Apex Court pointed out that as section 3 of the Act seeks to prohibit certain kinds of agreements[12], hence becomes incumbent to first find about the presence of any agreement and then about the anti-competitiveness of such agreement. Moreover, the Act provides that for assessing whether an agreement causes an appreciable adverse effect on competition, the factors as enumerated under section 19(3) of the Act.[13] The term 'market' stipulated here requires the determination of relevant market; which can be further be assessed in terms of relevant geographical market and relevant product market. In the present case, the Supreme Court took into account the definitions of the relevant market given by the CCI and the COMPAT. Wherein the consensus amongst CCI and COMPAT was the geographical market definition i.e. 'the State of West Bengal', was considered apt by the Supreme Court, on the ground that the Coordination Committee carried out its activities in the said state only. So far as product market was concerned, it was felt that the COMPAT erred by adopting the narrower delineation of the relevant

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12 'Agreement' has been defined under Section 2(b) of the Act, it includes any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings.

13 Section 19(3) states that The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors,

namely:-

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution

of goods or provision of services;

(f) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

market as only restricted to broadcast and telecast of the television serial. Therefore, in the view of the Apex Court, the relevant market must have covered the entire film and television industry of West Bengal as the constituent effect of such boycott would have been extended to the entire Film and TV Industry of West Bengal ;.[14]

The Supreme Court then assessed whether the activities of the Coordination Committee could be regarded as 'agreement' as stipulated under section 3 of the Act. For the said purpose, the said entities have to be an 'enterprise' or 'association of enterprises' or 'person' or 'association of persons'. Under the Act, an enterprise constitutes an entity or a person which is engaged in an economic activity excluding the sovereign functions performed by the Government entities. The definition has explicitly excluded all the activities of the certain departments of Central Government namely atomic energy, currency, defense and space from the ambit of the anti-monopoly regime. However, in case of any other government departments, the activity which may not be relatable to thesovereign function of the government would be covered within the definition of enterprise.[15] Hence, it becomes significant while qualifying or

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14 Supra. 11 at para 36 and 37. The Supreme Court held that the, "…myopic view taken by the Tribunal which ignores many other vital aspects of this case…" Also there existed "No doubt, the Coordination Committee was against the 'broadcast of the television serial 'Mahabharata' on the aforesaid two channels, in the dubbed form. However, even as per the agitators, the said broadcast was going to adversely affect the TV and Film Industry of West Bengal and the alleged purport behind the threats was to save the entire TV and Film Industry".

15 Section 2(h) of the Act defines an 'enterprise' to mean a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services , of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the

disqualifying an entity as an 'enterprise' is the functional aspect of the entity, i.e. nature of the activity carried out by the entity. Further, a liberal interpretation has been resorted to, for defining 'economic activity' as well.

The Apex Court observed, that the concept of enterprise is a relative one, where the focus must be on the functional aspect than the form of the entity. Such relatively becomes apparent in cases of not-for-profit entities and public bodies, as generally they carry out charitable functions, however the moment they engage themselves in commercial activity, they can be regarded as an enterprise within the purview of the Act.[16] It was averred that by far, the Coordination Committee (which is an association of traders) in the present case may be called a 'person' under section 2(l) and not enterprise as it (on its own) is not engaged in any economic activity as such. In the instant case, the Coordination Committee (and even EIMPA) were anassociation of enterprises, wherein each of its members could individually be regarded as anenterprise.[17]

The Supreme Court affirmed CCI's ruling and set aside COMPAT'S order as the acts of the Coordination Committee echoed the intent of its constituent members and the said association (Coordination Committee) could not be let free in the garb of protection to trade associations.

Central Government dealing with atomic energy, currency, defence and space. Further the Act defines 'person' in a widest possible manner under section 2(l) "person" includes—(i) an individual;(ii) a Hindu undivided family;(iii) a company;(iv) a firm;(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;(vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);(vii) anybody corporate incorporated by or under the laws of a country outside India;(viii) a co-operative society registered under any law relating to cooperative societies;(ix) a local authority;(x) every artificial juridical person, not falling within any of the preceding sub-clauses.

16 Supra n. 11 at para 40. The Supreme Court held, '...any entity, regardless of its form, constitutes an 'enterprise' within the meaning of Section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making that involves economic trade."

17 Supra n. 11 at para 41.

Analysis and implications of the Supreme Court ruling

The said decision can be regarded as a heralding step towards the development of the nascent competition law jurisprudence in India. It is laudable how the Apex Court has appreciated the competition law as a concoction of law and economics by touching upon the concepts such as relevant market,appreciable adverse effect on competition and enterprise. In the context of 'relevant market', rather than the correctness of the definition of relevant, the judgment raised the concern whether 'relevant market' should be the starting point of enquiry for section 3 cases as well. The ruling puts across a firm assertion that 'relevant market' must be defined for proper assessment of the 'alleged conduct' for cases concerning section 3 also (not only for cases concerningsection 4[18] or 6[19]of the Act).

The said view is contrary to the observation with which the CCI has been deciding matters before it for years, the CCI has unequivocally held that definition of the relevant market is not required in section 3 cases. The said view of CCI is on the pretext that the legislation is clear, wherein section 3, specifically uses the term 'market' and not 'relevant market', on the other hand section 4 and 6, clearly makes use of the term 'relevant market'. The CCI's understanding of not defining 'relevant market' in Section 3(3) cases is also echoed through a number of its pronouncements, like in Re. Builders Association of India and Cement Manufacturers' Associationand others[20], where the CCI observed that;

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18 Section 4 of the Act prohibits the enterprise/person from abusing their dominant position in the relevant market. Explanation (a) to Section 4 of the Act states: "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to – (i) operate independently of competitive forces prevailing in the relevant market; (ii) affect its competitors or consumers or the relevant market in its favour.

19 Section 6 pertains to regulation of combination wherein the position of the proposed (merged) entity is assessed in the relevant market. Section 6 (1) of the Act states that "No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void."

20 Case No. 29 of 2010 (Competition Commission of India, 31/08/2016)

"….There is no requirement under the provisions of Section 3 of the Act read with Section 19(3) thereof to determine and construct a relevant market, although the determination of relevant market for examining the contraventions under the provisions of Section 4 of the Act is prerequisite. Section 3 is concerned with the effect of anti-competitive agreements on markets in India. There is a distinction between 'market' as in Section 3 and 'relevant market' as defined in Section 4 of the Act. There is no need of determination of relevant product market or relevant geographic market for the purposes of establishing any anti-competitive agreement."[21]

Undoubtedly, the order poses to make relevant market delineation a necessity in all cases including section 3 cases involving anti-competitive agreements, such view will leave in dark, the fate of many decisions of the CCI.

Further, the ruling has attempted to iron out the creases so far as nature and scope of 'enterprises' which can be brought under the ambit of competition law is concerned. The Hon'ble Court clarified that it is the functional aspect pertaining to the activity carried out by the said entity, of relevance and not the mere form of such entity to fall under the rigors of the present legislation, which to an extent the correct implication of the law.

This judgment will serve as a significant benchmark for the present and the future cases before the CCI. However, this ruling leaves all 'need for more' as it happens to be one of the first from the many (more significant cases) lined up before the Apex Court.[22]

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21 Supra n. 20 at para 219.

22 Cases like Competition Commission of India v. Gulf Oil Corporation, DLF Limited v. Competition Commission of India and others are few of them.

Analysis of the Inter-State River Water Disputes (Amendment) Bill,2017

KunikaKhera*

INTRODUCTION

The law-makers have provided adequate legal machinery to deal with the river water disputes and issues in the Constitution and other statutes. These have played a major role in shaping the river and water system in India, including dispute redressal structure, developmental projects and distribution of water among states. Entry 17[1] of the State List includes water as one of its' subjects. However, this jurisdiction of the state is subject to Entry 56[2] of the Union List, under which the Union can make a law relating to water in public interest.

The Constitution of India has provided the Parliament with the right to legislate laws for adjudication of water related disputes.[3] The same article also states that the Parliament can exclude jurisdiction of the Supreme Court or any other court. In exercise of this power, the Parliament enacted two laws.

The *River Board Act, 1956*[4]established certain River Boards that work to provide parameters for advancement of inter-state river and river valleys. The main function of the same is to advice the Central Government regarding developmental projects, resolution of disputes and water plants. However, since the adoption of the Act, the government has failed to establish a single River Board.

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1 Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I.

2 Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

3 Id, at Article 262.

4 Act No. 46 of 1956.

Another act that was brought in was the *Inter-State Water Disputes Act,1956*[5]. The legislation was adopted for regulation on 'use, control and distribution' of inter-state water. The Act provides for an alternative dispute resolution system in form of tribunals[6]. They have been given the powers of a civil court; however, their verdict has the same effect as that of the Supreme Court. The 2002 Amendment[7] brought a change wherein new tribunals could change the decisions of a previous tribunal.

Article 131 and 136 of the Constitution have also been used from time to time for bringing inter-State river water disputes to the Supreme Court through Special Leave Petitions. The President has also been given a right to seek the advice of the Court on issues concerning water-related matters, under Article 143(1) which provides advisory jurisdiction to the judicial body.

Despite these legal statutes and provisions for various legal machinery, the government has been unable to create an effective mechanism that could solve water-related disputes. The cases in tribunals continue to go on forever. There is lack of a mechanism with swift resolution of disputes among states. As mentioned before, despite the Act being in force, the government has failed to even formulate a single River Board. The issue regarding whether water is to be dealt by the state or the Union continues to haunt, at a time when water scarcity is one of the major problems that country might face in the near future. Even though these problems are being faced for decades now, the governments have shown sheer ignorance towards the matter.

In the light of these issues, the government has introduced a new bill as a step towards establishing a permanent forum for sensitive water-sharing matters.

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5 Act No. 33 of 1956.

6 See Section 4 of the Inter-State Water Disputes Act,1956.

7 Act No. 14 of 2002.

INTER-STATE RIVER WATER DISPUTES (AMENDMENT) BILL, 2017

For years, the governments have been thinking of forming of a permanent medium to develop consensus among states on the sensitive water-sharing issues prevailing before the country.[8] Therefore, considering the growing distress among states in relation to sharing of water, on 14 March 2017,the present Water Resources Minister, Uma Bharti introduced this Bill in Lok Sabha as a 'revolutionary step'[9] towards resolution of such disputes. The Bill seeks to fix all the lacunae that are present in the current water disputes redressal system.

In the current paper, the amendment proposed is appraised in detail and the forthcoming consequences of the same are assessed. It pursues to answer the question whether the Bill is an suitable step towards solving the current water crisis among the states or is it a fruitless effort of the government in response to the growing pressure by the states. Each provision of the Bill is discussed in detail below.

Dispute Resolution Committee

In the Act, after a complaint by the states, the Union may ask the states to solve the dispute through negotiations. If the same is unable to be resolved, the Government may set a Water Tribunal for them.[10]

The Bill adds Section 4A to the original Act for a new commission for amicable resolution of water-related issues that arise among states.[11] On request of any State Government, the Central Government shall have the duty to set up a Dispute Resolution Committee. The committee would be composed of members from 'relevant' fields.

8 Vibha Sharma, Permanent forum to solve state water disputes, The Tribune, 3/10/12.

9 Press Information Bureau, Government of India, Ministry of Water Resources, http://pib.nic.in/newsite/PrintRelease.aspx?relid=159201, 16/06/2017, 12:36.

10 Supra note 7.

11 See Section 3 of the Amendment Bill.

It is to resolve all problems through negotiations within one year, which may be extended by six months. The committee also must submit its report to the Centre with contentions of the parties, its views, and the facts and information of the case.

The intention behind establishing thiscommittee, rather than just simply asking the affected to states to negotiate, can be inferred to be to create a more formal forum for negotiation between the disputed parties as Water Resources Ministry secretary, Shashi Shekhar said that it is expected that most disputes will get resolved at the DRC's level itself.[12] This committee would provide an opportunity to the parties to decide in a more peaceful manner with less stringent legal formalities, before getting involved in a legal battle in a tribunal. The committee is also answerable to the Union as it is to submit a report to it after the said negotiations.

However, there continues to be a bit of ambiguity regarding the composition of the committee as no criteria has been laid down regarding membership. A qualified judge or someone who has been involved in legal matters for years or with experience and knowledge in related field must be appointed. The same could have been echoed in the Bill.

Inter-State River Water Dispute Tribunal

The Act had provided that in case the negotiations failed, the Centre could set up a Water Tribunal.[13] Till date, there have been eight Water Tribunals formulated, out which three of them have been resolved with acceptance of the states.[14]

The Bill has sought to introduce a substituted Section 4 in the Act to bring an altogether permanent Inter-State River Water Dispute

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12 PTI, Single Tribunal to Decide All Inter-State Water Disputes, The Indian Express, http://indianexpress.com/article/india/single-tribunal-to-decide-all-inter-state-water-disputes-4433463/, last seen on June 16, 2017.

13 Supra note 7.

14 Prelims Listicles, List of Major Inter-State River Water Disputes in India, Civils Daily, http://www.civilsdaily.com/blog/list-of-major-inter-state-river-water-disputes-in-india/, last seen on June 16, 2017.

Tribunal to solve all the disputes that are not resolved by the Dispute Resolution Committee.[15] The previous tribunals would dissolve and the cases would transfer to this tribunal.[16]However, already decided cases cannot be re-opened. Also, the tribunal may have multiple benches for swift settlement of disputes simultaneously.

This tribunal would be a welcome change as it would help in effective and quick adjudication of matters. Instead of the time lag due to formulation of a Water Tribunal every time a dispute is arises, a permanent machinery would always be in place to provide its services to states affected.

Composition of the Tribunal

The Bill sets out that the Tribunal shall have a Chairperson, Vice-Chairperson and up to six members (Judges) nominated by the Chief Justice of India. The Union Government may also appoint two persons with experience in the Central Water Engineering Service, not below the rank of Chief Engineer, as assessors who would counsel and advice the Bench.[17]

The tenure of the Chairperson is fixed for five years or till the age of seventy years, whichever is earlier. While the term of other members, including Vice Chairperson shall be co-terminus with the adjudication of the water dispute and would end on dissolution of bench.[18] The assessors shall hold the office till adjudication of the dispute and till the final report is submitted to the Centre.[19]

The qualifications and composition by the Bill is appropriate and justified. The judges with vast knowledge and experience in adjudicating matters shall increase the expediency of the Tribunal. Adding to that, the provision of appointment of assessors with

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15 Supra note 13.

16 Section 11 of the Amendment Bill exempts the Ravi and Beas Tribunal to stand dissolved.

17 Section 3 and 5 of the Amendment Bill.

18 Added as Section 4C into the Inter-State River Disputes Act, 1956 in the Bill.

19 Added as Section 5C to the Inter-State River Disputes Act, 1956 in the Bill.

involvement in Central Water Engineering Service would help in providing an expert opinion to the bench. The fixing of tenure would also make sure that the adjudicators are able to complete their duties without fear or favour.

Time Allotted to take a Decision

The Act currently states that a matter before a Tribunal must be decided within three years which may be extended for a maximum period of two years. Also, if a state asks the Tribunal to reconsider the decision, the Tribunal must submit its report to the Union within a year, which may be extended by the Centre as it may deem necessary.[20]

On the other hand, the Bill provides that a matter is to be decided within two years, the period extendable by one year. In case of reconsideration, the time to submit report to the Centre would be extendable by only six months.

The Tribunals under the Act have taken decades to end and many continue till date; for example, Cauvery and Ravi Beas disputes have been present for more than 26 and 30 years respectively.[21] Reducing the period for their settlement would help in curtailing such delays and cater to the needs of the states' more pragmatically. Fixing of the time for report submission would also prevent matters being extended for indefinite amount by the Government. Thus, this provision would prove beneficial for quick settlement of the trials.

Multiple Benches within the Tribunal

The Bill has also provided for multiple benches in the Tribunal.[22] This would also result in preventing delays and simultaneous decrees and judgements.

Filling of Vacancies and Temporary Absence

Section 5B has been proposed to be added that lays down provision for filling of seats of the Chairperson or any other member.[23]

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20 See Section 5 of the Inter-State River Disputes Act, 1956.

21 Supra note 11.

22 Added as Section 5D to the Inter-State River Disputes Act, 1956in the Bill.

23 Section 5A of the Inter-State River Disputes Act, 1956 currently lays down the provisions of filling of vacancies.

This provision elaborates upon the one currently in the Act and makes sure there is effective substitution of members in case of such absence or vacancy. This shall make sure in organisation of the workforce within the tribunal.

Publication of Decision in the Official Gazette

The Act states that decision of the Tribunal is to be published in the official gazette by the Union Government. It is only after this that the judgement would have same effect and force as that parted by the Supreme Court.[24]

This Billdoes away with this unrequired convention of having a judgement published before actually giving effect to it. This removes an irrelevant and unnecessary legal prerequisite for enforcement of judgement.

Agency for Maintenance of Data Bank and Information

The Act[25] provided the Central Government to maintain data bank and information at national level with regard to water basins in the country.

The Section has been modified whereby the Centre may employ an agency for the same. Such an agency would prove to be more qualified in collecting such data and may also relieve the Centre with the pressure that it currently faces due to the numerous water disputes. An official reiterated the same, "Transparent data collection system will help in resolving any dispute. Once we have such a system in place, the states will have enough information to take a call while relying on scientifically collected data."[26] Thus, making the whole system more open for inspection and more responsible towards the people.

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24 See Section 6 of the Inter-State River Disputes Act,1956.

25 Section 9A of the Inter-State River Disputes Act, 1956.

26 VishwaMohani, Bill introduced to set up a single tribunal, Times of India, http://timesofindia.indiatimes.com/india/bill-introduced-to-set-up-a-single-tribunal-to-resolve-river-water-sharing-disputes/articleshow/57631926.cms, last seen on June 17, 2017..

Dissolution of Bench

The amendment under its' Section 9[27] proposes that, on advice of the Chairperson or anyone acting on his/her behalf, the Centre may dissolve the Bench after adjudication and submission of its report. On such a dissolution, the members are to vacate their seats.[28] The staff has to be provided to other Benches and the assets are to be returned to the Centre Government or to the State that provides it.

These Sections help in proper appropriation and allocation of resources at both the Centre and the State level.

Additional Rule-Making Powers

The Union Government has been granted with power to make laws on the following matters[29]:

- On the manner in which the water shall be distributed at times of stress situations due to water shortage.
- On which data is to be maintained and in what manner.
- On the manner in which the staff of a dissolved Bench is to be dealt with.

These legislative powers elaborate the role of the Union in water distribution system. The role of the government, in development of the same, cannot be predicted. If the power is used efficiently, the Government can bring uniformity and consistency in the issues related to water which till date remains under the hand of different State rules and statutes. This uniformity would help in times of stress and shortage of water resources.

However, the same has to be dealt with caution. Water is a state subject. The authority and power of the state should not be infringed upon and the Union must make sure that it remains within the realms of a federal structure of the country.

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27 Section 9 of the Amendment Bill calls for substitution in Section 12 of the Inter-State River Water Disputes Act, 1956.

28 The members who are members of any other Bench are to remain members of that Bench.

29 Along with those already provided in Section 13 of the Inter-State River Water Disputes Act, 1956.

CONCLUSION

"The Inter-State River Water Disputes (Amendment) Bill, 2017 seeks to streamline the adjudication of inter-State river water disputes and make the present legal and institutional architecture robust."[30]It is in response to the decade-long delays and vague provisions of the Act haunt the states who are involved in age-old legal battles with each other. The lack of active performance of the government for the past 70 years concerning water related matters has cropped up many struggles that the country has had to face. The threat of water scarcity in the future has made matters worse and has increased the pressure on the Centre for settlement of old issues and development of a sustainable plant that would prevent the country from perishing. This Bill is a ray of hope in that direction.

The Bill has finally proposed a single tribunal for resolution of all inter-state water disputes. This step was long due since the long trials of tribunals had failed to bring any positive result. The states remained unsatisfied and no result of the same came out. Time was another issue. The amendment shall fix the time limit of the trials and make sure the judgement is given as soon as possible. Apart from this, the Bill provides some power to the Centre which would help the balance of water resources among states. It has developed a more systematic mechanism for inter-state water issues. Maintenance of data bank information is also another technological advancement in organized sortation of information which would make the institution more transparent and open for scrutiny for the people and the states. This would make the tribunal more answerable and accountable to not only the parties involved but also the states of the country at large.

However, the Amendment has at some points failed to answer many questions. There is uncertainty in composition and working of the Dispute Resolution Committee. As Biju Janata Dal (BJD) leader BhartruhariMahtab[31] voiced his concerns, the Amendment may be

30 Statement and Objectives, the Inter-State River Water Disputes (Amendment) Bill, 2017.

31 IANS, Bill for Permanent Water Tribunal, Business Standard, http:

'overstepping' its authority because at the end of the day, water is a state subject.[32] This balance of power must be maintained by the Union so as to make sure that the states are not held at a disadvantage. Also, the dissolution of current water tribunals may worsen the situation for the cases that have been going on. The Dispute Resolution Committee also seems like an extra and unnecessary hurdle for dispute settlement. The constitution and qualifications for the same are quite vague and unexplained.

Despite the various lacunae and gap holes in the amendment as well, it cannot be denied that the Bill has definitely proven to be a much desirable footstep in the direction of restructuring and reorganization of the current redressal and settlement system for river water disputes in the country. The Bill, once approved by the Parliament, would play a historic role in shaping the water-distribution system of India.

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www.business-standard.com/article/news-ians/bill-for-permanent-water-tribunal-moved-in-lok-sabha-117031400893_1.html, 17/06/2017, 09:30.

32 "I am not going into the merit of the Bill. It's a very badly drafted Bill. Since water is a state subject, I would also ask the government whether it has consulted all the 29 states before drafting it."

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