NLUA LAW REVIEW

Volume 3 Special Issue Number I

MESSAGE FROM THE PATRON

NLUALR is the mirror of quality research orientation of students of NLUJAA. Like any other national Law University this University represents India with talented students from all over the country pursuing studies in divergent disciplines and forming inter disciplinary approach towards pertinent national issues. As good students acquiring and disseminating knowledge in different shades of life,the contributors to this journal are serving the great cause of societal aspiration to accomplish right to know more and updated information regarding socio-legal problems and their solutions.

This sixth issue of the journal covers a wide range of research areas containing adequate and relevant data, appropriate analysis, thought povoking ideas and new insights along with deep vision into the socially desired pursuit of Justice. Articles and reviews published in this issue contain contributions both from faculty and students. They include important contemporary human rights and other social and legal issues from divergent areas including neo-colonialism in International Criminal Court, patent laws, question of marital rape, wearing hijab, human rights in conflict situations, LGBTQ Rights, human trafficking, women's rights, environmental issues, labour rights, privacy etc.

The National Law University, Assam Law Review is the result of untiring and relentless efforts of the Editorial Board consisting of talented and good students devoting their precious time without impairing the high pursuit of learning and study. The students involved in publication of the Review and having taken keen interest in bringing out this issue deserve special congratulations.

As a patron of NLUALR, I wish all success to this issue and handover to readers to read, evaluate, comment and encourage the budding scholars to work with new zeal for social service and community welfare through constructive, creative and innovative suggestion to solve social-legal problems and eradicate social evils.

EDITORIAL

NLUA Law Review has established itself as a platform for sharing interdisciplinary and multidisciplinary research. As has been the hallmark of our Review, this issue also upholds the benchmark set up by the previous issues. We had received an amazing response to our 'Call for Papers' for this issue and had a tough time selecting these articles from the range of quality articles submitted.

In this issue, we have selected articles on numerous topics such as inter alia International Law, Constitutional Law, Human Rights Law, Environmental Law, and Business Law. Since one of our aims is to establish our journal as a platform for research focused on matters related to North-East India, we have selected one article on the environmental-legal facets of inland water transport system and the enormous potential that it holds in the state of Assam.

Aman Kumar in his review of the book by the title, "The International Criminal Court at The Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders" by DR Res Schurech, (1st edn, Springer, 2017) which deals with the author's explanation of the behaviors of the African nations towards ICC through the lens of neo-colonialism. The authors of this review thinks that this book is a much needed academic engagement on the topic of neo-colonialism and ICC.

Rituparna De and Anuttama Ghose in their article, "Effectiveness of Calculating Comparable Assets for Patent Valuation" try to understand the usefulness of market approach and the extent to which the same can be used to assess comparable assets in patents, to determine comparable factors for patent and to ascertain the controllability of the comparable assests in patent.

Kushal Srivastava in his article, "Marital Rapes in India: An Analysis" looks at marital rape which is exempted from criminality in the Indian Penal Code from the angles of right to live with human dignity and right to sexual privacy and questions as to why the same should not be criminalized.

Prachi Tyagi in her article, "Why is my Hijab Your Problem: A Jurisprudential Analysis of Women Behind Veil" discusses about the question of women's choice in wearing hijab in the light of the opposing positions that include some European countries like France and Belgium banning it and other Arabian countries imposing it on women. An analysis of the same has

been done with the help of the works of Jeremy Bentham and Robert Nozick.

Debanjana Bhattacharya in her article, "Human Rights in Conflict Situations: A Study in the Context of the Syrian Crisis" discusses about human rights violations and gruesome crimes against humanity happening in Syria between the government and the non-State actors like Free Syrian Army. Lamenting on the failure of international actors in preventing the same, she ponders upon the role of the UN in establishing peace in the region.

Radhakrishnan K. and Dr. Praveen Kumar Lochab in their article, "Relevance of the Budapest Treaty and Biological Diversity Act in Biotechnology Patents" discuss about the implication of the Biological Diversity Act, 2002 and the Budapest Treaty in biotechnology patents.

Vaibhav Sharma and Ravi Apoorva in their article, "Decriminalisation of Section 377, IPC: Charting Judicial Course of Correcting the Archaic Anomaly" discuss about decriminalization of sec 377 of the Indian Penal Code and its effects on LGBTQ community and their rights. They further also discuss of about the implications on marriage, inheritance rights, adoption of child and consequent legislative measures needed.

Bhargov Bikash Dutta and Barasha Kalita in their article, "Trafficking of Women and Children with Reference to North-East Region" discuss about the current situation of human trafficking in India and identifies the causes of child and women trafficking in the Northeast. They also look into various existing national and international instruments preventing the same. More specifically they analyse the missing Children in Assam, what makes the children in the tea plantation area more vulnerable to trafficking.

ThangzakhupTombing in his article, "Insurgency Movements in North East India and its Impact on the Hill Women folks of the States of Nagaland, Mizoram and Manipur: Voice of the Unheard Victims" explore the unheard voices of the tribal women folks in the state of Nagaland, Mizoram and Manipur who were silent victims of insurgency movements and counter insurgency movements in these three states. He further attempts to critically analyse relevant national and international statutes, treaties and conventions and remedies available to women victims of war crimes as a class in themselves.

R G Suriaprakash in his article, "How Not to Make Feasibility Reports: A Critical Analysis of the Feasibility Report of the Chennai-Salem Greenway

Project" discusses about the case of (G.Sundarrajan v. Union of India and Ors. W.P. No. 15889 of 2018) and the question of vires of s. 105 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (RFCTLARR Act) to the extent that the exclusion of certain legislations from the provisions of land acquisition under RFCTLARR Act violates Article 14 of the Constitution. The author suggests that suggests that the petitioner in G. Sundarrajan might have made some sense at a normative level.

Bijeta Chetry in her article, "An Analysis on the Functioning of State Pollution Control board of Assam in Respect of Hazardous Waste Management" discusses various problems with the ineffective functioning of the Assam State Pollution Control Board.

Tathagat Sharma and Prince Raj in their article, "Abolition of Contract Labour in India: A Study of Judicial Trends" discuss about judicial trends in relation to Abolition of Contract Labour in the Country and their Absorption through case law analysis.

Sandeep Jain in his article, "Looking at the Right to Privacy Through the Prism Of Personal Laws" explores the dimension of the right to privacy in the international and national scenario and assesses the position of the personal laws within the constitutional framework. He further evaluates the extent to which the right to privacy has been respected, recognized and protected in the province of personal laws.

Shristy Banerjee in her article, "International Instruments on the Indigenous People and Response of India with Special Focus on Education: An Overview" explores some major international and national measures for the upliftment of the tribal population.

Indira K in her article, "Need to Foster the Foster Care- A Critical Analysis" evaluates critically whether foster care can be a better alternative to curb the menace of increasing child sexual abuses caused by institutional care.

Vaibhav Suppal in his article, "Sabarimala : Inequality in Divinity" critically analyses what the author thinks is a discrimination against menstruating women. He suggests that age old discriminatory traditions and customs violating human rights need to change with changing times.

Manavendra Singh Jadon in article, "The Role of Public Interest Litigation in Shaping up the Public Policy Regime in India: Overreaching or Justified and the Way Ahead" provides an insight into the accountability and transparency of the Indian democratic system through discussion on the far-reaching effects of the court's decisions on the public sentiment. He

further ponders over the question as to whether the policy intervention by the courts is a way to supervise and monitor issues affecting the consensus or is a way to establish hegemony over the emerging and developing system.

Toshali Pattnaik in her article, "Legal Framework Concerning Child Labour in India: A Critical Assessment" critically analyses the provisions of the 2016 Act, in the light of existing legal provisions and international conventions, pointing out the defects and loopholes in the law.

Aditi Singh Kavia in her article, "Legality of Armed Drones Under International Law" explains the Indian position with regards to armed drones. She suggests that the dearth of proper regulatory regime has given unparalleled power in the hands of such private players and hence there is an urgent need to address such issues and draft laws in sync with technological advancements and to increase government intervention in privatization of armed drones.

Devapreeti Sharma in her article, "India's Liaison with the International Criminal Court" argues that India not adopt the Rome Statute of the International Criminal Court, 1998. She discusses the reasons why India chose not to join initially and how it is essential now that India accede to the Rome Statute.

Jayanta Baruah in his article, "Judicial Dynamism in India: Supreme Court's Landmark Judgments in 2018" has done a critical study of some of the landmark judgments given by the Supreme Court of India that will create a lasting impact on the legal regime in India.

We sincerely hope that this unique set of articles will propel further research in their respective areas. We are extremely to all our authors for contributing to our journal. Through this issue we take yet another step to academic excellence.

Editorial Board

EFFECTIVENESS OF CALCULATING COMPARABLE ASSETS FOR PATENT VALUATION

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Anuttama Ghose [2+]

ABSTRACT

Any product of our human intellect if protected by law becomes an intellectual property and a tool to drive away competition and hence becomes an important part of overall business strategy of the owner. Market approach is one of the most significant as well as easily applied appraisal techniques. Under this approach, the present value of the future benefits obtained by an IP asset is measured with the help of a consensus judged in the market. The market approach is applied generally by using various methods to compare which determines the value of a business and its ownership interest. It is generally based on comparable circumstances for comparison with the actual price paid for a similar IP asset. Market approach reflects the perceptions and moods of those in the market with comparable assets. "The pre-requisites of Market approach include an active market, exchange of an identical IP asset, or a group of comparable or similar IP assets and if comparable assets are not available, variables to control the differences are considered.[1]" (Patent Valuation unlike other intellectual property assets valuation because the comparable patent which otherwise seem to be similar with the subject patent may differ in various ways and that may have effect on the process of valuation.) There are chances that certain factors are easily controlled and adjusted without making much difficulty in the valuation process while there is some other which might pose serious problem and invalidate the valuation process. This paper endeavours to understand the usefulness of market approach method and in what extent it can be utilized for valuing comparable assets in Patents, to determine the comparable factors for patent and to ascertain the controllability of the comparable assets in patents

Keywords: Intellectual Property Assets, Patent, Valuation, Market Approach, Comparable Assets.

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INTRODUCTION TO VALUATION OF PATENTS

"If this business were split up, I would give you the land and bricks and mortar, and I would take the brands and trademarks, and I would fare better than you."

— John Stuart, Chairman of Quaker (ca. 1900)

Valuation of intangible assets in a company which are mostly technical in nature like investment in research and development, knowledge, software, innovation, etc can be the part of patent valuation. Patent valuation like any other IP asset valuation is mostly done to ascertain the future value of the particular asset, which will be useful for making major business decisions. But unlike other IP asset, valuing patents in its early life or even in the later stage is much more difficult because of several technical, business related uncertainties and other legal issues involved in relation to grant of application and further enforcement. [3]

But then valuing a patent is unavoidable and thus assumption needs to be done in the most accurate manner possible as only then decisions can be taken regarding continuance of patent application, renewal of granted patents, ascertainment of damages in case of infringement, etc. The IP owners should not withdraw themselves from valuing their respective patents basing on a self-made assertion that valuation is not mandatory as then they may take some irrational decisions. Moreover, all patents are not assured to pay similar returns only certain patents gives out unusual value thus decisions must be taken wisely keeping in mind the limitations of budget that IP sector of a company can afford and thus, the method which assures to provide the most accurate estimated value are appreciated by the valuators.[4]

3 Robert Pitkethly, 'The Valuation of Patents : A review of patent valuation methods with consideration of option based methods and the potential for further research' (New Developments in Intellectual Property: Law and Economics, held at St.Peter's College, Oxford, 1997) http://users.ox.ac.uk/~mast0140/EJWP0599.pdf accessed 27 November 2018

4 Robert Pitkethly, 'The Valuation of Patents : A review of patent valuation methods with consideration of option based methods and the potential for further research' (New Developments in Intellectual Property:Law and Economics, held at St.Peter's College, Oxford, 1997) http://users.ox.ac.

There are several methods of valuing a patent but the objective of valuation is same and that is to find out the maximum return which can be received after exploiting the patent in every possible manner. In other words, what would be the gain of having the patented invention over its absence?

Among all the other methods of valuation, market based approach for valuation of Patent is used only in certain cases where there is any strong reasoning behind it otherwise this method is least used in case valuating patents due to some inherent problems attached. There are certain requirements of valuation through market approach which must be followed and the basic three requirements that must be followed is requirement of an active market, perfectly comparable asset, disclosed data, and arm's length price. In case of patents, generally it is difficult at times to find an active market and perfectly comparable asset. And even if it is found, sufficient data of the transaction between comparables is not always traceable.[5]

FACTORS AFFECTING THE CALCULATION OF COMPARABLE ASSETS FOR VALUATION OF PATENTS

When a subject patent is being valued with the help of calculation of value of its similar comparable patent then several factors need to be taken into account because the comparable patent which otherwise seem to be similar with the subject patent may differ in various ways and that may have effect on the process of valuation. There are chances that certain factors are easily controlled and adjusted without making much difficulty in the valuation process while there is some other which might pose serious problem and invalidate the valuation process. These factors are discussed below in detail:

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uk/~mast0140/EJWP0599.pdf accessed 27 November 2018

5 A. Martin Bader and Frauke Rüether, 'Still A Long Way To Value-Based Patent Valuation The Patent Valuation Practices Of Europe's Top 500' (2011) https://www.lesi.org/news-results/2011/08/04/still-a-long-way-to-value-based-patent-valuation-the-patent-valuation-practices-of-europe-s-top-500 accessed on 27 November 2018

A. REMAINING LIFE

This factor is especially relevant in the Patent valuation cases as it affects the value or price of a patent immensely. Every patent has a fixed economic life of 20 years after which it comes into the public domain. And it is during this period when maximum benefit is earned by the inventor from the particular patent. In order to extend this period often inventors modify their patent and try to gain a new patent over the same unless any kind of restriction posed by the patent office in this regard. However, patent is sure to have a definite life. So, it is very much important that at the time of finding a suitable comparable asset, the remaining life of the patent be taken into consideration. It is obvious that the patent with longer life would be valued more over the one with shorter life so if the comparable asset has a longer or shorter span of remaining life, it would surely affect valuation. Thus, in order to remove such inequalities it is required that the rates are adjusted accordingly.

CASE STUDY: NOVARTIS INTERNATIONAL AG AND BAYER AG

Novartis International AG – "It is a multinational pharmaceutical company which is primarily based in Basel, Switzerland. It is considered as one of the largest pharmaceutical companies across the globe. Moreover, this is concluded by both market cap and sales. It manufactures several drugs such as Clozaril, Voltaren, etc."

Bayer AG: "It is a German multinational chemical, pharmaceutical and life sciences company. It is headquartered in Leverkusen. Bayer's major areas of work include human and veterinary pharmaceuticals, consumer healthcare products, agricultural chemicals and biotechnology products, and high value polymers."

If we consider the above two companies, the global reach and portfolio of these companies are similar to one another. In order to find the value of a patent in the first company that is Novartis comparison can be made with the value of a similar comparable patent in the second company, Bayer. Provided that the patent is in relation to

a particular drug, curing the same illness and all the other factors being same. But there can be a risk of inaccuracy in value if the asset with which comparability is being done has a different 'remaining economic life' than its subject patent. This is because the life span of Bayer can create an impact on the value. For a drug as soon as it comes in public domain its being taken away by the generic drug manufacturing companies, the economic value which the inventor gets in the protection period is lost. So, if the remaining life of patent of Bayer is 18 years and that of Novartis is 14 years then even though they are comparable in every aspect still there will be difference in their asset value. Bayer would get a higher value because of longer life and also because of the sense of security, it provides to the investor. So, if this value is taken into account by Novartis then there will be high chance of inaccuracy as the real value for Novartis will be lower. So, before the valuation is done adjustment in rates need to be done.

B. MARKET REACH

It plays a major role when valuing patent through comparable transactions. A patent which has been registered internationally in different countries and is protected under the patent laws of different countries will have a global market and better protection than the patent which has only been registered domestically as it would have a smaller market and lesser protection. An investor would be ready to pay more value for the internationally registered patent as that would yield him higher returns and a stronger market position than the one which is being registered nationally. Thus, a comparison of value of two such patents, which is otherwise of similar nature, becomes highly difficult, as they cannot be brought at equal footing with one another.

CASE STUDY: NOVARTIS INTERNATIONAL AG AND SUN PHARMA

Novartis International AG – "the second largest pharmaceutical company in the world."

Sun Pharma – "Sun Pharma mainly operates in the domestic pharma market and focuses in the lifestyle therapeutic segments. The company

is in the process of expanding its business globally through exports. But it has not yet acquired a strong global presence."

These two companies belong from a similar type of industry that is pharmaceutical industry and both are involved in manufacture and R&D for drugs. Each of them has a similar kind of patent but the only difference that persists is that Novartis has filed and being granted a patent protection under PCT that means it has been registered internationally while Sun Pharma has registered its patent under the Indian Patent Law. So, Novartis is having patent protection in all those countries that are part of PCT while Sun Pharma is protected only in India. So, a valuation of comparable transaction is quite impossible as the value of transaction of the comparable asset cannot be relied upon for the subject asset which is to be valued.

C. EMERGING TECHNOLOGIES

This factor is of high relevance at the time of valuing patents. Patent protection is given over new technologies and the protection provided under law is for 20 years but certain technologies are so fast moving that in no time a better product enters into the market making the existing technology obsolete. So, there is constant risk of emerging technologies over the patent. While calculating the value for a comparable patent this risk needs to be considered because the degree at which emerging technology would affect the patent may vary even if the patents are from the same industry. If the impact is more, then the value will be less due to inherent risks and vice versa. So, a calculation of value without considering this factor may result in inaccuracy.

CASE STUDY: FIFTH GENERATION SYSTEM

It is quite apparent that the fastest moving industry in today's era is the computer industry, which evolves daily, and thus software generally have a short economic span of life. In the year 1985, when for the first time hard disk program was introduced by fifth generation system, it enjoyed the market attention only for 2 years after which several competitors entered the market, which posed serious threat

to the technology and thereby lowered its value. But if speculation is to be made of the value of a similar comparable patent basing on the value of the hard disk program then this factor is required to be considered because the emerging technology might not have similar impact on the subject patent it may vary thus bringing variation in the value too. Thus, avoiding this factor for consideration may bring erroneous result.[6]

D. NUMBER OF LICENSES

This factor also creates a huge impact on the valuation process because of the simple reason that 'greater the demand, better the product'. Meaning thereby, the valuators will give higher value to those patents which are in high demand among the licensee. The investor would also be ready to pay more for a patent that is so much in demand as that would increase his chance to yield high rate of returns. So, in case of valuation of a patent using comparability method, consideration of this factor is a must because while speculating the value of a patent basing on its comparable patent which is otherwise similar, there might be chances that there may be difference in value because of the high demand among licensee for the comparable asset which need not be same for the subject patent.

CASE STUDY: TATA CHEMICALS LIMITED AND HINDUSTAN UNILEVER LIMITED

Tata Chemicals Limited (**TCL**): "is an Indian company which is globally recognized and mostly operates in chemicals, crop nutrition, and consumer products. It has its headquarter in Mumbai, India. The company significantly operates in India and Africa. Tata Chemicals is actually a subsidiary company of the Tata Group."

Hindustan Unilever Limited (**HUL**) "is an Indian company, which is

6 V. Gordon Smith & L. Russell Parr, *Valuation of Intellectual Property and Intangible Assets*, (2 ed. 1994) 2.

also based in Mumbai. The owner of HUL is an Anglo-Dutch company Unilever. HUL's main products are foods, beverages, cleaning agents, personal care products and water purifiers."

Both the companies are highly reputed Indian companies that are engaged in development of certain devices involving innovative technologies. In recent time, TATA has come up with a 'Filter device' involving some latest technology. HUL also have a similar patent and tries to value its patent basing on the comparable patent in the market that is of TATA but here what needs to be considered is the number of licenses of the comparable asset, this creates a major variance in the value so at the time of speculation it must be kept in mind that the if the number of licenses is more of the comparable asset then its value can be more that the subject patent value even if the patent is similar in other manner.

E. OPPOSITION

This could also be a factor to be looked into while valuing a patent basing on comparable transaction method. When the value of a subject patent is being estimated depending on the value a similar comparable asset then factors which give rise or lowers down the value needs to analyse intrinsically, otherwise there might be a high chance of wrong estimation. So, the value of a patent becomes dependable even on certain pre-grant factors, one of such factor is opposition. The value of the patent generally decreases with the rise in the number of opposition as it raises question over the uniqueness of the product and also increases the possibility of infringement. This in turn lowers down the value of the comparable asset. In case of subject patents, it is hard to find out before hand what would be the exact level of opposition so calculating the value would be difficult unless such values are adjusted.

CASE STUDY: BAYER AG AND NOVARTIS INTERNATIONAL AG

Bayer AG: "it's a famous German multinational pharmaceutical company involved in R&D and manufacture of several drugs. It has also acquired patent over cancer drugs."

Novartis International AG: It is also one of the world recognized pharmaceutical companies engaged in R&D and manufacture of several drugs including cancer drugs.

In this scenario, if Novartis tries to determine the value of its patent over a cancer drug by following the method of comparable transaction then it needs a comparable asset which is similar to its own patent. Here, if Bayer's patent over cancer drug is considered as comparable asset then while valuing Novartis must trace back to the period when opposition was made on Bayer's application of patent. It is only then correct evaluation of value can be done because more the opposition lesser will be the value due to rise in infringement possibility so real value must be calculated accordingly.

F. LAPSE AND RESTORATION

A patent can lapse if the patentee fails to renew his patent and this may take place when payment of renewal fees is not being paid by the patentee or due to some other reasons. Even though law provides for ways of restoring the patent, the time gap between lapse and restoration of patent is very crucial because that can affect the value of a patent. This is mainly because during that period the patent loses its protection and it becomes prone to infringement as any other inventor can develop a similar patent without even infringement. While valuing a patent if it is found that a patent has lapsed and then after a certain it has been restored then there might be chances that the value of the patent lowers down due to risk of competition in the market. So, when a comparable asset is chosen for comparable transaction valuation it must be seen that whether the comparable asset is a lapsed one or not because this might affect the real value of the patent and therefore lead to wrong calculation of value.

CASE STUDY: VLI CORPORATION CASE

The impact of lapse and restoration on a company's value can be well depicted through this case. This company has acquired patent over a vaginal contraceptive sponge with the brand name TODAY. The patent

was unique because of which there was high growth in sales of the product. Sales in 1986 rose to $17 from the year 1983 which was then in standstill. Later in the year 1987, it was found that the US Patent and Trademark office denied renewing of patents for the company on the ground that the company had not paid the maintenance fee that was required by them to pay in order to reinstate the patent. This affected the value of the company immensely other factors were still the same but the rise of value was solely contingent on the reinstatement of patent and this was because the company has lost its protection and had become prone to more competition and copying.[7]

So, in this scenario if a company tries to value its patent by comparable transaction method and they take the patent of VLI Corporation as their comparable asset then it that case they must take into account the lapse and restoration factor that affected the value of the company immensely. If this factor is not taken into consideration then it is hard to determine the real value of the asset through the valuation of its comparable asset.

G. COMPULSORY LICENSE

At times Government can also interfere in the determination of the value of a patent and one of such example is compulsory license. When compulsory license is imposed by government on a company then that company needs to give out its patent on license to a patentee on an average royalty rate. This affects a company heavily as the value of its patent deteriorates, investors lack interest in the company's patent as the company loses control over its own patent leaving very less chance of high returns. In this scenario, this cannot be a proper measure of valuation for other similar kind of patent. The value it portrays is because of the impact of compulsory license on the comparable patent and such value can create inaccuracy in the calculation.

CASE STUDY: BAYER AG AND NOVARTIS AG

7 V. Gordon Smith & L. Russell Parr, *Valuation of Intellectual Property and Intangible Assets*, (2 ed. 1994) 2.

Bayer AG: "a famous German multinational pharmaceutical company having patent over cancer drugs."

Novartis AG: "a Switzerland based multinational pharmaceutical company which is also having patent over cancer drugs."

Bayer Corporation which has developed a drug called SOFRAFENIB to cure primary kidney cancer, was given out for compulsory license under the controller's order to Natco Company, which was an Indian based company. Such compulsory licenses do create impact on the value of the patent and when any other company having similar patent like in this case Novartis is to be valued and the value is being estimated basing on the patent value of Bayer then this factors play a major role as it may result in increase or decrease of value from the actual value of the patent.

H. LITIGATION

Value of a patent when determined with the help of the value of a similar comparable asset several factors are to be taken into account as discussed in the above cases. Another such factor, which can be very much important in terms of valuation, is litigation. This factor can be further divided under two heads and they are successful litigation and Ongoing Litigation.

If a company, holding a patent has undergone through a litigation process and has succeeded in those litigations then the value of its patent increases as it removes a point of future uncertainty of being questioned on the point of validity of the patent. Through a successful litigation, the validity of the patent is all the more established and the risk of any further infringement also reduces as the infringer might have fear of losing the litigation. Therefore, while taking the patent of this particular company as a comparable asset the successful litigations must also be considered to reach to the correct valuation.

In similar way the patent of a company also gets affected by the ongoing litigations like if the litigation that is still in process and the case is moving in favour of the patent holder or the

precedents of the case are such that it is favouring the patent holder then the risk of losing the patent reduces to a great extent therefore it do not reduce the value of the patent and in certain cases enhances the value but if the situation is reverse then in those scenario the value of the patent decreases and therefore all these factors are very important and must be taken into account while valuing a similar comparable patent which even though being similar may yield different value due to interference of the above factors.

CASE STUDY: NOKIA CORPORATION AND SAMSUNG GROUP

Nokia Corporation: "Nokia Corporation is a Finnish multinational company which manufactures mobile electronic devices, mobile telephones and other devices related to communications, and in converging Internet and communications industries in 120 countries. It was the world's largest manufacturer of mobile phones in 2011".[8]

Samsung Group: "is a South Korean multinational conglomerate company headquartered in Samsung Town, Seoul. It encompasses numerous subsidiaries and affiliated businesses, most of them united under the Samsung brand. Few of which includes Samsung Electronics, Samsung Heavy Industries, Samsung Engineering, etc."[9]

These two companies are comparable from all aspects and have similar patents in relation to technologies, as the products of the companies are almost similar to one another. So, it can be said that they are perfectly comparable and thus in order to find out the value of a patent of Samsung company, the value of the patent which Nokia company holds can be evaluated but in order to get an accurate value the litigation that is in continuance or has already taken place on Nokia must be taken into account specially when the litigation is one involving the patent involved in developing the technology. As the litigations are sure to have a forceful impact on the value of the Nokia,

8 Mahesh Kumar, 'A Project Report On Comparison Between Nokia Mobiles & Samsung Mobiles' (Project Report 2012) https://www.scribd.com/doc/87559881/Project-Report-on-Nokia-vs-Samsung. accessed 19 November 2018

9 *ibid*

company is patent and must have an impact on the market shares.

Thus, Samsung in order to derive its value from the comparable patent that is Nokia must adjust the value accordingly so that the factor does not create much impact on the real value.

FINDING AND CONCLUSION

Analyzing the Controllability of the Comparable Factors

The main objective of the valuator is to get an accurate value of a particular comparable asset so that the value of the subject asset can be easily derived from it. But there are certain factors which are very important for the assets in order to conduct an accurate valuation through comparable transaction method. In addition, it is necessary that if the factors create any kind difference between the patents such factors should be controlled in order bring them to an equal footing with one another. So, all the above factors are further analysed in this section to check whether they are controllable factors or uncontrollable factors and these analysis is laid down below:

- **Remaining Life-** This is very important and good factor for comparing two patents as unlike other intangible assets like Trademark, patent has a fixed economic life during which it provides maximum returns. Thus valuation on this basis is very much required. If the two patents differ in this respect then it needs to be controlled and brought into equal footing. In order to do so the remaining life cannot be extended but the value of the comparable patent can be adjusted to the subject of comparison so that a speculated value can be achieved. Even though there will be a risk of inaccuracy still prevailing.
- **Market Reach-** this factor is a good basis of comparison only in those cases where both the assets that are to be compared share the same market. but it can bring huge variance between the comparable assets and would not be a good basis for comparison if the market for both the products are highly different from one another like for example one patent is registered under a particular national law and the other is

protected through the process of international registration. In that scenario, trying to control the factor to bring the patents at an equal footing may prove to be unfruitful as in no way adjustment of value can be done.

- **Emerging Technologies-** considering this factor at the time of valuation of comparable assets can prove to be a difficult task as this factor is uncontrollable in nature. A valuator while valuing an asset cannot determine the impact of emerging technology on the comparable asset and it if such determination is done, it is hard to judge the impact it will have on the subject asset because degree of impact is not similar asset. So, this factor is not considered good for value determination of an asset.
- **Number of License-** while estimating the value of a patent this is a good basis of determining the value of its comparable asset as license shows demand for a particular patent so it gives a clear idea to the subject patent which is similar to the comparable patent as to what would be its value in the market. This is also a controllable factor as it is up to the inventor as he can give out no. of licenses as he desires.
- **Opposition-** this factor of determining the value of a patent can give out erroneous results as no two comparable assets is certain to get similar level of opposition. The number of opposition of the subject patent can be more or less from that of its comparable patent and it is totally not in their hands to control this factor so it is uncontrollable in nature.
- **Lapse and Restoration-** this is also one significant factor for comparing both the assets as it depicts the loss that a comparable asset has incurred due to non-payment of renewal fees. This gives the estimation of the value of the comparable asset if the lapse would not have taken place and it is surely a controllable factor as for the subject patents such lapse can be prevented in order to avoid the loss of value of the asset.

- **Compulsory License-** this factor is quite difficult to be considered upon as two patents even though similar the court may or may not grant compulsory license in both the cases. So, determining a value relying on this factor would be not so good. Moreover, this factor is not at all of controllable nature as it is completely based on government policies and decision of courts which is not under the control of a valuator.
- **Litigation-** this factor is a good one to be considered at the time of valuation of the comparable asset as it give out a vivid idea to the subject patent as to what kind of challenges it might face in future in the form of future litigations because of it similar nature with the comparable patent. Even though its good but it is an uncontrollable factor and true estimation value of the comparable asset is difficult to be traced. It is not necessary that the subject patent would face similar kind of litigations.

Conclusion

While concluding, it can be said that the researchers found that market approach gives the estimated value of the comparables assets in a market and is suitable only when perfectly comparable asset is available along with discoverable data.

In case of Patents, the comparable transaction method under market approach is suitable only in limited cases. This is due to the fact that it is quite difficult in case of patents to find out a similar comparable patent. Patent is unique and thus, each innovation varies from the other. In addition, it is also very difficult to trace accurate data in relation to a comparable patent as this IP is not discoverable in nature. So, there are chances that the valuation may lead to erroneous results. Nevertheless, in certain circumstances when this method is applied it is suggested that certain factors are taken into consideration so that an appropriate results can be reached. Among these factors certain factors can be controlled while some others are uncontrollable. In, case of uncontrollable factors the valuation becomes all the more difficult.

MARITAL RAPES IN INDIA: AN ANALYSIS

Kushal Srivastava[1]

ABSTRACT

Marital Rape has become one of the most debated topics of the contemporary era. This paper has tried to put forward an analysis in this regard. If we see the Indian Penal Code, there is a Section 375 which deals with the issue of rape; however there is an exception which says that a person is not responsible for rape if the woman is his wife, this has raised the main concern. Now will the explanation change if the man's status changes? These aspects are vital to be pondered upon. Focus on the same with an analytical approach is carried out throughout the paper. Does achieving the title of 'husband' exempt him and his deed from the definition of Rape per se? The situation of marital rape in India bring a very pertinent question as to why it is so that heinous crime like marital rape is hidden behind the curtains in the form of marriage? Through the cases like 'Francis Corallie Muin v.U.O.Delhi' & 'Kharak Singh v. State of UP', the paper raises question on Right to live with human dignity and right to sexual privacy. Does marrying give the man ownership right over the wife? This is one of the pertinent questions asked in the paper.Moreover, Indian legal system by refusing to criminalize marital rape, tend to accept that sexual coercion against women is an accepted norm in the society as well as the legal fraternity. We need to ask the government as well as the legislatures that why marriage is considered as a shield over such violations. These are some issues which this paper tries to emphasize upon.

Key words- Marital Rape, Consent, Human dignity, Sexual Privacy.

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INTRODUCTION

'Section 375[2] of the Indian Penal Code 1860 states that a man is said to commit "rape", except in the case hereinafter excepted, has sexual intercourse with a woman without her will, against her consent or consent obtained by fear of death, hurt or any fear for that matter.' Talking particularly about 'Marital rape', which is the fundamental topic of discussion in this whole project. Marital Rape actually occurs when a man has intercourse with his wife by force or any threat of force or in a condition wherein the wife is unable to give consent. Now will the explanation change if the man's status is married or not? Whether he is the husband of the victim? These aspects are vital to be pondered upon. Does achieving the title of 'husband' exempt him and his deed from the definition of Rape per se? Quoting the exact words of a Minister way back in 2015, he claimed that marital rape cannot

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2 A man is said to commit "rape" if he-—

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:— First.—Against her will. Secondly,when without her consent.

Third/y.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourth/y.—with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifth/y.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.Sixthly.—with or without her consent when she is under eighteen years of age.Seventhly.—when she is unable to communicate consent.

apply in Indian perspective because of many factors like illiteracy, religious beliefs, social customs, 'sanctity' of marriage. If these are the situation, than is it Ok for a man to sexually abuse his wife because they are poor or because their marriage is within the domain of religious rituals? This project tries to put such fundamental questions into the limelight. Another aspect of the project also highlights on the darker side of marital rape. It also asks a pertinent question that is the occurrence of Marriage equivalent to some kind of ownership over wife or is it a mere misconception prevalent in the Indian society ? If we talk about rape per se, it should be seen not only as crime against women but also as a serious infringement of individual's freedom and ideals to life. Thus the connection amongst culprit and casualty does not transform it. It is not right to consider that sex with spouse is any kind of privilege given to him by the institution of marriage.[3] Husband is seen using his position to break wife's trust and in long run increase individual dependability. This project demonstrates that how marital rape is traumatic in nature and has severe mental as well as physical impacts. Women in such traumatic condition see Law as an important tool to change their status and achieve equality. Such is the aura of Law in everyone's eye. There are several organizations which today have started raising voices, and lobbying for a substantial revision of rape laws and a demand of significant change in the traditional attitudes about rape, especially attitude about a 'husband' committing rape. But the irony rests with the sole advocate of rights i.e. the Courts. These courts continue to use unfriendly procedures of evaluating what acts as legal evidence. It is of prime concern that the ways, in which facts are constructed in legal arguments, they often work to the disadvantage of women. Women are not viewed as credible sources if they tend to delay in reporting of their situations. In addition to this Media portrayals are not less. Not all rape cases receive widespread media attention. Then we can probably imagine the chance of portrayal of cases of Marital Rape.

Furthermore, another facet of the paper highlights the exception to the section of Rape. It says that sexual intercourse or sexual acts by

3 Vaishna Roy, 'The Marital Rape Debate' *The Hindu*(March 19, 2016).

a man with his wife, the wife not being under fifteen years of age is not rape. It is to be noted that in such a situation 'it is NOT a rape'. It brings a lot of confusion with a question that is it worth the existence of such exemption in the Indian Penal Code. Why is it that the Indian legal system has never thought about the existence of the exception or has simply ignored it? Through the project such vital arguments are also taken into consideration. Eventually, it is seen that as of today, numerous countries have either revoked cases of marital rape nature or established marital rape laws. Thus there is a holistic approach taken through this paper which emphasizes on both socio as well as legal aspect attached to the topic and concludes with the note that can marriage engulf the scenario of marital rape or it will come into limelight and go through process of elimination.

MARITAL RAPE IN INDIA

Before talking about marital rape in particular it is necessary to ponder upon the element of rape. Rape is basically a sexual intercourse without the consent of the person followed by a physical force or threat to do so. In India, section 375 and 376 of the Indian Penal Code, penalize the offence of rape. Rape is not mere violence against women but also a violation of a person's fundamental right to life with personal dignity. Historically the term 'Rape' is derived from the term 'rapio' which means to seize. Thus rape is considered to be a forceful seizure without her consent, by methods of force, fear or fraud. Thus it is coercive in nature. It leads to violation of the self of a woman. The Supreme Court of India described it as 'deathless shame and the gravest crime against human dignity'. Rape is not merely an assault which is physical but is destructive for the victim. Whenever Rape is mentioned there is a general tendency that we think of a stranger in the picture, but we fail to think of rape in context of marriage. This is what is known as 'marital rape'. The issue of marital rape though quite prevalent everywhere in India has received huge attention. In the patriarchal society which has dominated Indian system for so long, women has been considered as mere property by her husband or the so called 'patriarchal guardians'. Why is women treated as property? This shows that women have no right to their own body.

She is considered as a subject to her husband's will. Marital rape is thus, a sexual intercourse by the husband with his wife without her consent. Thus marital rape is hard to deal with since the perpetrator is one whom the woman knows. The ideology has influence our legislatures in ignoring the offense committed by husband, thereby giving it a shield of matrimonial right of husband over wife's sexuality.[4] They go through not only vaginal rape but also anal and oral. Physical violence and coercion has become a tool in Indian society to have non- consensual sex.[5] It is true that cases of marital rape in India go underreported, but we cannot neglect the fact that it has immense impact on the lives of women who go through it. Factors like family pressure, financial dependency on the husband, safeguard of children play an important role in preventing the issues from coming to the limelight. If we acknowledge the recent developments, today many countries have either repealed the distinction between marital rape and other rape or enacted strict marital rape laws. In the year, 2006, it was estimated that marital rape is considered as an offence punished under the criminal law in at least 100 of the countries and to the expectation, India was not one of them. This data shows the pathetic condition. Though several laws and enactments have been done in India in regard to its women; laws against female infanticide, laws against domestic violence but India has tremendously failed to come up with a legislation against marital rape. Is India not neglecting gender justice by such an ignorant step towards the issue?

MARRIAGE: OWNERSHIP RIGHT OVER THE WIFE?

The situation of marital rape in India bring a very pertinent question as to why it is so that heinous crime like marital rape hidden behind the curtains in the form of marriage? Does marrying a woman give the man ownership rights over the wife? Why do Indians tend to forget that marriage is a bond which is based on trust and affection? A man exercising sexual superiority is not the element of the institution. But

4 Saurabh Mishra and Sarvesh Singh, *Marital Rape- Myth, Reality and Need for Criminalization* (2003).

5 Sangamithra Longananthan, *Marital Rape* (Legal services India, Women Issues, July 04, 2017).

this is ignored in India.[6] Here, marriage is just a sexual contract since it gives the man implied consent to sex. It acts as there is an ownership over the wife. Marriage in Indian context denies the women any right over her body.

Moreover, Indian legal system by refusing to criminalize marital rape, tend to accept that sexual coercion against women is an accepted norm in the society as well as the legal fraternity. We need to ask the government as well as the legislatures that why marriage is considered as a shield over such violations. Because if women had the fundamental right, she could have the right to say NO to their husbands without being looked down by the society. It is evident that since India penalize sex outside marriage; men see marriage as a safeguard and a protective ground to fulfill their need and free access to physical violence over their wives. There are some who advocate from the other side of the argument considering the fact that the institution of marriage will be threatened by such laws. They however underestimate the bonding, affections and understanding which holds marriages together. To their point of view, there is a clear answer that when a society makes murder or theft for that matter a punishable offence, it does so not because everyone has a tendency to commit such offences but in order to safeguard everyone from the few who commit such offence. However such is the situation only because the wife's role has been taken and understood to be that of a submissive and docile. Sex has been treated as obligatory in a marriage and thus giving space which leads to creation of man mindset which consider ownership right over their wife.

Thus the emergence of marital rape can be seen as a by-product of our society's basic understanding of the role of the institution of marriage. Men see marriage as a space, a right for free and convenient sex; it rather becomes difficult for him to understand the meaning of partner's consent.[7] Eventually, mere defense of protection of institution of marriage should not be the detriment to enacting laws to protect the

6 Priyanka Rath, Symbiosis Law School, "Marital Rape and the Indian legal Scenario" (Vol. 2, Issue 2).

7 Charles D. Burt, "The Crime of Marital Rape", (1985), 1,5.

fundamental rights of women. Apart from such judicial awakening, what we require is a spark of awareness. UN says that since men are the perpetrator of such crime, it is important to educate them and make them view women as their partner in life and that understanding between both the gender would bring in solidarity and peace.

DEVELOPMENTS IN INDIAN PERSPECTIVE

If we talk about India in particular, marital rape is not an offense in India. The only development is the section of 375 which is only about Rape. However there is an exception clause attached to it which says that Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape. Hence marital rape is considered as a rape if the spouse is less than 15 years old. And there is no lawful security agreed to the spouse after the age of 15. This is the situation in India. Now taking note of the punishment attached, offense when wife is between the age of 12-15, the punishment with imprisonment is for 2 years or fine or both. And when the wife is less than 12 years of age the punishment goes up to 7 years. In the year 2005, the act for protection of Women from Domestic violence considers marital rape as a type of local violence. In marital rape, women's affection, her trust is shattered. And to the contrary Indian legal system finds no ground to enact laws against marital rape. Through this paper it is urged that it is high time the meaning as per prescribed by the section of IPC should be changed.

Right to live with Human Dignity

In the case of 'Francis Corallie Muin *v.* Union Territory of Delhi', the idea of right to life under Article 21 was highlighted. It says that with right to life, comes the right to live with human dignity. To live with dignity is the fundamental element of the right to life, and when rape or marital rape takes place, women's right to life and dignity is hampered. In addition to this there was a case 'Bodhisattva Gautama *v.*Subhra Chakraborty',[8] the court held in the case the exemption which is there in the section 375. It depicted that the exception is

8 Tan Chen Han, "Marital Rape- Removing Husband's Legal Immunity", (1989) 31, Malaya L.Rev. 112,112,128.

violation of spouse's right to live with human dignity. Any law which damages women entitlement over her right to dignity is unlawful in itself.

Right to Sexual Privacy

Right to privacy is considered to be a fundamental right by the Constitution of India. In the case of 'Kharak Singh *v.* State of U.P.', the Supreme Court held right to privacy intrinsic to the article of 21. Be it any type of intense sex, it damages the right of protection and sexual security. Similarly, through the case judgment of, 'State of Maharashtra *v.* Madhukar Narayan' and the recent case of 'Vishakha*v.* State of Rajasthan', the Supreme Court extended the right of privacy in working environment also. Thus it is clearly evident how the legal scenario has developed with time.

These are few rights which are of great concern when it comes to the right of the Women in matters which have been neglected for so long. There are two sides of the same coin which needs to be considered. On side the law does not permit girls to get married before the age of eighteen years. In addition to this, any intercourse with a minor irrespective of the consent is a rape. But on the other side of the coin besides such protections, a girl is abandoned from all such provisions as soon as she gets married. There is POSCO Act to protect girls after eighteen years but no law to protect her but only exceptions which is not a protection from any side.

Thus marital rape is not completely criminalized in India. It certainly is a genuine wrongdoing against women. We can never neglect the fact that women who are raped by their spouses are more inclined to various attacks and physical abuse. We need to acknowledge that in the prevailing situation of marital rape in India there is an urgent need of positive legitimate change for women both legally as well as socially. There are many loopholes present and no legislation looks straight towards marital rape.

IS IT A TOOL TO HARASS HUSBANDS?

There is a counter argument which arises when we discuss on the topic

of Marital Rape. It is claimed by many including the government faces that if it is tried to make the act of marital offence an offence under the Penal Code then it will be used as a tool to harass the husbands. Such husbands would face harassment on hands of their wives. Now this is the picture which is seen in today's India. It is popularly argued that making criminalizing marital rape would "destabilize the institution of marriage". This scenario really brings our mind to think that is this really the case or the reality is something else. If we see the contemporary scenario, there have arose many women organizations which are advocating this change for the decriminalization of the exception attached to the description of section 375 of Indian Penal Code. Putting forward the words of the exception,it says that if a husband establishes intercourse with a wife who is above the age of 15 years is not considered to be any offence. After the voices of these organizations, the High Court has asked the central government to come up with a stand of its own regarding the subject matter. Focusing on the stand of the government, first it depicted its inability in this regard and said that taking the literacy and social diversity of the country; it is not possible to criminalize marital rape. A parliamentary panel report talked on the same line as of the government's and demarcated that if it tried to criminalize the aspect of marital rape it would be a unnecessary burden on the entire family. On the similar tone a former governor who happens to be the husband of current cabinet minister said that there is no concept such as marital rape. Homes should not become police stations. If such happens than husbands would be in jail rather than being in homes.

Thus we also cannot deny the fact that voices against the abolition of the exception which protects husbands are being heard every now and then. There is an NGO which has been opposing the petition of making the marital rape an offence under Indian Penal Code. The described NGO represents the alleged men of the society who might be the victim of laws which are sought to be changed. They claim that a large number of male will be 'victimized' by the women through false domestic violence and rape cases. But one genuine question needs to be asked at this juncture of discussion. What if a girl who is more than

15 years of age affirms for a consensual sex? Will the act be an offence, taking into consideration that the law terms the act rape only if a man establishes a intercourse with a wife who is less than 15 years of age. Thus a question arises that why is such distinction between 15 and 18 years of age? Be it of 15 years or 18 years, a girl is not physically as well as mentally developed to know the harsh consequences.

SOCIOLOGICAL & PSYCHOLOGICAL IMPACT

The sociological as well as the psychological impact of marital rape on women cannot be neglected. Report conducted by a woman NGO depicts that due to Indian perspective wherein marital rape is not seen as an offence has an long lasting impact on women's body as well as her mind. Many women accepted that they faced one or other form of abuse and among which forceful rape was the most heinous. The initiation of such acts follows from arguments between husband and wife based on men's jealousy and possessiveness, disagreement on certain issues and the authoritative mindset of men.[9] In order to explain the psychological impacts the help of study of different countries is taken into consideration. It is observed that the abusers have either experienced violence in childhood or witnessed violence between the parents. This acts as the reason behind the psychology of the perpetrators. This is supportive of the view that abusive patterns of behavior are passed through social learning mechanisms. There by meaning that the mindset of a abused women is affected and she expect the case to happen in the future also. While on the other hand the abusers are likely to have inclination towards alcohol and criminal activities. It is also depicted that some abusers develop a dominant attitude towards female counterparts just by seeing the deeds of their fathers. It was observed that abusers suffer from low esteem perhaps resulting from having been abused as a child. Evidence also says that violence in family is affected by the level of violence in the society as a whole.

Now coming to the Sociological explanations attached to the impact of marital rape, it is fact that male physically abuse their female

9 Burt (n 6) 4,5.

counterpart. It is depicted that the variations in the levels of abusiveness among individuals are related to the patriarchal nature of the society. Moreover, the patriarchy is the key term in sociologists' explanations of domestic violence. As for example Feminists consider societies to be patriarchal in their establishment and thus dominance of men over women is established. We know that Indian societies are based around family and thus society is shaped according to the elements existing in sets of family. The husband and wife have different roles to play in the given society. The sociological impact in one way raises the query about the notion of equality. The fact that most women in relationships are dependent on men for their financial support explains as to why women find it difficult to leave their partners. Thus it is seen that both sociological as well as the psychological argument put forward the impact of marital rape in particular.

CONCLUSION

It is considered that merely deleting the exception of the section of 375, which provides protection to husbands from prosecution for the offence of rape, may not stop marital rape. On the contrary, moral and social awareness plays a vital role in stopping such an act. Individuals are the ultimate bearers of rights and duties in a constitutional system; they are morally significant units in a democracy, thus it becomes important to protect individual's dignity and right. The centre comes with a quite silly justification that if the issue of marital rape is brought under the ambit of crime, the marital rape law will be misused in one form or the other. If we compare the scenario of India with other countries, those civilized societies have no such exceptions which India has. If we notice the case of marital rape, it really becomes a challenge to prove the offense. Dragging away the husband does not always is full proof idea. An important view is that criminalizing marital rape may not have an immediate result but what is needed is a long-term social change on a broader scale. In the real sense, what the state needs is to recognize marital rape as a crime in order to send a message to society that yes it is a crime. Because as long as we let a man think it's legal to force a woman including his wife, he will not get to know the gravity of the circumstances. We have experienced a lot

of change in the stagnant legal provisions through various judgments of the Apex Court. Thus such laws which hinder the growth of entire society should be molded in accordance with need of the hour. Such alteration is advocated because it is left as it was, i.e. a rigid law with the capacity to adapt the changing society. An example will be appropriate to explain the situation. It was the senior advocate Gopal Subramanian, who was part of the Justice J S.Verma Committee constituted in the aftermath of the December 16 gangrape in Delhi and was present in the courtroom said, they had considered various aspects and then suggested that it is necessary to criminalize marital rape. Thus, on a concluding note, it is of great concern both for the government as well as the legislatures to work in this regard and come up with a holistic solution which would act as a landmark judgment in the socio as well as the legal fraternity of Indian subcontinent.

WHY IS MY HIJAB YOUR PROBLEM: A JURISPRUDENTIAL ANALYSIS OF WOMEN BEHIND VEIL

Prachi Tyagi[1]

ABSTRACT

The socio-cultural development of any society is judged on the basis of the status of the women in that society. Better the say and rights of women in the society, better is the socio-cultural status of the society. The same can be easily said if we look at the status of any women in any section of the society. And depending upon the disparity of the women rights and status, the cultures are valued and discussed upon.

Hijab is one such aspect of the women which has attracted the attention of two different extreme opinions as far as the status of women in society is concerned. One major set is the Islamic countries which associate hijab with modesty of female and claim it as a practice that keep women at bay from the lustful eyes of the society. It has been made synonymous to the integrity of the female. And the fact that the society has changed, does not mean that the female should shed away the hijab to meet the western concepts of liberty.

On the other hand, there is a viewpoint which symbolizes hijab with torment and shackling of women through such customary practices and a way to put women at bay from the wave of development. The argument that the status of the women in society can not be prejudiced because of some customary and orthodox principles of the religion which has been interpreted to subside the interest and growth of the women in the society is heavily relied upon.

The fact that the world is divided on these lines and few countries like France and Belgium have put a ban on hijab and some Islamic countries are adamant and strictly following the concept of hijab. Both set of viewpoints have been the reason of the implementation of their set of laws. Amidst all these, the real and crucial point of discussion is eclipsed i.e. the choice of women, her will and whether the concept of hijab is against the development of women. The status of women, with or without hijab cannot be decided by the extreme notion of the concept of hijab.

This article is jurisprudential analysis of this debate on the analogies of Jeremy Bentham who supports the concept of hedonism and Robert Nozick who values the ideals of individual liberty.

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Introduction:

The wearing or not wearing the hijab attracts the debate because of the viewpoints held by two set of countries. One believes in the concept of upliftment of womanhood and also that no shackles should be imposed on the very being of a woman just because of some orthodox practices. They hold the view that being non-religious and being secular are not the synonyms of each other. In the garb of religion, the country cannot be made to suffer in a way that practicing the orthodox religious practices, one cannot be made to create a separate group or identity, making that person distinct from the majority.

On the other hand, the Islamic countries hold the view that the word hijab cannot be seen in isolation. Hijab connotes with itself the modesty and the very integrity of a woman. A woman is expected to save her chastity from the lustful eyes of the society. Moreover they hold the view that the religious teachings cannot be out casted with the so called modernization.

The point of controversy which attracts my research is that when the countries like France and Belgium are talking of the upliftment of the woman and consider wearing of hijab as a sign of backwardness and in the another set the Islamic countries where they uphold wearing of hijab as a righteous practice and attach it with the very modesty of a woman, so in that process, has it not been the case that in this debate, we have actually forgotten the centric notion of the debate- the woman, her choices, her will.

This article is jurisprudential analysis of this debate on the analogies of Jeremy Bentham who supports the concept of hedonism and Robert Nozick who values the ideals of individual liberty.

Bentham –French debate:

Bentham is a jurist who upholds the principle of utilitarianism. He believes that a law should be such which provided for maximum happiness of maximum number of people and in achieving this maximum happiness, even if the interests or happiness of the minority is at stake, that should be done, because in a society every person cannot be happy with the act of the state, but if the majority is in

consonance with the act of state, it will stand valid. For evaluating the test of happiness or pain, Bentham has given the following factors: intensity, duration, certainty, propinquity, fecundity, purity, and its extent.

The government of France and Belgium hold the contention that the wearing of hijab in the Muslim religionis a sheer sign of backwardness; it is just another effort by some male chauvinists to oppress the woman by mis-interpreting the Quran. Hijab wearing also poses a threat to the security of the nation as the French government believes that wearing of hijab is quite similar to the dressing of the terrorists, "this is how the terrorists dress up". Moreover it is creating the segregation of the identity of a Muslim woman from a non Muslim society which makes them more vulnerable to be very open for any kind of discrimination.

(a) Looking at the whole scenario with the **Benthamite lens**, will initially compel us to think that since the population of Muslims in France is very low[2], (French poll clearly states that less than 3% of the French population is comprised of Muslim people. This is an extremely low amount and will affect fewer than a million people) and the majority of the society believes in upliftment of woman and thus increasing the notions of pleasures achieved by a woman in France will upheld the opinion of the French government.

The irony is that a closer look at the problem with the analysis of **Bentham** actually reverses the position, making such acts of the government being against the principals of Bentham. For Bentham what gives pleasure to the majority is right. But the position would be different if the pain of the minority increases to such an extent that it actually becomes way more than the pleasure of the minority.

The researcher wants to bring to the notice that the actual position in France is not as rosy as it seems, researches have shown that the this attempt of the government is more or less an "islamophobia", women who wore hijab have been actually thrown out of schools, harassed and

2 <https://www.wikigender.org/wiki/the-debate-on-the-veil-in-france>(Redirected from Debate: Ban on Muslim veils in France)accessed on 5th November 2018

beaten up. The measure taken up by the government affected girls in French public school who in fact wore the hijab. The measure did not address the dress of Muslim females outside of schools, nor prohibit less ostensible Muslim religious symbols in schools. Determined terrorists would not push back or be pushed back simply because Muslim school girls in public schools were not veiled."Even though it was worn by very few students in French public schools, was an attempt to enact a particular version of reality, one which insisted on assimilation as the only way for Moslems to become French."[3]

(b) In such a case, talking about the factors which decide the propositions of pain and pleasure, the intensity, the duration and the pain of minority are increased to such an extent that it compels to really question the majority that the pleasure which they actually derive by passing such laws is a legitimate one or is another effort by the government to uphold its policy of racism in the lieu of the hijab. The pain inflicted upon the majority who is in support of banning hijab, will be way more than the pleasure which they will derive, when they will come to know that France, who talks for the upliftment of woman has actually targeted the woman for implementing their policy.

(c) Another interesting fact that one can analyze from the theory of **Bentham** is that, he has put forth the view that the legislative action of the government has to be seen in the light the way it affects the first person that is to say that whether the proposed law will give be a cause of pain or pleasure to the person who is directly affected by such law. In case of hijab, one is compelled to think, using the Benthamite lens that who is directly affected by the French policy of ban on hijab. The clear answer to this question is that the woman wearing hijab is directly affected by the policy making of the French government.

Now **Bentham**purports the view that the person who is directly affected by the law, that persons' pain or pleasure must be taken into account. It can be clearly seen that there has been a huge demonstration by the Muslim people residing in France against the policy of the French government on the ban of hijab.

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3 Joan Wallach Scott "Politics of the veil" [2010] Pg. 110

Thus, concluding the Benthamite analysis on the French scenario brings us to the point that Bentham while analyzing the policy of France will not favor the ban on wearing the hijab, as the pain inflicted to the woman, is way greater than the pleasure derived by others in lieu of their policy implementation, because upliftment and removal of backwardness is not done just with banning of hijab in schools. If one talks of real upliftment, the quality of education may be enhanced or the number of employments and the participation of woman in such activities. Banning of hijab is no way a method of upliftment of woman.

Bentham-Saudi Arab debate:

The government of Arab makes it mandatory to wear the hijab. In their view wearing of hijab is an obligation cast upon the woman by the instructions of the holy Quran, failing which one may not get the benefits of going to heaven. According to them the woman is required to protect her modesty which is done through wearing of hijab. They believe that by enacting such kind of legislations, they are giving a wider meaning to the womanhood and in a way are heading towards looking at a woman with utmost dignity and respect.

This is actually false.There is no directive within the Quran for all Muslim women to wear the khimar, jilbah or niqab and even less to wear a 'curtain' (hijab). This has been pointed out by many, from Egyptian modernist Qasim Amin. The hijab is mentioned eight times in the Quran, most not in relation to the Muslim women at all but in relation to god (sura 42, v 51), the separation between hell and heaven, the 'veiled' sun at the dusk; the separation between infidels and the prophet and Mary's confinement when she gave birth to Jesus. The only reference to women concerns when believers address the wives of the prophet: they should do this from behind the curtain so neither the wife nor, especially the prophet are importuned. The same verse also directs believers not to marry the prophet's widows as this would be a sinuous act in front of the god. These verses are thus less about the woman and more in regard to the prophet and pertain only to his wives in any case. This verse was written within the content of

prophet's seventh of the twelfth wife[4]. According to the survey done by the organization, Saudi Arabia was ranked as the 18th worst country, 20th being the lowest, as the worst country for a woman.[5]

"Legally as well as socially, women are second-class citizens. Women aren't allowed to drive, which is a symbol of larger restrictions on women's mobility, there is no law against domestic violence and a man's testimony in court is worth the testimony of two women." —Lyric Thompson, advocate with Amnesty USA and International Center for Research on Women.

Thus analyzing the aforesaid condition with the viewpoint of **Bentham**, one can draw the inference that while talking of imposing views on wearing of hijab the pain inflicted on the women, who is directly affected by such laws will be way greater than the pleasure it gives to the other. Moreover Bentham was not in favor of anything done in the garb of religion and morality. All what he appreciated was the pleasure derived by that law.

Robert nozick-what the woman wants:

Robert Nozick is a jurist who was strongly in favor of liberty of individual and the concept of distributive justice. He believes that the state should have no interference in the act of the individual. He believes that state should have a minimal role and thus should not interfere in any kind of activities. The utmost role of the state is maintaining of peace and nothing more. Thus whatever an individual does, how he does, with whom he does is not the topic for the state to decide.

Another point which Robert Nozick puts forth is that of the 'prudence', he holds that every individual is the guardian of himself in every aspect. The individual is regarded as the best judge for himself, so the individual should be given all choice to decide for him and the state should have no interference of any kind.

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4 Bronwyn Winter"Hijab & The Republic: Uncovering the French Headscarf Debate" [2008] PL448

5 <http://www.trust.org/documents/womens-rights/resources/G20Poll2012Infographics.pdf> accessed on 09 November 2018

Analyzing the acts of the French government and of the Saudi Arab states of which one states that the removal of ban should be upheld as it is an effort to remove the backwardness and let the woman come at par with the changing levels of modernity. Another view purported by the Islamic country is that the compulsion of wearing hijab is no way wrong as it protects the woman from the lecherous eyes of the society. It is the duty casted upon the woman, by the so called valid interpretation of the holy Quran, which says that it is the duty of every woman to save her modesty and thus to cover her body whenever she steps out of her home.

(a) A libertarian will out rightly reject all such contentions saying that this all are baseless and are in a way making the mockery of the individual liberty. **Robert Nozick** will put forth the view that the actions of the French and Saudi Arab government in the lieu of their interpretations on the notions of social upliftment and morality respectively have totally ignored the free will of the woman. In none of the contentions put forth by both the governments, has talked of the will of the woman wearing hijab. In both the actions of the government there is a sheer implementation of their policies, totally ignoring the will of the woman, who has to actually tow the burden of such policies which society centric and have actually forgot that the society consists of individuals, so prior to the will of society, the will of the individual holds a much higher value.

(b) Another point that Robert Nozick talks about is of the 'prudence' possessed by the individual. It is worth questioning that is the woman in debate so lacking of the cognitive faculties to decide as to what is good for her and what is bad? It should be totally a matter of individual's choice to wear or not to wear hijab, and the state should have no say in matters of individual choice. Upliftment doesn't come with the wearing or not wearing of hijab and morality is not a cup of tea for a libertarian.

Conclusion:

Thus it can be concluded that both the jurists, Bentham and Robert Nozick will reject the imposition of hijab in any form, initially it was being felt that the policies of the French government and Saudi Arab will be in consonance with the principles of Bentham, but a closer look at the theories of Bentham led us to the conclusive notion that the implementation of these policies will result in increase of the pain of the Muslim woman, that it will be way more than the pleasure given to others, if at all.

Robert Nozick will out rightly reject any kind of act of the state which encroaches upon the individual liberty of the individual and will be in favor of upholding the free will of the Muslim to wear the hijab or not to wear it.

HUMAN RIGHTS IN CONFLICT SITUATIONS: A STUDY IN THE CONTEXT OF THE SYRIAN CRISIS

Debanjana Bhattacharjee[1]

"Syria is the biggest humanitarian and refugee crisis of our time, a continuing cause of suffering for millions which should be garnering a groundswell of support around the world"- Filippo Grandi[2]

*No words will suffice for the description of the dreadful events taking place in the country of Syria which has been termed as the modern case of crimes against humanity. The Syrian crisis has caused massive and unimaginable destruction to its people and till the present date, huge influx of refugees is seen in the neighbouring countries of Jordan, Lebanon etc. The Syrian Government on one side and the non-State actors on the other, such as the Free Syrian Army (FSA) etc., have adopted methods of warfare such as unlawful air strikes, chemical attacks, indiscriminate bombings, attacks on schools and hospitals among others which have not only violated the principles of International Humanitarian Law (IHL) but has also disregarded the Human Rights Law which is similarly applicable. This 'armed conflict' of recent times has shown the international community the gruesome killings, rapes, torture and every form of violation which can be perpetrated towards humankind. Calling for a humanitarian intervention, it remains to be seen how far the actors like UN etc. are successful in establishing peace in this worse situation of conflict. But whatever be it, the large-scale damage and most importantly, the millions of lives lost in the conflict till now cannot be undone.***Keywords:** Crimes against humanity, Refugees, Human Rights, Torture, Damages

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INTRODUCTION

As we eagerly look forward to a new dawn everyday, nothing substantial has changed for the people living in Syria and the refugees who have managed to escape the country. This is because, for them, everyday is a day where they live in pain and a deep-rooted fear- the fear of being killed, the fear of losing their dear ones and the fear of not seeing the subsequent day. The ongoing armed conflict which has been eating up the country since 2011 has only deteriorated day by day with the tussle between the Syrian Government and the opposition groups growing strong. However, the sad part is that, amidst the ongoing conflict, the common people are the ones who have been the targets and subsequently, the worst affected. The civilians have been attacked deliberately by both the parties to the conflict and populated areas such as Da'ra, Aleppo etc. have been witnesses to these bombings since long. Usage of cluster bombs, chemical attacks, air strikes have resulted in the increasing casualties along with the destruction of the civilian properties and massive internal displacement. Human rights violations in general, have scared the people over times resulting in a psychological imbalance. Women have been stripped off their dignity and children have been attacked similarly with bombings of schools and hospitals. All forms of international norms including the Geneva Conventions and more specifically the principles of IHL and human rights have been violated by the parties without taking responsibility of the same.

If we pause for a moment and reflect on the happenings in Syria, it will make us go numb because we won't be able to even feel half of what they go through daily. So, it is high time that the humanity is saved.

Syrian Horror

The ongoing situation of war in Syria, a middle-eastern country, is not new to us and this March 15th of the year 2018 marked its completion of eight years since its first starting in the year of 2011. If we go back in time and analyse the series of events which culminated, in what is termed today, as the greatest case of crimes against humanity, we will see the nature of the war change from that of an internal one or civil

war to the present time where numerous outside States are involved. That is why a brief overview of, what is known as, the Syrian crisis and how it escalated to this extreme level of destruction to mankind has to be stated initially, in order to understand the seriousness of the problem in terms of violation of the International Law principles.

The root of this crisis dates back to the year of 2011, when inspired by the Arab Springs which overthrew the Presidents of Tunisia and Egypt, the Syrian activists who supported democracy, started holding demonstrations demanding the resignation of President Bashar al-Assad whose family had ruled the country since 1971.[3] They further took out peaceful protests in response to the detention and torture of 15 boys who had to face punishment for writing graffiti in support of the Arab Spring. Among the two boys, one boy who was aged 13 years was killed after being brutally tortured. The very next course of action taken by the Syrian Government under the instruction of President Bashar al-Assad changed the nature of the conflict which was peaceful till now. The Government responded to the protests by killing hundreds of demonstrators through firing and using lethal force along with imprisoning many. This agitated the protestors and from a peaceful protest, Syria gradually moved on to a state of 'civil war' when in July 2011, defectors from the military announced the formation of the Free Syrian Army (FSA), which was a rebel group and was strongly determined to topple the Bashar al-Assad Government. Some civilian volunteers also joined and later the Hezbollah and the Islamist group of al-Nusra front began to extend the support to the Syrian army.[4]

Massive protests started next where elements of the opposition increasingly started taking arms against the Government and further militarised the conflict. Syrian authorities were also no less as they launched another massive offensive attack in February 2012 whereby they used artillery (known as large calibre sometimes) to bombard civilian neighbourhoods and other areas under the control of

3 VP Haran, *Roots Of The Syrian Crisis*, Institute Of Peace And Conflict Studies, Special Report 181, (2016) 12

4 ibid

opposition groups.[5] Due to these military attacks, many Syrians had to take refuge in the neighbouring countries of Lebanon and Jordan (*Za'tari* refugee camp is opened which transformed from a temporary settlement to a permanent settlement for those refugees) to seek refuge. So, by May 2012, Human Rights Watch had made it official that these fighting in some parts of Syria had acquired the status of an 'armed conflict'.Subsequently, by August, the U.N Human Rights Council started alleging Syria of committing war crimes. There was also sharp sectarian divisions between the Shia and the Sunni sect at this point of time which was in contrast to the non-sectarian protests in 2011. Thereafter, the situations continued to become worse as military attacks and bombings started taking place. Bomb attacks were done by the opposition forces on the National Security Headquarters which took away the lives of senior officials. Places like Damascus, Aleppo were attacked which simultaneously cost the lives of the people residing there. President Assad was accordingly accused of the attacks including the chemical attacks which were confirmed by this point of time. As fighting intensified between the Syrian Government and the opposition forces, the casualties of people who suffered from such attacks continued to rise. For example, by February 2013, the United Nations Officer for the Co-ordination of Humanitarian Affairs (OCHA) had estimated that over 2 million people were internally displaced and living in intolerable situations.[6]

The years aftermath saw no change and although there was a deterioration of the humanitarian situation, it was difficult to reach such people who needed help. In the month of April 2014, another refugee camp i.e. the *Azraq* refugee camp was opened in Jordan and Lebanon saw the influx of about 1 million refugees which started to put severe strains on the nations' economy. Not only that, after ISIL declared a caliphate in Syria and Iraq's occupied territory, the number of refugees fleeing to the neighbouring countries doubled and now Europe started seeing the influx of refugees. In 2015, Europe

5 Iffat Idris, *International Humanitarian Law and Human Rights Violations in Syria*, GSDRC, University of Birmingham, June 5, (2017) 2-3

6 ibid, 3

felt the pressure of the Syrian refugees and migrants and the tally went to 1 million. In February 2016, the U.S and Russian delegates negotiated a temporary cessation of hostilities, sanctioned by the U.N which aimed at sending aid to hard-to-reach populations in Syria.[7] But the situation started growing tenser with refugees finding it hard to live in refugee camps and the civilians caught amidst the attacks of the Government and the opposition forces. In 2017, the numbers of affected people increased with 5 million people fleeing the country, 58 people being killed in the gas attacks and places like Dara, Raqqa, Homs and Hama still under conflict. In the first half of 2018 also, the scenario remained the same with the humanitarian access getting limited because of insecurity and the difficulty in supplying aid to the remote conflict-ridden areas.

The unlawful air strikes, attack on hospitals, cluster bomb attacks, chemical attacks etc. continue in the nation of Syria where people live in persistent threat and fear of their lives and many are compelled to seek shelter in the nearby countries. However, even the refugee camps have been over-burdened in the recent times with lack of security, food shortage and a bleak future with no means to pursue their dreams. For them, every day is a day of struggle and survival with an envision of a day when there will be peace all around and they will return home. But, till then, much needs to be done to solve the crisis.

Application of International Humanitarian Law

Public international law can be described to be composed of two layers- a traditional layer which consists of the law regulating co-ordination and co-operation between members of the international society (essentially the States and the organizations created by States) and a new layer consisting of the constitutional and administrative law of the international community of around 6.5 billion human beings.[8] The second layer brings the role of International Humanitarian Law (hereinafter referred to as IHL and also known as the international law of armed conflict or the law of war) into picture where we see how

7 ibid, 4-5

8 Marco Sassoli, et al., *How Does Law Protect In War?*, Volume 1, 3rd Edition, International Committee Of The Red Cross (ICRC), 12

international law regulates human behaviour, even when there is a use of violence and in cases when the structures of the international and national community have crumbled. Also, IHL is significant as it applies to both States and non-State actors. As is evident from the above, the Syrian war is 21st century's worst case of humanitarian crisis with rampant war crimes and thus to effectively study the problem from the perspective of international humanitarian law and human rights law, it is important to understand the associated terminologies and proceed step by step.

As has been already mentioned earlier, IHL being one of the branches of international law is applicable to the situation of 'armed conflicts', protecting, mainly through rules of behaviour addressed to belligerents, those who don't or no longer directly participate in the hostilities against attacks and arbitrary treatment.[9] Furthermore, it also aims at limiting the amount of violence permissible to the amount necessary to weaken the military potential of the enemy. The 1949 Geneva Conventions was the one which is acknowledged for giving the concept of 'armed conflict' for the first time in this IHL regime. So, for the application of IHL, an armed conflict should be present, which is said to exist whenever there is a resort to armed force between States or protracted violence between Governmental authorities and organised armed groups or between such groups within a State.[10] Furthermore, to determine the nature of this armed conflict as being an international armed conflict or a non-international armed conflict or a mixed conflict, the parties to the conflict need to be taken into account. In the case of Syria, by observing two criteria, we can say that the situation is that of a non-international armed conflict (NIAC). This is because, firstly, considering the intensity of the violence, the Syrian case, gradually resulted in the usage of increasing violence by the Syrian Government in the form of bombings and shelling with heavy weapons etc. Not only that, this escalating violence destroyed homes and caused heavy casualties also leading to the rapid increase

9 Orna Ben- Naftali (ed.),*International Humanitarian Law and International Human Rights Law*, Oxford University Press, United States,(2011) 34

10 *The Prosecutor v. DuskoTadic, Case No. IT-94-1-A, 1999*

of the Syrian refugees and a part of the population who were internally displaced. The second factor which determines a case of NIAC is the organization of the parties which needs to be seen where one side must be a non-state armed group portraying some level of organization. Therefore, the FSA, the Islamic State Group and Kurdish militia all fulfill this criterion of organisation and hence the armed conflict in Syria can be termed as that of NIAC.[11] In recent times, many have termed the nature to be that of a 'mixed armed conflict' or 'internationalised NIAC' with the increasing role of the third States in the crisis such as the two big players of US and Russia, apart from others. In the garb of preventing terrorism, Russia has time and again intervened and helped the Bashar al-Assad Government with military aid etc. Not only that, America's role in the Syrian crisis is also noteworthy. This is because the U.S has similarly participated in the war and did little to prevent the continuing violence in the region. But even though the crisis sees the participation of many States, the nature of the conflict as being shifted to internationalised NIAC remains to be fully accepted and as of now stands disputed. Although, in future, the status of the conflict might change, yet the sad truth is that the civilians are at the receiving end of such kinds of conflict.

When we say that IHL is applicable in the Syrian crisis which is a case of *jus ad bello* or an ongoing war, a point to be noted is that in the context of Syria, some basic principles of IHL have been violated. For example- the principle of distinction mandates that the parties involved in a conflict must draw a distinction between the civilian objects and the military objects whereby it is prohibited to target the civilian objects or the civilians. But analysing the Syrian crisis, this principle can be said to have been violated by the Syrian Government in times when air strikes with high-explosive munitions have been carried out in highly populated areas. The resultant effect was the indiscriminate and reckless harm done to the civilians and their properties and not to forget the destruction of schools, markets etc. Not only that, Government forces had sieged areas like Eastern

11 *Non-International Armed Conflicts In Syria*,<http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse4accord> (accessed on 15th April, 2018)

Ghouta etc. depriving the civilians from accessing basic services like medical care etc. The principle of proportionality has also been violated by the same as the launching of such attacks wasn't really proportional to the otherwise targeted anticipated military objects. The third principle of IHL violated in the Syrian context is that of the prohibition of indiscriminate attacks which prohibits the parties to a conflict to refrain from using such means and methods which will lead to aimless targeting. But the attacks of the Government and so also the armed opposition by using gas cylinders, car bombs indiscriminately is purely indicative that the principle such as this and the other IHL principles discussed above, have been grossly neglected by the parties concerned. Hence, the International Committee of the Red Cross (ICRC) has proved to be an utter failure in protecting the essence of the 1949 Geneva Conventions (most importantly Common Article 3), the 1954 Hague Convention and the basic principles of IHL in the Syrian case.

IHL and Human Rights

In the *Israeli Wall Advisory Opinion Case*, the International Court of Justice (ICJ) had advanced that International Humanitarian Law and International Human Rights Law are two complementary legal systems, which meant that IHRL is applicable in parallel to IHL during armed conflicts.[12]Although IHL is applicable in the case of armed conflicts and against non-State actors also, International Human Rights Law (IHRL) provides everyone subjective rights mainly against the State.[13] But even if that is the case, this is partially incorrect because IHRL, even though not specifically made for armed conflicts, is applicable even in the case of armed conflicts. Also, in cases where the rules of IHL and IHRL overlap, the principle of *lex specialis* is to be verified. This is where the inter-relation between IHL and IHRL is so important, though International human rights law has its own weaknesses when read together with IHL.

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12 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136, ICGJ 203 (ICJ 2004), (2004) 43 ILM 1009, 9th July 2004, International Court of Justice [ICJ], Para. 106

13 Orna Ben- Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, United States, (2011) 35

The Syrian Crisis, being a classic example of crimes against humanity and war crimes in the modern times, has witnessed the gross violation of the human rights which the Government has out rightly failed to protect. Not only it could save the people from the armed Syrian opposition groups, but the Government is itself liable for causing aimless attacks on its own civilians. The civilians, who aren't the members of the armed forces and who don't take part in the hostilities are the first target of such hostilities and are majorly affected when an armed conflict goes on.[14]So, this mandates the urgent requirement of scrutinising their human rights violation during the crisis and adopting methods to safeguard them.The next section delves into how women and children are the worst sufferers of the Syrian crisis and the tragic story of their human rights violation.

Women and Children- Human Rights Violation and Their Future

Nearly eight years of continued armed conflict in the nation of Syria has impacted the general population of the land whereby they have lost their homes, assets etc. including the most irreparable loss which is their lives along with the loss of their family members. Among the targeting of the civilians, women are the worst victims upon whom war crimes are being regularly committed upon, resulting consequently, in the abject violation of their human rights. However, women have been experiencing violence and discrimination way before the armed conflict began, because of the regressive laws of the country, but the armed conflict has shown the gruesome face of violence that can be perpetrated against mankind.

During the course of the armed conflict, women, in particular have been exposed to various forms of gender-based violence where their human rights have been violated both by the Government bodies as well as by some armed factions. The heightened form of this violence has been seen in the form of 'rapes' in their own houses and also in the public spheres, checkpoints and the detention centres.[15] The victims

14 VP Haran, *Roots Of The Syrian Crisis, Institute Of Peace And Conflict Studies*, Special Report 181, (2016)

15 *Violations Against Women In Syria And The Disproportionate Impact Of The Conflict On Them*, NGO Summary Report, Universal Periodic Review

and survivors are left helpless and endure severe trauma which makes the situation worst with the ongoing conflict. No one is held accountable for the rapes which has been used as a weapon of war in the sense that many a times, the rapes were filmed and circulated to the fighters and simultaneously sent to their families. The target is to rape them and dishonour them in the eyes of society so that they are faced with ultimate rejection by their own families too. Thus, the distressed victims are unable to seek help from anyone, even when it results in unwarranted pregnancies. Not only that, women and young girls ranging from 12 years have been sexually abused or witnessed sexual abuse in detention including rape, penetration with objects, sexual groping, prolonged forced nudity, electroshock and beatings to genitalia.[16] There has also been cases of torture and humiliation in the detention centres and the Syrian Government has deliberately arrested women in numerous occasions which caused a detrimental effect to the families of those women. Usage of toxic chemicals in several bomb attacks have resulted in the denial of basic health services to the women including increased rates of maternal death and problems during pregnancy. The list of brutal crimes perpetrated towards women such as forced prostitution, harassment etc. shows how the women who have been victims for long are denied their human rights and face immense suffering. Hence, these war crimes have violated not only the Geneva Conventions but have also breached the human rights instruments such as CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) and CAT (Convention Against Torture) which received the ratification of the Government of Syria (though with some reservations).

The refugees who flee the country to escape the violence are also not at a better position and often find themselves trapped in the host country. The counties such as Jordan, Lebanon etc. have been providing shelter to these refugees in the various refugee camps. For example, the *Zaatari* camp, *Azraq* camp, *Rukban* camp in Jordan, *Dohuk*, *Erbil*

Of The Syrian Arab Republic, Women's International League for Peace and Freedom, November, (2016) 9

16 ibid, 10

camps in Iraq, *Doliana*, *Katsika*, *Konitsa* refugee camps in Greece etc.[17] The nature of the refugee camps, including both formal and informal ones show no difference while coming to the treatment of the women refugees. Many among them live a life of poverty and become the easy prey of exploitation. From the roles of mothers, wives etc. and living a comfortable life before the outbreak of the war, their lives are shattered and fleeing the border gives them the additional responsibility of being the bread-earner which were otherwise looked after by men in their families. Left with no option, they become the sole caretaker of their children with the severance of ties from their families and living a life of isolation in the new environment. In addition to this painful living, they are forced to do odd jobs to make ends meet and live a life of struggle. Many are forced to provide sexual services to get basic needs and protection and can't report such crimes because of fear. Their fear also results from the absence of any male member with them who would otherwise be their support and hence give in to such demands. In times of medical emergency, the situation is worse as sometimes there is a shortage of supplies.[18] Tensions within the host country about providing refuge to such people who fled the Syrian crisis have often raised problems. The United Nations High Commissioner for Refugees (UNHCR) has, in its reports, time and again mentioned that Lebanon and Jordan, who are among the top countries to witness an influx of Syrian refugees over the years are themselves under severe pressure. The countries' own resources are depleting, and they are unable to cater to their population in terms of infrastructure, health, education etc. which has been causing dissatisfaction among the people. In such a scenario, it is highly unlikely that the already frail economic and social system respond in a positive manner to the problems of the refugees including the women.

The human rights violation in cases of children are equally grave in nature where the instances of violence have been harsh on them, with many children suffering from life-changing injuries. While the accurate number of children who are being killed or inflicted violence

17 ibid, 15-16

18 ibid, 20

upon changes every day, what is important is to see the type of violence perpetrated against them. Among the children falling in the category of civilians, child casualties have risen due to the repeated bombing of the populated areas. Added to this is the arbitrary arrest and torture of children in detention along with the mass kidnapping, murder, maiming and sexual abuse of the children and minor girls. Not only that, ISIS recruits children and have been reported to use them to execute prisoners as a part of their campaigns.[19] Attack on the schools and hospitals in Syria have been another way of violating the human rights of children. Reports have revealed that more than thousands of schools have been bombed and destroyed with a million children out of school and no further opportunities for education or development. A large number of hospitals have been targeted in a deliberate attempt to cause hurt to the civilians. Among them, children have been consequently denied access to medical care and rising incidence of diseases such as measles, diarrhoea etc. in cases of children under five raise a serious cause of worry. Children have also been reported to have been suffering from psychological imbalances including severe trauma and terror because of the ongoing conflict. The cases of the children with disabilities are worse as there rarely exists enough medical attention and infrastructure to take in account the special needs of such children. Despite Syria ratifying the United Nations Conventions on the Rights of the Child (UNCRC) in 1993, the ongoing conflict has contravened most of the provisions of this human rights instrument meant to protect the rights of the children.

Even the refugee children who have fled the country have been facing violence where at times, the child loses one of the parents during the journey. In the host countries such as Lebanon etc. and others where formal camps have been set up, access to education have been tried to be ensured so that their future is not impaired but even in such camps, they aren't secure. For example, in many camps, there is a shortage of teachers and while accessing education, they face obstacles due to the language barriers. Poverty stricken families are forced to send their children to whatever work they can do and hence push them

19 War Child U.K, *Briefing: 6 Years On: A War On Syria's Children*, (2016) 12

into further exploitation such as child abuse etc. In one survey carried by the UNHCR, it was found that in 13 per cent of the female-headed households visited, at least one child was working, and, in some cases, they provided the only source of income.[20] Child marriage is another problem in the camps which worsens the situation.[21] Food shortages resulting in malnutrition and further enhancing the deterioration of children's health have all made their future uncertain. They have literally lost their childhoods in the face of the ongoing armed conflict with no fault of theirs. The families, both the civilians and the refugees and their children have not done anything wrong to deserve such violence and the actions of the parties to the conflict have shamed humanity.

CONCLUSION

The Syrian crisis has devastated the nation of Syria with both the Syrian Government and the opposition forces equally responsible for causing such widespread violence resulting in the denial of human rights to its people. Where the civilians are regularly targeted with air bombings, chemical attacks, sieges etc. the condition of the refugees also seem to deteriorate with each passing day. Host countries such as Lebanon, Jordan etc. which have provided shelter camps to these refugees in the form of formal and informal camps, have seen a crises in the supply of goods and essential services which is also causing a hindrance to its national economy and its own population. The Syrian people are altogether trapped, be it in their home country or in the country in which they sought shelter. As seen above, the worst victims are the children and the women who have been facing war crimes in the form of rapes, murders, sexual violence etc. They lead a life of constant fear and have no one to seek help from. This humanitarian crisis in the Syrian history is at its heightened stage and calls for a humanitarian intervention.

In the Syrian context, analysing the situation till now, it can be observed that the parties to the conflict who are bound by the

20 Save the Children, *Humanitarian Response to the Syrian Refugee Crisis in Lebanon,* (2014) 8

21 ibid, 19

conventions and rules to respect IHL and IHRL in a state of armed conflict like this, have shown utter disrespect and adopted merciless tactics to perpetrate violence. Their ruthless means of using explosive weapons in the populated areas and disregard for the human rights have brought the world to a standstill; further showing the failure of the Geneva Conventions. Although Syria hasn't ratified Protocol II of the Geneva Conventions which is primarily applicable in case of a NIAC, yet it can't evade the responsibility of following minimum methods of warfare and humane treatment of the civilians. This is because under Article 3, common to the four Geneva Conventions, some fundamental rules are mandated for the parties to follow during armed conflicts including a NIAC, from which derogation isn't permissible. Similarly, even the armed groups are obligated to respect the human rights of the civilians under customary International Law and can't escape liability. Although, the Syrian Government has been defending the attacks against its own people by providing justification for the chemical attacks such as being a non-signatory to the Chemical Weapons Convention of 1993, the Convention on Certain Conventional Weapons of 1980 and all the CCW Protocols, or failure to maintain peace within its own territory, this doesn't change the fact that after the Rwandan violence, this Syrian crisis has crossed all levels of violence and torture and violated the norms of customary International Law, IHL and IHRL. The futile attempts of UN and other States in peace talks and negotiations have alarmed the whole world and made us rethink the time period we are living in and how helpless we are. There have been calls from the international community to take Syria before the International Criminal Court (ICC) and prosecute those responsible for the war crimes and crimes against humanity. But there lie apprehensions because of manifold reasons. For instance, Syria is not a signatory to the Rome Statute meaning thereby that ICC doesn't have jurisdiction over the country of Syria. The only way to invoke the jurisdiction in this case would be the UN Security Council referral. However, Russia, being a permanent member of the UNSC would veto any such move and therefore, it isn't easy to bring ICC into the picture. Also, individual criminal liability can be and should be

imposed on the President Bashar al-Assad and those on both sides of the conflict for committing war crimes and crimes against humanity at this massive scale. But again, this is extremely difficult given the complex dynamics. Similarly, a call for the establishment of a hybrid tribunal for prosecuting the perpetrators of the Syrian crisis has been unsuccessful. Therefore, as of now, the only solution is the coming together of the international community under its Responsibility To Protect and working towards solving this crisis which haunts today's modern world. The third parties to the conflict such as the U.S, Russia etc. should keep their individual interests at bay and try to help in achieving peace in this distraught region.

While at one end the international community tries to arrive at a solution to solve this acute crisis, on the other end, millions are trapped in the horrific war with no security for tomorrow. But amidst everything, there is still a faint flicker of hope in the hearts of those people who desperately long for peace someday. Till then, all they can do is wait for their time to come.

RELEVANCE OF THE BUDAPEST TREATY AND BIOLOGICAL DIVERSITY ACT IN BIOTECHNOLOGY PATENTS

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ABSTRACT

Novelty, Inventive step, Usefulness of the invention are the conditions for patentability along with the proper disclosure of the invention. If the invention involves a microorganism, covering biological material, it is difficult to disclose the invention by writing a patent specification or giving only the sequence listing related to that organism. The member states of Budapest Treaty shall recognise and allow the leave of biological material, microbes used in any process for the intellectual property rights application before the international depository recognised by the WIPO irrespective of the country. Using a biological material in your intellectual property attracts one more compliance, that is the conditions coming under the Biological Diversity Act, 2002. According to the Biological Diversity Act, the applicant who submits an application for a patent or intellectual property rights should get permission from National Biodiversity Authority (NBA) and execute an agreement with National Biodiversity Authority (NBA) to share a certain percentage of the profit out of the exploitation of biological material for patents. The breach of the above conditions of the Biological Diversity Law will be a punishable and non-bailable offence.

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Introduction

The growth of the field of Biotechnology paved a path to come up with several inventions in alignment with several another field of technology like pharmaceuticals, food and beverage, fertilizer etc. and further paved a way to make an order or system for attaining it, like Laws related to biotechnology and biodiversity and some additions in related laws like Intellectual Property Rights' Laws simultaneously. These laws are binding on one who sought the protection of their invention under IPR Laws. This article will be discussing the relevance of the Budapest Treaty and the Biological Diversity Act in biotechnology patents in India.

In the 1970s, the application for biotechnology patents was granted by various foreign patent offices for the process of genetically engineered plants, animals and microorganisms. The process included isolating or incorporating genes, DNA, gene fragments, cells from a living being and host organism, especially in the field of pharmaceutical products, genetically engineered foods and beverages etc. According to the conditions of patentability, the patent application must establish the novelty as well as inventive step and method of use by giving a detailed description of the invention in complete specification. If the patent application covers biological material such as microbes, it becomes very difficult to disclose the invention by writing a patent specification or giving only the sequence listing related to that organisms. Further, it may be very difficult to get access to such microorganisms easily. it is very important to keep such material in commonplace so that one who has interest in such microbes make use of it to understand such material. For that Purpose, biological material, microbes etc used in any intellectual property rights must be deposited in a specialised and particularly equipped laboratory for the microorganism. The concept of a collection of such organisms had raised not only for the purpose of patenting but also for guarantee the availability of such organisms to the public for the further experiment as well as to conduct a further study or further research on it.

Role of Budapest Treaty in patent filing procedure

Budapest Treaty[1] 1977 is a WIPO administered treaty relates to the micro-organisms exclusively for the patent filing process applicable to member States. According to the Budapest Treaty, the member states allow the deposit of biological material/microorganisms for the patent application process. That means the patent authority must frame a procedure to accept the deposit of biological material/microorganism in any of the World Intellectual Property Organisation[2] (WIPO) recognised lab/gene bank irrespective of the territory of such institution. The concept of a single depository institution for applications (conventional applications and National phase entry on the basis of the International application according to Patent Cooperation Treaty) filed in several states is very attractive for the patent applicants from a contracting state. The institution is a Culture Collection Centre and capable of storing microorganism.

Presently there are 80 member states signed to cooperate in the Treaty. India ratified Budapest Treaty in the year 2001[3]. In India, according to the Patents Act amendment with retrospective effect from 1st January 2005, if an applicant in his patent specification reveals an involvement of biological material for the purpose of that invention and the description does not satisfy the conditions stated in clauses (a) and (b) of sub-section- (4) of section-10 of the Patents Act,1970, moreover the disclosed materials are not easily accessible to the general public, then the patent application should be treated as incomplete. The patent application must be completed by depositing the said biological material disclosed in the specification to any international authority recognised under the Budapest Treaty. Further, the applicant has to fulfil more conditions of clauses (a) and (b) of sub-section- (4) of section-10 of the Patents Act, 1970 :

1 WIPO-Administered Treaties-Budapest Treaty http://www.wipo.int/treaties/en/registration/budapest/summary_budapest.html (Last visited on 13/11/2018)

2 WIPO-Portal http://www.wipo.int/portal/en/index.html(last visited on 13/11/2018)

3 WIPO-Budapest Treaty http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/budapest.pdf(last visited on 13/11/2018)

(A) deposit of the biological material must be done before the filing of the patent specification, the reference number of the biological material deposited should be made in the specification. The time period prescribed in the rules is three months;

(B) the correct identification or indication related to the characteristics of the material by way of sequence listing or any suitable method is to be included in the patent specification.

(C) the accession of the biological material deposited from the institution after the date of the patent specification or after the priority date of the patent specification

(D) geographical origin and source of the biological material mentioned the patent application should be revealed in the specification of the patent.

The biological material mentioned in the patent specification will be available for the public inspection of such microorganism, according to Section -11 A of the Patents Act, 1970. The public can also make use of this deposited microorganism for the purpose of experiment or further research.

In India there are two international depository authorities recognised by the World Intellectual Property Organisation(WIPO):

1). M.C.C. [Microbial Culture Collection], Pune[4].

2). M.T.C.C. [The Microbial Type Culture Collection and Gene Bank], Chandigarh[5].

At present, there are 47[6] such international depository authorities worldwide. There are seven international depository authorities in the UK. The Republic of Korea established four international depository authorities according to the Budapest Treaty. Three international

4 WIPO-International Depository Authority(IDA),India http://www.wipo.int/budapest/en/idadb/details.jsp?id=5835 (Last visited on 13/11/2018)

5 https://mtccindia.res.in/(Last visited on 13/11/2018)

6 WIPO- International Depository Authority(IDA) http://www.wipo.int/budapest/en/idadb/(Last visited on 13/11/2018)

depository authorities each established in the USA, China and Italy. Two international depository authorities in India, Australia, Japan, Poland, the Russian Federation and Spain and One international depository authority in Hungary, Slovakia, Mexico, Chile, Netherlands, the Czech Republic, Latvia, Belgium, Finland, Bulgaria, France, Canada, Morocco, Netherlands, Germany and Switzerland recognised by World Intellectual Property Organisation(WIPO)[7]. An applicant can deposit the microorganism in any of the above international depository authority irrespective of his Nationality.

IPR Protection pertaining to the Biological Diversity Act.

India has a vast biological diversity and associated traditional as well as a contemporary knowledge which prevails in its fullest extent. The IPR regime is encouraging Biotechnological Patents by ratifying TRIPS Agreement[8] and fulfilled the TRIPS obligation related to the Patent Protection. According to Biological Diversity Act **"biological diversity"** means "the variability among living organisms from all sources and the ecological complexes of which they are part and includes diversity within species or between species and of eco-systems" and **"benefit claimers"** means "the conservers of biological resources, their byproducts, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application". Hence, Intellectual Property Protection and exploitation is a subject matter of the Biological Diversity Act too.

Application for IPR not to be made without the approval from NBA.

According to the Biological Diversity Act, a person who wishes to apply for a patent, before Indian patent office or any patent office in abroad may be applied for an approval from NBA previous to the submission

7 WIPO-Administered Treaties http://www.wipo.int/treaties/en/registration/budapest/(Oct.12, 2018, 11 AM)

8 WTO- Members and Observors https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm(Last visited on 13/11/2018)

of the patent application and complete specification before the Patent Office. Further, the proviso of Section-6. (1) of the Act states that if an applicant files an application to get the patent right or any intellectual property rights, the NBA agreement must be executed before grant of any intellectual property rights or patents according to the Biological Diversity Act and Rules, the one who submits the application for any patent application which is derived from a new study conducted in India on any of the biological material and information derived for the study or research, should submit a request for permission by submitting the prescribed fees within the stipulated time period. The request for the approval for applying for patent before the National Biodiversity Authority of India must be submitted providing full particulars of the patent application, the description related to that invention on which the patent right is required, particulars of biological material and its resources used in the patent specification in India, the particulars of the originated place from where the biological materials were sourced and its collection and information related to the traditional knowledge used by any person, people or society practising the traditional knowledge, if any, the details of organisation where study and development were carried out and financial details accumulate to the applicant due the commercialization of the patents in India.

Disposal of approval of the National Biodiversity Authority.

According to the Biological Diversity Act, it is mandatory for the National Biodiversity Authority[9](NBA) to decide about the application for permission within 90 days and shall decide after due assessment of the application and after collecting additional information for the application if any. the approval for filing for a patent may be granted by the Authority or any other Intellectual Property Rights subject to satisfy the terms and conditions of the agreement executed by the Authority and the applicant according to the Biological Diversity Rules, 2004. The NBA permission shall be approved in the form of an agreement and duly executed between the parties as early as possible.

9 National Biodiversity Authority http://nbaindia.org/(Last visited on 13/11/2018)

The terms, the particulars and the conditions of the agreement may be decided National Biodiversity Authority and the applicant together. The form and particulars of the agreement may be decided by the NBA. The NBA has the power to disallow the request if it considers that the application cannot be assented to after documenting the grounds but the applicant is right to get an opportunity of being heard before passing an order of rejection.

Benefit sharing of Patents and the Criteria for the same.

The National Biological Diversity of India has the authority under sub-section (2) of Section-6 of the Biological Diversity Act, 2002. Section-6 states that permission is subject to the sharing of financial benefits coming out of the exploitation of intellectual property rights or patents rights. The Authority will decide the terms and conditions of the benefit-sharing and to publish according to the Biological Diversity Rules, 2004[10]. It must disclose the criteria of benefit sharing of patents. These include the transfer of knowledge and monetary returns for allowing others to make use of material like royalty. joint ventures; product development; education and awareness raising activities; institutional capacity building and venture capital fund. The formula for benefit-sharing shall be determined on each case by the NBA. The Authority will prepare the terms and the conditions to guarantee the impartial allocation of the benefits arising out of the commercial use of the intellectual property rights or patent rights. The owner of the patent or any intellectual property rights must take approval from the NBA for transfer or assign the results to any third-party. The permission of any person for access or applying for a patent or any Intellectual Property Rights the Authority may impose terms and conditions to assure the proportional benefits made out of the commercial exploitation also. The proportional benefits shall be mutually agreed upon between the applicant and the NBA. The decision has to be taken after the discussion with the concerned bodies and benefit claimers. It must be finalised after taking into the concern of certain consideration like of controls of the access, the extent of the use, the sustainability aspect

10 WIPO-Lex http://www.wipo.int/edocs/lexdocs/laws/en/in/in047en.pdf(last visited on 13/11/2018)

of the biodiversity, the impact and the expected outcome, including the measures and ensuring the conservation and sustainable use of the biological diversity in India. The NBA shall stipulate the time period for assessing benefit sharing depending upon each case. It will consider whether it is for a short time, medium time and long-term benefits. The NBA shall specify the benefits and make sure that the preservation and sustainable exploitation of the biological diversity of India.

Penalty Provision

Breach of conditions of the section-6 of Biological Diversity Act, 2002 will be considered as a cognizable and non-bailable offence[11]. It attracts punishment. It includes "imprisonment for a term which may extend to five years, or with fine which may extend to ten lakh rupees and where the damage caused exceeds ten lakh rupees such fine may commensurate with the damage caused, or with both" under sub-section (1) of section-55 of the Biological Diversity Act, 2002[12].

Conclusion

It is mandatory to deposit the microorganisms for the processing of the patent application before the Patent Offices of member states of Budapest Treaty. The submission of the microorganism can be done with the WIPO recognised international depositary authority situated in any of the member states of the Budapest Treaty. Using of a biological material for patents attracts one compliance more, that is according to the Biological Diversity Act, an applicant for patents or any intellectual property rights, has to apply for the permission from the National Biodiversity Authority and must be willing to execute an agreement for benefit sharing with the National Biodiversity Authority of India.

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11 http://nbaindia.org/unep-gef/pub1/Guidance.pdf(Last visited on 13/11/2018)

12 WIPO-Lex http://www.wipo.int/wipolex/en/text.jsp?file_id=185798(Last visited on 13/11/2018)

DECRIMINALISATION OF SECTION 377, IPC: CHARTING JUDICIAL COURSE OF CORRECTING THE ARCHAIC ANOMALY

- **Vaibhav Sharma[1] and**
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ABSTRACT

The Section 377 of Indian Penal Code, 1860 is an outdated legal provision being archaic British legacy, of the colonial rule. The provision was incorporated adopted in the IPC in 1860. The said provision aimed at curbing of sexual acts against the 'order of nature'. The provision has led to the stigmatisation of the entire LGBTQ community of persons, forcing them to live a life of desolate anonymity. There is no exemption even for case of two adults with legally valid consent. The Section was termed as violative of the Articles 14, 15 and 21 of the Constitution of India by the Hon'ble Supreme Court.[3] The Court has rightfully decriminalized 'any act' between two consenting adult persons.

Although the decriminalisation of Section 377 has removed the main antagonist for LGBTQ community, the road for their amelioration is still far away. The antecedent issues of marriages, inheritance right, adoption of child, etc. would require a slew of legislations. While such laws might take years for our society to accept, the decriminalisation of Section 377 is a welcome step. The present article traces the journey of its decriminalisation chalking the long path with a series of judicial pronouncements and their consequential effects on the society at large, particularly the vulnerable LGBTQ community.

KEYWORDS – Section 377 IPC, LGBTQ Rights, Right to Life, Decriminalisation of Section 377, and the Constitution of India.

"I am what I am, so take me as I am."

- Johann Wolfgang von Goethe[4]

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3 *Navtej Singh Johar & Ors. v. Union of India*, W. P. (Crl.) No. 76 of 2016.

4 Johann Wolfgang von Goethe was a German Social Scientist and leading thinker.

1. INTRODUCTION

The Section 377 of IPC, 1860 is an outdated colonial legal provision which was suited to the times of the British rule. The provision was adopted in the IPC in the year 1860 and was modelled on the Victorian Buggery Act, 1533 which punished the acts of sodomy and bestiality. The said provision appears to be neutral *per se* and is aimed at the curbing of the unnatural acts of sexual behaviour.[5] In reality, the provision has led to the stigmatisation of an entire community of persons, forcing them to live a life of desolate anonymity. The LGBTQ community has suffered unbearable humiliation and agony through its application. The main anomaly in the legal provision is that it make any sexual act of '*unnatural*' nature a criminal offence, without taking into account the question of '*consent*' of the persons. There is no exemption in the case of two adults performing the act with each other's legally valid consent. The Section was rightfully termed as violative of the Articles 14, 15 and 21 of the Indian Constitution by the Hon'ble Supreme Court in the recent judgement of 2018. The Court has rightfully decriminalized '*any act*' between two consenting adult persons; and has restored the original position of the law after the Delhi High Court had decriminalised the same in the year 2009 in the case of *Naz Foundation* v. *Govt. of NCT of Delhi*[6].

Although the decriminalisation of the Section 377 has removed the main antagonist for the LGBTQ community, the road for their amelioration is still far away. The antecedent issues of marriages, inheritance right, adoption of child, etc. for the LGBTQ community would require a slew of legislations. While such laws might take years for our society to accept, the decriminalisation of Section 377 is a welcome step. The present article traces the journey of its decriminalisation chalking the long path with a series of legislative interpretations by the judicial pronouncements and their consequential effects on the society at large, particularly the vulnerable LGBTQ community.

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5 Kumar Askand Pandey, *BM Gandhi's Indian Penal Code* (4th ed. Eastern Book Company, New Delhi 2017) 651-52.

6 *NAZ Foundation v. Govt. of NCT of Delhi*, 2010 Cri LJ 94 (Del).

1.1. Section 377, Indian Penal Code 1860

Section 377- Unnatural offences:

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine."[7]

Explanation: Any amount of penetration is enough for constituting the carnal intercourse necessary for the above stated offense.

The Section 377 punishes all the acts of unnatural sexual intercourse and covers the offences of bestiality and sodomy under the English Law.[8] The word 'sodomy' generally intercourse *per* anus by a man with a man or with a women or with an animal.[9] Sodomy may be either homosexual or heterosexual. Bestiality means the sexual intercourse by either a man or a woman carried out in any manner/mode with an animal or a bird.[10]

Under the Section 377, the issue of consent is wholly irrelevant. It makes even the consenting parties equally culpable as forced commissions. By virtue of explanation appended to it, penetration, as in the case of rape, howsoever minimal it be, is required to constitute the 'carnal intercourse'. Voluntary sexual intercourse which is '*against the order of nature*' with an animal, man or woman evinced by 'penetration' is essential to attract the Section 377.[11]

1.2. Constitutionality of Section 377, IPC

The Section 377 of IPC makes a person culpable for any sexual act between the consenting adults in private and it therefore, violates the following Articles of the Constitution of India:-

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7 Indian Penal Code 1860, s 377.

8 Prof. SN Misra, *Indian Penal Code* (19th ed. Central Law Publications, Allahabad 2014) 341.

9 *Supra* note 2, at 679.

10 *R. v. Grey*, 1982 Cr LJ 177(CA).

11 Ratanlal & Dhirajlal, *The Indian Penal Code* (35th ed. LexisNexis India, New Delhi 2017) 568.

1.2.1. *Article 13* - The fundamental rights enshrined under the Part III are guaranteed by the Constitution itself to the people. They are considered as basic rights needed to live a meaningful life. The Article 13 (2) provides that

"The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void [12]."

According to the above stated constitutional provision, the § 377 is violative of the rights of the LGBTQ people if the act is validly consented amongst the adults.

1.2.2 *Article 14* - Article 14[13] provides with equality before the law along with the equal protection of the law. Although it does not permit the class legislation; it allows a reasonable and rational classification of the persons, objects and transaction by the legislation.[14] In order to classify as reasonable classification under the ambit of the Article 14 of the Constitution of India, the following two essential conditions needs to be fulfilled:-

1) that the said rational classification must be based on an intelligible differentia that is able to differentiate between the members of the group; and

2) that the differentia needs to be based on a rational criteria which correlated to the objective of the statute which needs to be achieved by it.[15] There needs to be a definite nexus between the classification sought to be achieved and the objective of the legal provision which introduced it.[16]

Absence of a rational nexus with the objective

12 The Constitution of India, art. 13, cl. 2.

13 "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."*

14 MP Jain, *The Indian Constitutional Law* (8th ed. LexisNexis India, New Delhi 2018) 881.

15 Narendra Kumar, *Constitutional Law of India* (9th ed. Allahabad Law Agency, Faridabad 2015) 116.

16 *Supra* note 8, at 711.

The Section 377 IPC is suffering from the primary anomaly that it does not take into its ambit the factors of consent and the age of the persons involved in the act. There is a blanket prohibition in the said section without any exemption even for the adult persons.[17] Another problem in the legal provision is that it makes both the partners in the act culpable for the offence in case of the adults. It is in derogation with the criminal jurisprudence which rets on the principle of '*mens rea*' that is the guilty mind of the accused. There is no distinction between the perpetrator and the victim of the offence. Both are presumed to have the requisite guilty mind to constitute the offence under the said provision.

1.2.3 *Article 15*- Article 15[18] of the Indian Constitution prohibits any discrimination on the grounds like caste, race, religion, colour, sex or place of residence. The need is to accept the principle that the '*sexual orientation'* of a human being is an inherent part of his sexual identity. Thus, any discrimination on the sole basis of the sexual preference of a person is bound to be violative of the Article 15 'Right against discrimination' of the person.

1.2.4 *Article 19* – The Article 19 deals with the freedom of expression of the people. The Section 377 curtails the basic freedom given under the Articles 19(1)(a),(b),(c) and (d). It leads to inability of the person to express about his sexual orientation, his right to associate and his right to move freely in exhibition of his sexual conduct for the fear of being convicted under the said section.

1.2.5 *Article 21* – Article 21[19] deals with the right to life along with personal liberty of a person. The Section 377 of IPC constitutes an unreasonable abridgment on his right to privacy as well. The right to dignity guaranteed in the Article 21 is also violated. The Supreme Court's judgement in the landmark case of *K S Puttaswamy* v. *Union*

17 *Supra* note 5, at 358.

18 The Constitution of India, art. 15.

19 "*No person shall be deprived of his life or personal liberty except according to procedure established by law."*

of India[20] which established that the right to privacy to be an integral part of the Article 21 is curtailed by the Section 377 of the IPC.

Thus, the impugned Section 377 of the IPC is in direct contravention with the Fundamental rights which are guaranteed to the citizens of India by the Constitution itself.

2. JUDICIAL JOURNEY IN INDIA

The rights movement to seek the deletion of the Section 377 has its genesis in the organisation AIDS Bhedbhav Virodhi Andolan's attempt to decriminalise the said legal provision in the year 1991.[21] Their seminal report titled "*Less than Gay: A Citizen's Report*", described in detail the problems face by the LGBTQ community because of the impugned legal provision. The matter lingered on for a number of years without any significant headway to be achieved in the matter.[22] The movement was reinforced by the Public Interest Litigation (PIL) filed by the Naz Foundation before the Delhi High Court. The PIL filed in the year 2001 sough to criminalize the consensual acts of the sexual intercourse between the two adults with a valid consent.[23] The movement suffered by the 2003 Delhi High Court decision to dismiss the said PIL for the want of the locus standi of the petitioner in the present matter.

2.1 <u>The High Court's Decision</u> - In the case of *NAZ Foundation* v. *Govt. of NCT of Delhi*[24] the High Court finally annulled the British colonial law and legalised the consensual sexual acts between the adults on 2nd July, 2099. The historic decision was welcomed by the civil society activists with great joy. While delivering the said judgement took into account the while the Article 15 of the Indian Constitution prohibited any discrimination on the sole basis of 'sex', the Section 377

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20 *K S Puttaswamy v. Union of India*, (2017) 10 SCC 1.

21 R Raj Rao, *Criminal Love? Queer Theory, Culture and Politics in India* (1st ed. Sage Publication Pvt. Ltd., New Delhi 2017) 89.

22 A Revathia and Nandini Murali, *A Life in Trans Activism* (2nd ed. Zubaan Publishers Pvt. Ltd., New Delhi 2016) 142.

23 *Supra* note 18, at 121.

24 *NAZ Foundation v. Govt. of NCT of Delhi*, 2010 Cri LJ 94 (Del).

is blatantly voilative of the said Article.[25] The High Court also noted that the spirit of inclusiveness is central to the Indian society and the decriminalisation would a step in that direction. The court said that the discrimination implicit in the Section 377 is a direct anti-thesis of the quintessential Right to Equality given by the Indian Constitution.[26] Thus, the court declared the Section to be in contravention of the Articles 14, 15 and 21 of the Constitution. While the civil society was rejoicing the liberal interpretation of the Fundamental Rights, a number of review petitions were filed before the Hon'ble Supreme Court of India against the decision of the Delhi High Court.

2.2 Decision in Suresh Koushal's case – As a result of review petitions filed against the verdict of the *Naz Foudation*[27] case before the Apex Court, the Hon'ble Court on 11th December, 2013 overturned the Delhi High Court's decision and recriminalized the Section 377 of the IPC. Besides the petitioner, the Central Government had even filed a review petition against the Delhi Court's verdict.[28] It appears that even the government was not able to digest the liberal interpretation of the right to equality and wanted to restore the colonial law over the people of the country.

The petitioner in the pertinent case of *Suresh Kumar Koushal* v. *Nav Foundation*[29], contended that the Section 377 only intends to criminalise the acts of sexual conduct between the persons and not the exhibition of their sexual orientation at large. The court accepted the rational of the petitioner and reinstated the Section 377 of the IPC. The Court said that those who indulge in the sexual intercourse against the order of the nature constitute a '*separate class*' and thus, the discrimination is based on an intelligible differentiate and would not be construed as a violation of the Article 15 of the Constitution.[30]

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25 *Supra* note 19, at 173.

26 *Supra* note 5, at 612.

27 *Supra* note 21.

28 KD Gaur, *Textbook on Indian Penal Code* (6th ed. Universal Law Publishers, Allahabad 2016) 813.

29 *Suresh Kumar Koushal v. Nav Foundation*, (2014) 1 SCC 1.

30 *Supra* note 25, at 814.

The Court, although erroneously, stated that it must be considered that in the past 150 years of the application of the law only 200 persons had been successfully prosecuted for the offence. It said that the criminalisation of the offence only affects a miniscule of the population of the nation and its retention helps in curbing the cases of the sexual abuse of the population at large.

2.3 'Third Gender' Rights Case – After the perverse decision in the case of *Suresh Koushal*[31], the movement for the decriminalisation of the Section 377 got a major fillip when the Supreme Court in the historic case of *National Legal Service Authority* v. *Union of India*[32] acknowledged the rights of the members of the Transgender community in India. The case pertained to the policy of affirmative action for the betterment of the socially and economical backward classes of the nation. The petitioner sought the state recognition to the transgenders and hijras as a '*Third Gender*' in order to afford the reservation in the educational institutions and the government jobs. In the landmark verdict, the Apex Court ruled that the transgenders must be accorded the status of '*Third Gender*' in order to safeguard their right to gender identification. It rejected the '*de minimus*' principle adopted in the case of *Suresh Koushal* for the enjoying the protection of the fundamental rights under the Constitution. It proclaimed that though the transgenders may be '*insignificant in numbers*'; they enjoyed the same rights as the rest of the population under the Constitutional scheme.[33] The Court order the state to recognise the transgenders as a '*Third Gender*' and provide them the benefits given to the other backward classes in the nation.

In another important case, *Kiran Kunar Devmani* v. *State of Gujrat*[34], the High Court of Gujarat rescinded the reasoning given in the case of *Suresh Koushal*. The case pertained to the grant of the tax concession by the state to a film. The petitioner contended that a film was refused to be given tax benefits on account to the depiction of the lives of

31 *Supra* note 26.

32 *National Legal Service Authority v. Union of India*, AIR 2013 SC 604.

33 *Supra* note 25, at 850.

34 *Kiran Kunar Devmani v. State of Gujrat*, (2014) 71 VST 55 (Guj).

homosexual in it. The Court stated that such a refusal amounted to the violation of the Right to Equality given by the Constitution. The Court said that even a homosexual has the same right to life enshrined in the Article 21 as the rest of the population.

3. JUDGEMENT DECRIMINALISING THE SECTION 377

3.1 'Rights to Privacy' Judgement

The Supreme Court of India declared the '*Right to Privacy*' to be an inseparable part of the Right to Life and personal dignity given under the Article 21 of the Constitution in the seminal judgment of *Justice K.S.Puttaswami and anr.* v. *Union of India*[35]. The 9 judge constitutional bench while discussing the various facets of the Right to Privacy also dwelled into the ambit of the Section 377 of the IPC. The Court state that the ratio decidendi in the case of *Suresh Koushal* is fallacious. It noted that the sexual orientation is a quintessential part of the identity of the LGBTQ community and the rights inscribed under the Articles 14, 15 and 21 of the Indian Constitution.[36] The Court rightly declared that the Fundamental Rights could not be denied to even a miniscule of the population. Even if a very small segment of the population is affected by the rulings, it is the contravention of the Constitutional safeguards guaranteed to the people of the nation. *"Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual."*[37] These formative lines from the judgement is a glaring example to the richness of the Constitution principles. The sense of inclusiveness of the different strands of the society form an indestructible feature of the ethos of fundamental rights protection bestowed by the Constitution.

3.2 Decriminalisation of Section 377 (Supreme Court Judgement 2018)

The long journey of the slew of judgements and the judicial reasoning

35 *Justice K.S.Puttaswami and anr. v. Union of India*, AIR 2017 SC 494.

36 Alok Prasanna Kumar, 'Right to Privacy: Fundamental Rights Redefined' The Indian Express (Chandigarh, 25 August 2017) 12.

37 *Supra* note 32.

given by the various courts over the decades, culminated in the form of the decision of the Supreme Court in the case of *Navtej Singh Johar & Ors.* v. *Union of India*[38]. The historic verdict of the Apex Court decriminalised the Section 377 constituting '*intercourse against the order of nature*'. The court found that the said Section was voilative of the Articles 14, 15 and 21 of the Indian Constitution. Though the decision is primarily aimed at the decriminalisation of the Section 377, it tried to highlight the *'Doctrine of Progressive Rights*'. The Apex court highlighted the need to recognise the march of the rights towards the progressive realisation of the free life by the people. The Court cited the case of *State of Kerala and another* v. *NM Thomas and others*[39] in which the Court had noted that the Constitution of India is a great living document. It recognised the role of the Constitution to better itself in it's strive towards the more egalitarian and modern society in consonance with the changing times.[40] The court had stated that Law, including the Constitution cannot go alone. It had stated that is must be in consonance with the sociology and other specialised knowledge of the society.

The Court noted the liberal laws enacted in the various nations across the globe and courted that the Section is linked to the sexual perversity of the person. The court cited the case of *Fazal Rab Chaudhary* v. *State of Bihar*[41] where the Supreme Court has reduced the quantum of the punishment of the convict due to the growing acceptance of the various sexual orientations in the modern society. Thus, the Court in *Navtej Singh*[42] noted that the acceptance of the *Suresh Koushal* would be a retrograde step towards the march of progressive rights. The requirement of the majoritarian aspect of the rights in view of minority is rightly reject by the Constitutional Bench verdict. The Chief Justice Misra noted that the requirement of the larger number of persons to

38 *Navtej Singh Johar & Ors. v. Union of India* W. P. (Crl.) No. 76 of 2016.

39 *State of Kerala and another v. N.M. Thomas and others*, AIR 1967 SC 490.

40 Ram Sarangaan, 'In Good Faith: The Natural Fallacy' The Indian Express (Chandigarh, 17 September 2018) 10.

41 *Fazal Rab Chaudhary v. State of Bihar*, (1982) 3 SCC 9.

42 *Supra* note 35.

ascertain their rights is "*meaningless; much like the zero on the left side of a number*".

The Court also said the impugned law is also bad in relation to the doctrine of '*reasonable classification*'. The court stated that there is no nexus with the legal provision with the objective to prevent the sexual abuse of the population. It said that the Section 375 of IPC along with the POSCO Act is ample enough to deter the criminals in the cases of sexual abuse. The court also reiterated that it has only decriminalised consensual acts among the adult population; and not those involving minors, bestiality and forceful intercourse.[43] It also found the Section to be riddled with manifest arbitrariness against the LGBTQ community. It stated that the restriction on the sexual intercourse by the community is not founded on any rational criterion and must be perceived to be voilative of the Article 15 of the Constitution to be against the Right to Equality.

The Court took into account the International practises in the various nations. It noted the progressive steps taken in the various nations in the sexual orientation laws in the recent years. The Court cited the UN Commission of Human Rights case of *Nicholas Toonen* v. *Australia*[44] in which the Commission noted that the criminalisation of the consensual acts among the adults amounted to an infringement of the right to privacy given under the Article 17 of the International Covenant on Civil and Political Rights (ICCPR). In the said case, the impact of the legal provision on the health of the HIV+ persons was disastrous. In *Navtej Singh Johar*[45], The Court noted that the continuation of the Section 377 of IPC had pushed the LGBTQ community out of the public health system. Those suffering from AIDS/HIV in the community are not able to seek medical aid for the fear of being tried for the offence of Section 377. It has led to increased risk of AIDS transmission in the people and have increased their vulnerability in leading a healthy life.

43 Arvind Narrain, 'Section 377: A Gender Transformation' The Hindu (New Delhi, 10 September 2018) 9.

44 *Nicholas Toonen v. Australia,* U.N. Doc. CCPR/C/50/D/488/1992 (1994).

45 *Supra* note 35.

The Court highlighted the value of '*Constitutional morality*' in the judgement. It referred to the recent case of *Government of NCT of Delhi* v. *Union of India*[46] in which court had emphasised the need to evolve '*Constitutional culture*' in consonance with the democratic system of the government and representative character of the state. The court had said that the constitutional morality is a protection against the "*tranny of the majority*". The Court declared the indispensable role of the constitutional morality in order achieve the values of liberty, equality and fraternity.[47] It stated that the guiding light for the transformation towards the constitutional values must be accorded by the protection given in the Fundamental Rights. Thus, the verdict of the Apex Court partially decriminalising the Section 377 of the IPC is an unparalleled step towards the goal of attaining an egalitarian society in the nation.

4. IMPACT OF RECENT JUDGEMENT (2018) ON INDIAN SOCIETY

It must be emphasised that mere decriminalisation of Section 377 will not solve the problem, although it is a welcome first step. The issue needs a serious thought at all levels in the society and only by reading down Section 377 IPC would not give immediate recognition which homosexuals are actually demanding form society.[48]

The problem of stigma associated with the LGBTQ community would not vanish with the judgement of the Court. The quantum of the problem could be grasped from the fact that on the day the legendary verdict was given, there were many political leaders which criticised the judgement and called it against the morals of Indian culture.[49] This self-proclaimed protectors of Indian culture would not hesitate in even calling the Hon'ble Supreme Court erroneous in its decision without any knowledge of law or culture.

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46 *Government of NCT of Delhi v. Union of India*, 2018 (8) SCALE 72.

47 Faizan Mustafa, 'No right of way for the majority' The Indian Express (New Delhi, 14 September 2018) 12.

48 *Id.*

49 Sneha Rajaram, 'Understanding Mental Illness: For tackling stigma, we must to stop the blanket denial of the Individual Perception' (Firstpost 21 September 2018) < https://www.firstpost.com/living/understanding-mental-illness-for-tackling-stigma-we-must-to-stop-the-blanket-denial-of-the-individual-perception-5233041.html> accessed 23rd November 2018.

The need of the hour is to take into account the developments in the various countries across the nations. The homosexual acts have already been decriminalised in nations like USA, Canada and major European nations. Recently, Australia has enacted a Homosexual Marriage Act to grant them rights on par with the rest of the population. The liberal sexual movement around the world is on a rise and the Supreme Court's decision would be a significant addition to it, with India being home to one-sixth of the human mankind population.[50] The United Nations has also congratulated India for the progressive and liberal verdict benefitting the Right to Life.

5. CONCLUSION

The road for the amelioration of the LGBTQ community is still far away with the Apex Court putting the ball in the court of the Union Government to make significant changes in the personal laws to grant the rights of marriage, adoption and inheritance for the community. The decriminalisation of the Section 377 is a major victory for the progressive rights movements and would improve the condition of the sexual minorities greatly. The state must ensure implementation of the verdict and must take steps to stop harassment for the minorities by the hand of right-wing majority groups. It is hoped that the government takes cue from the Supreme Court and enacts laws for enhancing the Right to Life and personal dignity of the sexual minorities.[51] The social benevolence of the verdict could be gauged from the statement of German Social thinker Johann Wolfgang von Goethe courted in the verdict, "*I am what I am, so take me as I am*". Thus, the Court has granted the Right to Life to the LGBT community with full life to choose their partners without being subjected to any discrimination with equal protection of the laws.

50 *Supra* note 44.

51 Vishavjeet Chaudhary, 'Victory under belt, long road ahead' The Tribune (New Delhi, 7 September 2018) 10.

TRAFFICKING OF WOMEN AND CHILDREN WITH REFERENCE TO THE NORTH-EAST REGION

Bhargov Bikash Dutta[1]
Barasha Kalita[2]

ABSTRACT

" Everyone has a right to peaceful coexistence, the basic personal freedom, the alleviation of suffering, and the opportunity to lead a productive life " -Jimmy Carter

Trafficking is one of the dangerous and illegal businesses of the entire universe. The sufferers of this network are mostly women and children. This business is termed as illegal because it infringes the rights of individuals. In this field victims are forced to do illegal work which is unsafe for their health, safety, security and morals, separated them from their families by giving threat, restrict them from going schools and so forth. The individuals who fall prey in this business are harassed with sexual violence; their age group are not even counted. There are lot of people who are underage and they are harassed very badly. They are not able to go to school because of all these issues and for which they lack various opportunities of their life. Trafficking of human beings are not only done for domestic help, sexual abuse etc. but also used for organ smuggling and many more. Above all these issues it gives mental and psychological trauma to a child victim as well as to the women victims. Each year, millions and millions of women and children are victimised and exploited for labour and sexual purposes.

Thus, in the light of above grown importance, this article presents a current scenario of human trafficking in our country and also identifies the causes of women and child trafficking in North East region. The aim is to make study of the existing international, national instrument to combat trafficking in Women and Children. In this background, the study particularly analyses the missing Children in Assam, what makes the child in the tea plantation area more vulnerable to trafficking and how children are lured away from the tea garden.

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Keywords: trafficking, exploitation, women, Children, rights.

INTRODUCTION

Freedom and Dignity is one of the most significant aspects in human being's life. A person may have millions but he or she cannot be happy if there is no dignity and freedom in their lives. If a person takes away the dignity and the freedom of another person, then it is as good as taking life and the worst possible crimes in today's world in this scenario would be the crime of human trafficking. Human trafficking involves the highest degree of human rights violation. Trafficking in broader sense includes all forms of exploitation which includes all forms of exploitation and it also includes forced labour, slavery and other forms of exploitation. It is considered as one of the worst crimes to exist in today's world. A world is coming closer through a mean called the global economy, in the same fashion the crime rates and the degree of the crime is also getting stronger by each passing day and the people who commit such crime are increasing day by day. At present human trafficking is continuously increasing. Human trafficking is one such crime which has from the local village to the countries abroad has strong roots and which are to access all the time.

Now a days women and children is an important matter of trafficking in human sourceparticularly subject of national and international concern. Every day, women and children are being bought, sold and transported from their homes. Children who are as young as 4 years are pushed into the crime of trafficking when they should be learning the basics of life in school at that particular time they go to the work place. The trafficking of human source specifically women and children has become a multi-dollar commercial exposure that appears to be growing.

"The main factor which helps in the growth of trafficking is abject poverty. Besides this factor there are various other factors which contribute in the growth of human trafficking are like lack of resources, lack of human and social capital, social insecurity, gender discrimination, social exclusion, marginalisation, inadequate and out-dated state policies, lack of governance, nexus of police and traffickers,

unemployment, breaking down of community support system, cheap child labour, child marriage and priority to marriage, attraction of city life, corruption, employment trade, migration policies conflict, lack of awareness among the victims etc. Globalization can also be said as a factor of contribution for human trafficking. All these factors force the victim to get further exploitation, vulnerabilities and to become an element of this modern kind of slavery throughout their life span."[3]

"In India it is very difficult to collect data regarding the depth of human trafficking. Though it is very difficult still accepted there are various sources, destination, transit country for trafficking of people, including young girls. Almost ninety percent of the trafficking is internal where the victims are trafficked for forced labour. The victims of under age group are exploited in different ways. They are forced to work in the factory, agriculture, for domestic help and some of them are used for begging also. In many cases it is seen that girls are forcefully use of marriages and commercial sexual exploitation."[4]In spite of the fact that India has several laws to fight against trafficking but the outcomes are not satisfactory.

HUMAN TRAFFICKING- DEFINITION, KINDS

Since December 2000, there was no proper definition of trafficking characterised in international law. For the first time the term trafficking came into existence in international law in the middle of twentieth century which is connected to white slavery. "The convention against White Slavery, first accept in 1904, sought to suppress the criminal traffic of women or girls compulsively procured for immoral purposes."[5] After that Palremo Protocol came in to existence in international law which give an international concurred meaning of child and individual trafficking.[6]

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3 JfferLatiefNajar, 'Human Trafficking in India' <https://www.countercurrents.org/najar031114.pdf> accessed 12 October 2018.

4 Harpreet Kaur, 'Child Trafficking' (2015) Lawctopus Law Journal <https://www.lawctopus.com/academike/child-trafficking/> accessed 12th October 2018.

5 Anna. T. Gallagher, The International Law of Human Trafficking (first published 2010, Cambridge) p.13.

6 *Supra Note p.28.*

Acts	Means	Purpose	
Recruitment	Threat or use of force	Exploitation including prostitution	
Transport	Coercion	Other forms of sexual exploitation	
Transfer	Abduction	Forced labour or services	= Trafficking
Harbouring	Fraud	Slavery or practice similar to slavery	
Receipt of persons	Deception	Servitude	
Child bellow 18 years	Abuse of prostitution of vulnerability	Removal of organs	
	Giving or receiving payment or benefit		

Table 1: Meaning of Trafficking

From the above table when any parts from all the three segments can be associated together to the circumstances of an individual, than the individual can be regarded as trafficked. Exploitation incorporates prostitution and different types of being compelled to work, exploitation, bondage, harmful work, the evacuation of organs and forcing people to do unlawful or criminal exercise. The definition applicable to all individuals, men, women and children's.

SAARC convention[7] adopted all around by 7 country's including India. And it is applicable for South Asia cross border trafficking, additionally has characterised trafficking as, "the moving, buying or selling of

7 South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002).

women and children for prostitution inside and outside a nation, for business reason and different contemplations, with or without the consent of the individual exposed to trafficking."[8]

The Goa's Children Act 2003 is state legislation. "Child Trafficking, means the procurement, recruitment, transportation, transfer, harbouring or receipt of persons, legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of deceit, of deception, of the abuse of power, or of a position of vulnerability or of getting payments or benefit to achieve the consent of a person having control over another person, for commercial purpose or otherwise."[9]

In the present Criminal Law Amendment Act, 2013 sees trafficking as an offence in the Section 370 of the Indian Penal Code. This is on comparative lines as the Palermo protocol, ratified by India in May 2011, after the Supreme Court judgement characterized trafficking in the case ofBachpanBachaoAndolan which is filed by Public Interest Litigation (PIL) in 2011. Section 370 provides further that, "whoever for the purpose if exploitation recruits, transports, harbours, transfers or receives a persons or by using threats, or using force, or any other form of coercion, or by abduction, or by practicing fraud, or deception or by use of power, or by inducement, including the giving or receiving of payments or benefit, in order to attain the assent of any person having any possession over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking."[10]

Essential Ingredients for Human Trafficking

Human trafficking has been a problem for civilised society. Today it affects virtually all the countries. If we see the graph it is higher in the less developed countries and decreases with the developed countries. But more or less it is present in every society. Trafficking includes the

8 UNODC, "Response to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka", <https://www.ecoi.net/en/file/local/1129695/1226_1306235463_responses-to-human-trafficking-in-bangladesh-india-nepal-and-sri-lanka.pdf> accessed on 12 October 2018.

9 Goa Children Act 2003, Section 2 (z).

10 Indian Penal Code 1860, Section 370.

highest degree of human rights violation. Human trafficking happens because of the simple concept that human body is an expandable, reusable commodity Essential ingredient for a trafficked person are as follows-

i) Displacement of a person from one community to another- The displacement can be starting with one village to another village, one house to another, one district to another, one state to another or from one country to another.

ii) Exploitation of the trafficked person-

It was seen that in case of 65 prostitutes were detained in the government welfare for women……Trafficking in women and the same in contravention of Article 23 of the constitution of India,[11] and related law envisages sexual exploitation of the trafficked person. The process of exploitation may be manifest.

iii) Commercialization of the exploitation and commodification of the victim-

The trafficked victim is exploited as if she is a commodity, thus the exploitator generates revenue from the exploitation. Thus such are the violations of the human right of the person who are trafficked.

Kinds of Trafficking

Trafficking for sexual exploitation

The trend in the rise of trafficking in the women girl can be said to be on increase since 1990.[12] They are trafficked for pornographic films, brothels etc. they make false promise and result in exploitation. The lucrative promises made by them led the women and girl child to such exploitations. Trafficking also pertains to sex tourism and internet sex industry.[13] Reasons cited are commonly poverty, desire of employment etc.

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11 P.N. Swamy,Labour Liberation v Station house officer.1998 (1) ALD 755.

12 Francesca Bettio, T.K. N andi, 'Evidence on Women Trafficked for Sexual Exploitation: A Right Based Approach,European Journal of Law an Economics' Vol. 29 p 47.

13 Lin Chew, Global Trafficking in Women: Some issues and strategies, the feminist press at the city of New York' Vol 27, pp11-18.

Trafficking For Labour Exploitation

If we go through the ILO report, we find that forced labour effect more than 12.3 million people globally. It led to slavery at earlier times and now it leads to the bonded labour, domestic help etc. for the reason of forced labour can be identified in the context of ILO Convention No.29 (1930). "As all work or service that is exacted from any penalty and from which the said person has not offered himself voluntarily" (Art 2). [14]

Trafficking of Children

Trafficking of children is common in both developed and underdeveloped countries. They are commonly indulged into sexual services forced into marriage illegally indulged into begging which itself is a huge industry. It is one of most important reason for the spread of HIV/ AIDS. Intentionally if we go by the data we find that UNICEF states that almost 1.2 million children are trafficked worldwide every year. Thus child trafficking is rampant for the reason of drug smuggling, prostitution, organ selling, begging, domestic help.

INTERNATIONAL AND NATIONAL APPROACH FOR COMBATING TRAFFICKING IN WOMEN AND CHILDREN

Human trafficking as defined by UN reads as: "the recruitment, transportation, transfer, harbouring or receipt of persons by means of fear or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving payments or profits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or service, slavery or practices similar to slavery, servitude or the removal of organs."[15]

14 Ibid.

15 The United Nations Charter 1945

Relevant International Statute for Trafficking of Women and Children

- *International Agreement for the Suppression of the White Slave Traffic 1904*[16]*:*

  The earliest activities to prevent international trafficking in women and girls were the appropriation of the international Agreement for Suppression of White Slave Traffic; 1904.

  The treaty did notprovide safeguard to the women's who are already working in brothels. It not able to prevent the problem of trafficking, from this treaty we can also feel the continuous racism of international agreements.

- *International Convention for the Suppression of the Traffic in Women and Children 1921*[17]*:*

  The 1921 convention abandoned the term "white slave trade" and, instead, used the expression "traffic in women and children" which also includes boys under aged. The age limit for protection was raised from twenty- one and it was made clear that the measures adopted should be adopted to all races alike.[18]

- *International convention for Suppression of Traffic in Women of full Age 1933*[19]*:*

The 1933 Convention mandated the holdings of individual responsible

16 League of Nations, international Convention on the Suppression of the White Slave Traffic (18 may 1904, Registered No.11) <https://treaties.un.org/pages/viewdetails.aspx?src=TREATY&mtdsg_no=VII8&chapter=7&lang=en> accessed on 13th October 2018.

17 League of Nations, International Convention for the Suppression of the Traffic in Women and Children (30 September 1921, Registered No. 269, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-3&chapter=7&lang=en> accessed on 13th October 2018.

18 Velena Roth, 'Deffining Human Trafficking and Identifying its Victims: A Case Study On The Impact And Future Challenges Of International, Euoropean And Finnish Legal Responses To Prostitution-Related Prostitutuion In Human Beings' (first ed. 2012), pp 45-46.

19 UN General Assembly, International convention for suppression of Traffic in Women of full Age (11 october 1933, Registered No. 772) <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/1933_international_convention_en_1.pdf> accessed on 13th October 218.

for trafficking "notwithstanding that various acts constituting the offence in question have been committed in different countries".[20] The convention provides an obligation to the countries who signing it to prosecute, prevent, prohibit or punish those who involved in trafficking in women and girl child. It characterize the trafficking which means the women who are transfer all over the nation-state border for immoral purposes, without their consent or intimidation.

- *Convention for the Suppression of the traffic in persons and of the Exploitation of the Prostitution of Others, 1949*[21]*:*

  In Article 1 of the Convention parties are required to punish any person who, to satisfy the interest of another:

1) "Procure, entices or leads away, for purpose of prostitution, another person, even with the consent of that person; and
2) Exploits prostitution of another person, even with the consent of that person."[22]

- *International Covenant on Civil and Political Rights 1966*[23]:

ICCPR contains certain provision which provides certain advantages to the women and children and additionally it provides certain provisions which are specifically on shields for Children in the association of Justice and members of family unit. Article 14(1) incorporates a more definite reference to privileges of the young: "any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceeding concern matrimonial disputes or the guardianship of children."

Article 24 of the ICCPR is specifically related to children. It specify that

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20 Jean Allian, 'Slavery In International Law Of Human Exploitation And Trafficking' (first ed. 2013), p 344.

21 UN General Assembly, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the prostitution of others (2 December 1949, A/RES/317) <http://www.refworld.org/docid/3ae6b38e23.html> accessed on 14th October 2018.

22 Ibid.

23 UN General Assembly, International Covenant on Civil and Political Rights, 1966 (16 December 1966) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed on 14th October 2018.

"every child shall have, without any discrimination as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and state."[24]

- *International Covenant on Economic, Social and Cultural Rights 1966[25]:*

"The international covenant for economic, social and cultural right makes up the international bill of human rights, by recognising that the ideal of human beings to be free can be achieved only if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."[26] Article 10 and 12 of this convention gives Particular references to children are given in.

- *Convention on the Elimination of all forms of Discrimination against Women 1979[27]:*

The 1949 Convention kept up its status as the last official word on trafficking in international law for thirty years. "It compels the state parties to take all necessary legislative and other measures to suppress all forms of traffic in women and exploitation of the prostitution of women. The CEDAW Convention signifies to departure from the earlier treaties on while slavery and trafficking incorporating the 1949 in different regards. The emphasis on exploitation of prostitution can be perused as a tacit rejection of the unequivocal abolitionist position of the preceding instruments."[28]

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24 Ibid.

25 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 1966 (16th December 1966, Resolution 2200A XXI) <http://www.unicri.it/wwd/trafficking/minors/docs_ilr/international_covenant_on_ecnomic.pdf> accessed on 14th October 2018.

26 UNDOC, Resource Book on the legal framework on Anti Human Trafficking (first published 2008) p. 138.

27 UN General Assembly, Convention on the Elimination of all forms of Discrimination against Women, (18 December 1979. A/RES/34/180) <http://refworld.org/docid/3b00f2244.html> accessed on 15th October 2018.

28 CEDAW, Article 6

- *Convention on the Rights of the Child 1989*[29]*:*

The United Nations General Assembly adopted the CRC in1989. The convention is the most far reaching articulation and clearest of what the World Community needs for their children. It is likewise the most expected Human Rights treaties as almost in the world every country has now ratified it. The convention came into force on 2 Septemberb1990.

- *United Nations Convention against Transnational Organised Crime 2000*[30]*:*

The convention wants to eradicate "safe havens" where organised criminal activities or the disguise of proof or benefits can happen by advance the appropriation of fundamental least measures. Five offences, regardless of whether carried out by individuals or corporate entities,[31] are secured: participation in corruption, organised criminal group, obstruction of justice, money laundering, and "major crime". Particular measures are also to be taken to secure witnesses (including the victim who is also regards as witnesses) from potential retaliation or intimidation. Certain methods are used in training programs for law enforcement personnel are to particularly deal with in the safe guard of victims and witnesses.

Relevant National Statute for trafficking of Women and Children

- *The Constitution of India:*

Constitution of India, the fundamental law of the land, forbids trafficking in persons. There are number of articles, e.g.: Article 23 of the Constitution prohibits trafficking. The constitution directly or indirectly speaks about trafficking. Other fundamental rights Article 14 which is enriched in the constitution relevant to trafficking i.e. equality

29 UN General Assembly, Convention on the Rights of the Child (20 November 1989) <http://www.ohchr.org/Documents/Professional Interest/erc.pdf> accessed on 15th October 2018.

30 UN General Assembly, United Nation Convention against Transnational Organised Crime, (8 January 2001, A/RES/55/25) <http://refworld.org/docid/3b00f55b0.html> accessed on 15th October 2018.

31 United Nations Convention Against Transnational Organised Crime, Art. 10.

before law, Article 15 states that the prohibition of discrimination against on the ground of religion, race, caste, sex or place of birth, Right to life and personal liberty under Article 21 and Protection from arrest and detention except under certain conditions under Article 22. The inclusion of these laws can be viewed as progressive; thereafter several anti-trafficking advocates that claim that the "prohibitions model" further victimize the victims of trafficking, particularly for those who are indulged in commercial sexual exploitation. "Thus the Constitution of India which is the highest law of the land and from which laws emanate, guarantees equality as a fundamental right and prohibits traffic inhuman beings".[32] Article 23 (1) expressly prevents traffic in human beings, beggar and other different types of constrained work. It is important to make reference that there is no particular prevention for prostitution, what is prohibited is traffic in individual. Further Article 39A coordinates that the legitimate framework ought to guarantee that without any discrimination of economic or other disabilities it givesopportunities for securing justice are not denied to any citizens of India.

- *Immoral Traffic (Prevention) Act (ITPA), 1956:*
  This is the most fundamental legislative instrument in India which helps in combating the problems of trafficking in human beings.

Offences under this Act are as follows:

1. "Punishment for keeping a brothel or allowing premises to be used as a brothel (S.3)
2. Punishment for living on the earning of prostitution (S.4)
3. Procuring, inducing or taking persons for the sake of prostitution (S.5)
4. Detaining a person in premises where prostitution is carried on (S.6)
5. Prostitution in or the vicinity of public places (S.7)
6. Seducing or soliciting for the purpose of prostitution (S.8)
7. Seduction of a person in custody (S.9)"[33]

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32 Constitution of India, Article 14.

33 ITPA 1956 <http://www.protectionproject.org/wp-content/

- *The Bonded Labour System (Abolition) Act, 1976:*

Though this Act, 1976 is not directly concerned with the women and child labour, yet the entire object is to protect the interest of poor, unorganised and literate work force. The basic object of this Act is to check the miseries of ill-fated persons deprived of basic human needs and are compelled beggar and forced labour. The Act prevents all forms of bonded labours which includes children from any forced labour.

- *The Child Labour (Prohibition and Regulation) Act, 1986:*

This Act regulatesspecially for the prohibition of employment of child labour in particular occupations and also regulates the conditions of child labour who are working on other establishment.

Although in this Act there is no procedure clearly states in which any law for choosing in which jobs, procedures or occupations the work of children ought to be prevented. There is additionally no law to control working condition of children in the greater part of the jobs where they are not restricted from working and are working under exploitive condition.

- *The Juvenile Justice (Care and Protection of Children) Act, 2015:*

The Juvenile Justice Act, 2015 is enacted for strengthening the provisions of both children in need of protection and care for child in collision with law.

Section 15 of this act provides special provisions to handle child offenders committing grave offences under the age group of 16-18 years. An alternative is given to the Board of Juvenile Justice to transfer the cases of such children who have committed grave offences to a children's court (Court of Session).

After attaining the age of 21, if the child is reformed than the child will be released on probation and if within that specific period of time the child is not reformed than the child will be sent back to the jail for remaining term. As per the Act, any juvenile who is between the age of 16 and 18 years and commits a lesser serious offence, may be

uploads/2010/09/India_Acts_1986.pdf> accessed on 15th October 2018.

tried as an adult only if he is apprehended after the age of 21 years. This provision undoubtedly violates Article 20(1) which expresses that a person cannot be exposed to a compensation punishment more noteworthy than what might have been appropriate to him under a law in power at the time of commission of the offence. This provision may influence the assumption of blamelessness and lead to lopsided techniques and assertion under the constitution.

CURRENT SCENARIO OF WOMEN AND CHILD TRAFFICKING IN INDIA

The crime of trafficking in India has grown up as a serious problem in the last few decades.It can be said that the main cause of trafficking can be traced back to poverty, unemployment and underemployment as well[34].It has been said that the Government of India (GOI) have failed to trace the problem of poverty which leads to various problem among which human (women and children) trafficking is one of the most burning issue.

Most of the trafficked person in India faces the problem of forced labour.[35] Labour trafficking as explained earlier is trafficking of persons by means of fraud, coercion duress etc., it is exploitation and thus a gross violation of human rights. It includes exploitation such as slavery, debt bondage involuntary servitude. Sex trafficking is also prevalent in India. It is one of the most heinous crimes. It is the worst manner of exploitation. It is done for commercial purpose. The number of persons trafficked for either labour or sex is difficult to estimate.

Reasons behind Expansion of Women and Child Trafficking in India

The main reason behind human trafficking is poverty. Because of poverty people are forced to do whatever they have in their hands. Accordingly various other factors are also there for which human trafficking is growing robustly such as caste based discrimination, lack of resources, lack of human and social capital, unemployment, social security, breaking down of community support system ,cheap child

34 Amit Bhaskar, *Human Trafficking Law In India,* vol.563 p 4.

35 Forced Labour Convention,1930.

labour, gender discrimination, lack of governance, social exclusion, inadequate and out-dated state policies, nexus of police and traffickers, attraction of city life, corruption, child marriage and priority to marriage migration policies conflict and lack of awareness among the victims and so forth. As reported by the International Organisation for migration states that 90 percent of the victims who are engaged as sex workers have the knowledge of domestic violence before they were trafficked. Another factor which contribute in trafficking is high demand of sex ratio in some women starve region. There are also various other factor which help in the growth of trafficking both directly and indirectly but the above cited issues are the principle factor which force the victim to get further abuse, vulnerabilities and also force to engage in the modern world of slavery throughout their life expectancy.

Report of the Government on Women and Child Trafficking in India (2006)

As per the report of Govt. of India in 2006 almost 20,000 children and women became sufferer of human trafficking in India.

As reported to the Parliament by the Ministry of Women and Child Development that 19,223 women and children were trafficked against 15,448 in 2015. From the report it is also recorded that highest number of victims are from the eastern state of West Bengal. One of the fastest growing regions for trafficking of women and children in the world is South Asia, with India at its centre. Many of the victims who fall prey in the hands of traffickers are largely from poor family. The basic needs of human beings are food, cloth and shelter. Therefore in order to have these basic needs the poor people get fascinated by the traffickers. From the rural areas most of the children and women are lured to other parts of India's cities and towns by traffickers by giving fake promises of good jobs, but in return they sell them into modern slavery. Some of the victims are engaged as domestic workers, or some of them are compelled to work in small hazardous industries like textile workshops, glass industry, ranching etc. without any kind of payment. Even some of them are bump into red-light districts where they are sexually, mentally abused.[36]

36 Government Report, 'Almost 20,00women,children trafficked in 2006'

Trafficking of human soul is counted as one of the most unfavourable criminal activities. This is one of the devilish actions which made the lives of hundreds and millions as bad as a nightmare. Immediate attention and appropriate solution is required in order to tackle this heinous crime from the society in order to save humanity because it is seen that humanity is being washed away from the people who are being involved in this profession. There is no significant meaning of rights and justice for them because every time their rights are violated and denied from getting justice. Due to impotent legal watch system, less income opportunities, insufficient resources, highest demand in the market and so forth the rate of entanglement is expanding day by day in this wrongdoing. In order to have a clean and dirt free society from this crime there must be monitoring mechanism as well as strong interruptions and assurance. It is one of the most important aspects of our society which needs imperative attention.

CURRENT SCENARIO OF WOMEN AND CHILD TRAFFICKINGINNORTH EAST REGION

Throughout the entire universe human trafficking is treated as the third biggest corrupt business. Today entire world is confronting this issue irrespective of caste and creed. Be that as it may, alarmingly North East India is turning into the problem area of women and child trafficking from all edge of the globe. The rackets of corruption are spoiled to such an extent that law enforcement officers are also seen incorporated into the trafficking business. There are no other choices or decisions left in the hands of women and children to turn after they are being trafficked. Many young women of North East region are forcefully taken from their local spots to far away states of India or outside India for forced labour and sex business. According to the Government of India's measurements in every eight minute a child disappears in our nation in 2011 and the greater part of them are from West Bengal and North East India. A large portion of the conditions

Times of India <http://timesofindia.indiatimes.com/india/almost-20000-women-children-trafficked-in-india-in-2016-govt-report/articleshow/57569145.cms> accessed on 17th October 2018.

of North Eastern locales are battled for roti, kapraaurmakan. Human trafficking incorporates sexual exploitation, bonded labour, cross border trafficking and trafficking for human organs and so forth. Notwithstanding sixty nine years of freedom, the monetary improvement of India is not remarkable. The minimized area of India is still under the poverty line and they survived for food, shelter and cloths, which are essential needs of individuals.Poverty and hunger makes women and children more helpless against human trafficking. Trafficking keeps on being an issue for the most part because of absence of activity. Due to lack of action and effective solution trafficking becomes a problem of the society.However the large amounts of corruption regularly restrain their capacity to have an extensive effect. Sometimes the rescued victim did not get the psychological help which they need to overcome the scary circumstances they faced. Many victims are dragged once again into trafficking after being recovered from such situation. There are a few principle exportersand importers of traffickers. Much even more ought to be done to stop human trafficking, yet as long as it remains fuelled by financial dissimilarity and local corruption, it will continue.[37]

Present Scenario of North Eastern States

"It was recognised that the term 'internal trafficking' is not an issue in the zone North East. But from 2003 onwards the initiatives of addressing this term was done by some social organisations. Internal trafficking as a subject of growing concern came into notice when the awareness building and rescue intervention program were carried out along with the drug trafficking in the border districts. The indication of growing threat of internal trafficking of girls in the region of Assam, Nagaland and Dimapur border was noticed when interviewed with almost 60 "City Social Welfare Service Office" (CSWS) of these states. Besides all these issues, luring women and children by giving fake promises of giving jobs in metro cities and send them to other parts for illegal work. These kinds of activities are seen growing especially in the conflict affected areas such as Bodoland Territorial Council,

37 Eli Kumari Das, 'Human trafficking in North Eastern region: a study with globalperspectives', [2016] Journal of Humanities And Social Science.

Assam. Enormous girls from the zone of North East are seen working in unrecognised restaurants and bars. Most of them are under the age of eighteen years. Sometimes it so happens that these girls are forced to do so and in certain cases some wilfully comes to work in such places. The number of girls are growing in this sector in trans-border areas of North- East are due to rise of poverty issues, conflict, flood situation along with all these issues some goes in order to have glamorous world. There is no such division of caste or community is set that who can and who cannot work in such areas, but all sector of the society is engaged in from that region."[38]

Most of the young girls as well as women of North Eastern region are send for the work domestic servant to the cities like Kolkata, Delhi, Mumbai, Bangalore, Darjeeling and so forth. The alarming rate of enrolled operators coming to the North East region to trap the young girls for domestic servant and also for certain unwilling activity has depict the clear picture of large network of trafficking operating in the region. In many cases women and girls are being trafficked by the operator through local transit reachable to Siliguri and then again from that spot they send them to some other destination with the traffickers. For the transportation the traffickers use carrier like trucks and other vehicles who carry women and girls from the area of North East by the route of 31 national highways which is the only connecting route to the other states of North East.

Over a passage of time it is being noticed that the number of divorce cases are increasing in the region in a massive growth due to various reasons like alcoholism, practiced of bigamy, drug addiction and so forth. Basically it has been noticed that women become the victim of this worst situations. More than this the children in the family are seen facing massive disturbances specially the girls. When need arises to tackle the problem of this sort of situations then most of the it so

38 Dr.Rekha Roy, *Women and child trafficking in India: a human right perspective* (first published, New Delhi :Akansha Pub. House, 2010).

happen that the state crisis centres are dysfunctional to help women.

"From different reports, the issue of trafficking is trying to highlightwithin a boarder's migration framework and to propose policies which are powerful and effective in diminishing trafficking and in preventing the human and labour rights infringement to which ethnic transient workers are so frequently oppressed. It unmistakably stands up the requirements to actualize all the state party to execute the Convention rules for the affirmation of the vagrant rights. In many of the cases it happens that the trafficked migrants do not want or hesitate to reveal what has happened to them when they are initially come into contract with the non-governmental organisation. The hesitation might be for various reasons like fear of social exclusion, fear of retaliation from trafficking against themselves or families, unwillingness to discuss what has happened to them because of trauma or shame; distrust that they will be persecuted. The trafficked individual therefore need reflection period."[39]

Press Information Bureau Government of India Ministry of Women and Child Development (Trafficking of Children and Minor Girls)

The number of cases recorded under the supervision of Immoral Traffic (Prevention) Act, 1956 in the North Eastern Region increased from 32 to 43 in the year of 2008-9 as per the data of National Crime Records Bureau (NCRB).The State-wise details are given below as recorded in the data:[40]

State	2008	2009*	2010* Up to the month of
Arunachal Pradesh	0	0	0 (June)
Assam	27	37	1 (March)
Manipur	0	0	2 (September)

39 Ibid.

40 The National Crime Records Bureau (NCRB), 'Trafficking of Children and Minor Girls' (15 November 2010) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=67115> accessed on 20 October 2018.

Meghalaya	3	1	2 (August)
Mizoram	1	1	0 (August)
Nagaland	1	3	0 (July)
Sikkim	0	1	1 (August)
Tripura	0	0	0 (August)
Total	32	43	6

Table 2: Rate of Trafficking from 2008-10

*Data is provisional

Tea Plantation: A Hotspot For Trafficking

Several factors made the tea plantation in Assam a place for migration who depends on tea plantations alone.

In the case study of Somalia whom was born on the Nahorani Tea plantation in Assam. She was sixteen years old when she was trafficked. Two days before she was trafficked, the trafficker came to her and gave her tempting ideas that if she goes with him she will be happy and earns a lot of money. Later she behaves differently, she wear different and plays with her friends outside. It was then she failed to return the parents started to panic. Three years had passed after she had gone missing; the parents had received a brief phone call saying that Somalia will be allowed to come home. But till date there is no return.

The work and living conditions experienced on the tea manors are making individuals powerless to the intimidation and vulnerable for the traffickers. Breaking the poverty cycle, instructing tea garden groups on what trafficking is and enabling them to make a move are all fundamental segments in building resilient, traffic- free community. A holistic approach required keeping in mind the end goal to handle this wrongdoing, i.e. Organisations, government, law enforcement, NGOs, people group and individual all have a part to play in keeping individuals from being trafficked out of the tea ranches of Assam.

CONCLUSION

In India the widespread phenomenon of human trafficking must be recognized among individuals and also consciousness must be brought up in order to overcome this problem with a specific end goal and punish the culprits of this offence. With the absence of education, health care, proper nourishment, nutrition and security of the women in the society, it is beyond belief that women empowerment as well as women trafficking can be reduced. Education is the key to everything through which we can remove dirt of the society to a great extent. Through education one can know about the good and bad in the surroundings as well as helps in breaking the movement of women, children and men from going into unwilling employment or domination. It is the education for which it becomes very easy to eliminate the negative impact in the scuffle against human trafficking. It is not possible to prohibit or prevent human trafficking through the measures of public awareness and education of professionals only. Involvements of proper and competent social work practitioners are required. The practitioners must have the knowledge of case management and advocacy skills along with these comprehensions of theeco-friendlyprospect of assessment and treatment methods to endeavour with the multifaceted and far reaching commitment of the residue.

Trafficking is the most dangerous and profitable illegal business in the world. This industry is known as one of the most successful because people are easily attracted towards this in order to earn more money within short span of time. Many thousands of people suffer from human trafficking in various forms. There is an urgent need of effective solutions are required to get rid of this problem. It is very important to make sure that every individual is aware and have the sufficient knowledge of existence and nature of human trafficking. By giving adequate education to every individual to some extent, definitely will help in various ways like empowerment of women by emerging “natural capacity, inner transformation of one’s consciousness to overcome obstacles, access resources and traditional ideologies”. Therefore it is clear that education is the pillar to achieve a dirt free society.

Education also helps in eradicating poverty by educating people to get employment. Where the rate of employment is high automatically the curve of poverty will go down which will indicate that vulnerability of human trafficking will be reduced. Lastly one more aspect needs attention is that women should be given technical education which will help in decreasing the serious issue of human trafficking.

Insurgency Movements in North East India and its Impact on the Hill Women folks of the States of Nagaland, Mizoram and Manipur: Voice of the Unheard Victims

Thangzakhup Tombing[1]

ABSTRACT:

The scar of war is never easily forgotten, it remains in the memories of generations to remind the victims and survivors of war crimes the ugly truth of what war actually is.. It may be war for self determination, for justice or for the establishment of democracy, however, what can be unshaken is that the aftermath of war leaves behind trails of destruction, dead and brutality committed on man, children and women. The insurgency movements in the states of Nagaland, Mizoram and Manipur may be apparently for political status and recognition of different ethnic tribal groups against dominant government. However, little insight into politico- ideological aspect of the insurgency movements will unravel strong ethnic undertone and escalation of ethnic wars and brutality among tribal groups. Thus, be it the erstwhile MNF or the NSCN (IM)or (K)or the UNLF or PLA or KN or ZRA operating in the states of Mizoram, Nagaland and Manipur, it is the children and women who are always at the highest risk and are most likely to end up as victims of heinous war crimes and brutalities like molestation, rape, slavery, trafficking, murder etc.

The paper attempts to explore the unheard voices of the tribal women folks in the state of Nagaland, Mizoram and Manipur who were silent victims of insurgencymovements and counter insurgency movements in these three states. It further attempts to critically analyse relevant national and international statutes, treaties and conventions and remedies available to women victims of war crimes as a class in themselves. To examine the concept of victim jurisprudence in this regard by examining judicial opinions pertaining to state crimes and state accountability,for the concerned tribal women victims of insurgency related atrocitiescommitted by state as well as non state actors.

Key words: Insurgency, human rights, women.

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INTRODUCTION

Insurgency is not new to the North East India, in fact insurgency, militancy and disturbed area tag has become synonymous to most of the North Eastern states. The struggle for identity and self determination with different social, cultural and political aspirations with all the ramifications of economic hardships had been borne by the community since last 60 years[2]. The Nagas with fervor for self determination had initiated the Naga movement since 1950s. The Naga Peace Accord was signed between Government of India and NSCN (IM) on August 03, 2015, whereby the Naga had change their stand point from the demand of complete independence to assimilation to mainstreamIndia with special administrative zone to protect promote and preserve their unique culture, heritage, language and traditions in all Naga inhabited areas[3]. The Naga insurgency assertion of identity and nationhood had its impact on the Nagas inhabited areas of Manipur, Assam and Arunachal Pradesh[4]. In Mizoram the MNF uprising led to the declaration of independence in 1966 which was later suppressed by the Government of India by the signing of peace accord[5] on the dual conditions of cessation of all forms of violence by MNF and negotiation within the framework of the Constitution of India[6]. In Manipur insurgency movements were initiated in 1964 and

2 Prasenjit Biswas and Chandan Suklabaidya, *Ethnic Life- Worlds In North-East India: An Analysis*(Sage India 2008)11.

3 Thangzakhup Tombing, Conflict Governance: Study of Naga Peace Accord and Territorial Integrity of Manipur, Lalneihzovi (et al.), *Proceedings of 2015 International Seminar on Governance in India: problems and Prospects* (Vol. I, Mizoram University, Aizawl) 72.

4 Radha Binod Koijam, 'The Impact of Insurgencies Activities in North East India on Socio- economic Development and its Solution Thereof' speech delivered on 29 January 2010 in the *12th NERCPA Conference at Shillong* , CENTRE FOR NORTH EAST STUDIES AND POLICY RESEARCH (28- 30 January 2010)<https://www.c-nes.org/539/the-impact-of-insurgency-activities-in-northeast-india-on-socio-economic-development-and-its-solution-thereof/> accessed Aug. 30, 2018.

5 The Mizo Accord was signed between Government of India and MNF on 30 June 1986.

6 Th. Siamkhum, 'A Case Study of MNF Movement of Independence in Mizoram Counter- Insurgency Operation and Human Rights Violation- Part 6'*E- Pao* (Imphal, Jan. 31, 2015) <http://e-pao.net/

later intensified between 1977 and 1980[7] on the ideology and politics of the independent kingdom and manipulated into merger of Manipur with Union of India in 1949[8].

The armed struggle in the states of Mizoram and Manipur had led to hardship, struggle, abuse, murder and rape of many innocent people of the states. Many of these crimes would have been overlooked for reasons of ignorance of the law or because of lack of state mechanism or for political exigencies. The paper intends to highlight and discuss the impact of insurgency and counter insurgency and the exploitation of women in the States of Mizoram and Manipur[9].State wise discussion of human rights abuse of women folk and their experience during counter insurgency operation and schemes for their rehabilitation will be critically analyzed from the stand point of relevant UN conventions, treaties, State based laws and also on best practices and judicial opinions.

1. WOMEN OF MIZORAM

The Mizoram uprising in 1966 and the Mizo National Front (MNF) movement which stretched for almost two decades is a stigma to world's largest democracy not only because of the military brutality committed on the people of Mizoram but also due to the airstrike on its own people by the Government of India[10].The airstrike and the aftermath

epSubPageExtractor.asp?src=education.Human_Rights_Legal.A_case_study_of_MNF_movement_for_independence_in_Mizoram_Part_6_By_Th_Siamkhum> accessed 30 August 2018.

7 Koijam(n. 3), the first separatist group the United National Liberation Front (UNLF) was first formed followed by the formation of People Liberation Army (PLA) and Peoples Revolutionary Party of Kangleipak (PREPAK) in 1978, thereby intensifying insurgency movement by indulging in urban and semi- urban warfare.

8 M.S. Prabhakara, 'Insurgencies in Manipur: politics and Ideology'*The Hindu*(Imphal, 28 January 2010)<http://www.thehindu.com/todays-paper/tp-opinion/Insurgencies-in-Manipur-politics-amp-ideology/article15969897.ece> accessed 30 August 2018.

9 The armed struggle and the experience of armed struggle in Manipur and Nagaalnd and other tribal groups of Manipur and its impact on women folk in the valley and in the hills are intertwined, common yet distinct.

10 J.V. Hluna And Rinitochawng, *The Mizo Uprising: Assam Assembly Debates On The Mizo Movement 1966- 71* (Cambridge Scholars Publishing

leading to the atrocities committed by the Indian armed forces on the innocent Mizo villagers and women to quell the movement is a blight on the Indian democracy as it caused negative impact and extreme hatred towards everything that is India, which further alienated the Mizo people and forced them into the rank and file of insurgents[11]. However, before discussing the atrocities committed on women and their alleged human rights abuse during counter insurgency operations it is pertinent to briefly discuss the social- political situation which led to the uprising.

1.1. The Mizo Uprising

In an endeavor to carve out ethnic and cultural identity of Mizo[12] and with a mission to preserve, protect and secure a better future for the Mizo people, the Mizo National Front was conceived under the leadership of Pu Laldenga. Prior to the uprising the MNF was known as the Mizo National Famine Front in 1960 however, due to the utter neglect and indifference towards the hardship, sufferings and deaths faced by the Mizo people due to *Mautam*[13]it was rechristened into the MNF[14]. The phenomenon had also occurred in 1862 and 1911. The Mizo District Council were wary that *mautam* would strike again in 1958- 59, however their apprehensions were conveniently ignored by the Government of Assam as mere tribal superstition. The bamboo

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UK 2012) 100- 132.

11 Th. Siamkhum, 'A Case Study of MNF Movement of Independence in Mizoram Counter- Insurgency Operation and Human Rights Violation- Part 4'*E- Pao* (16 January 2015)<http://e-pao.net/epSubPageExtractor.asp?src=education.Human_Rights_Legal.A_case_study_of_MNF_movement_for_independence_in_Mizoram_Part_4_By_Th_Siamkhum>accessed 30 August 2018.

12 Hluna (n. 9) Introduction xviii.

13 *Mautam*-literally mean bamboo death, a cyclical ecological phenomenon of bamboo blooming which occur every 48- 50 years leading to huge surge in the population of rat. The rats would raid stored grains, thereby eventually leading to famine. The phenomenon had also occurred in 1862 and 1911.

14 *Id.* at 3

flowering did happen in 1959 and in the ensuing development, the population of the rat multiplied enormously leading to an evitable famine[15].

The utter let down by the Assam Government and the Union of India strengthened the nationalist propaganda of the MNF for complete and full separation. On March 01, 1966 the MNF seized the Assam Rifles Head Quarters at Aizawl and hoisted its flag in place of the Indian Tri-colour thereby declaring the Mizo uprising for complete separation against the Government of India[16]. The Government of Assam declared Aizawl district as Disturbed Area on March 2, 1966[17]. Armies were mobilized to quell the uprising. The Indian Air Force razed different parts of Aizawl on March 5, 1966[18]. On March 6, 1966 the Government of Assam declared MNF as an unlawful organization[19], thereby clamping on the people the much controversial Armed Forces Special Power Act, 1958[20]. The Central Government ordered the application of Rule 32 of the Defense of India Rule 1962, which greatly enlarged the power of the Armed Forces.The provision of emergency under A. 352 of the Indian Constitution was also imposed, thereby implying that free hand with absolute immunity was given to the army to deal with MNF[21].The ensuing atrocities and the human rights violation committed on the Mizo people and women in particular by the Indian army for almost two decades as part of war strategy to quell and to completely demoralize the MNF movement needs to critically examined.

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15 Anand Ranganathan, 'A Brief History of Mizoram: From the Aizawl Bombing to the Mizo Accord'(*News Laundry*, 6 August 2015) <http://www.newslaundry.com/2015/08/06/a-brief-history-of-mizoram-from-the-aizawl-bombing-to-the-mizo-accord>(last accessed Aug. 30, 2018).

16 Hluna (n. 9) Foreword ix

17 ibid.

18 ibid.

19 Later promulgated by invoking the provisions of the Unlawful Activities (Prevention) Act of 1967.

20 Ranganathan(n.14).

21 Hluna (n. 9), the Central Government had empowered the Army to exercise raids and combing operations in liaison with the Government of Assam, xviii.

1.2 Atrocities On Mizo Women

Massive deployment of infantry and air raids were commissioned on the Mizo people, they were subjected to settlement centres to ensure physical and political isolation from the insurgents[22]. Settlement Centres or the Village Grouping Plan[23] originally proposed by General Manekshaw was with an intent to accelerate development and improve security[24]. But in the case of Mizo community it was a new settlement where every villager was given an identification number, the day would begin and end with roll call[25]. There was constant surveillance, humiliation, fear and sufferings on man, women and children of all ages[26].

The safety and security of Mizo women was the most precarious and vulnerable because of the Village Grouping and the imposition of Arms Forces Special Power Act, 1958[27].Women have to face untold hardships, they have to manage their households with whatever meager food supply the army would provide, since all their belongings were burnt down there were no food to cook, no sufficient material for making mat to sleep on and be warm at night. A woman who had given birth in one of the Village grouping recounted that she had to wash her new born daughter from drainage water[28]. As well there was constant fear lurking on the womenfolk of being sexually exploited by the Army.

According C. Zama, an ex- MNA fighter in his book "Untold Atrocity"

22 ibid. xxi.

23 It was an attempt to replicate the Regrouping of Villages model engaged by the British and American in Malaya and Vietnam to isolate the insurgents and keep villages under army surveillance. In the context of Mizo insurgency it was called the "Protected and Progressive Villages (PPVs)".

24 Ranganathan(n. 14).

25 ibid, the villagers were coerced to sign documents to show that they have migrated on their free will.

26 Ibid., after villagers were relocated to settlement centres the previous would be burnt down and all food grain destroyed to ensure that the insurgents would not find anything to sustain themselves.

27 Siamkhum (n. 10).

28 Sajal Nag, *State Atrocities As History: Counter Insurgency Operations And Human Rights Violation In North East India, Human Rights And Insurgency In North East India* (Shipra Publications, N. Delhi 2002) 68.

a Mizo woman could be simply raped by Army personnel on mere whimsical suspicion of her being a supporter of MNF, and that it was at the discretion of the Army to decide what was right or wrong or decide who was MNF supporter and who was not[29].The Army under the guise of the dreaded Armed Forces Power Act, 1958[30] would hoard together the entire villagers in a school or church building or playground, separate the good looking women from the male, parading them naked in open and also assaulting pregnant women[31]. This was a case where one pregnant woman Lalthuami, wife of a cultivator where one fateful night in 1966, five Army men barged into their house, took her husband out of the house at gun point, two of the army men pinned her down while the third person committed rape on her[32]. And on many occasions women were raped by them in full view of their husbands[33]. In a particular notorious case of mass rape of women at Kolasib in 1966, a number of women were raped in front their husbands to create psychological terror with an intent to instill helplessness and to finally demoralize the male community and the MNF movement[34]. From the above cited incidents, it can be inferred

29 ibid.

30 s. 4 of the Act provides that, "...any Commissioned Officer, Warrant Officer, non- commissioned or any other person of equivalent rank in the armed forces may exercise, in the disturbed area, for the maintenance of public order fire upon or otherwise use force even to causing death..., or destroy any arms dump, prepared or fortified position or shelter or any structure used as training camped for armed volunteers..., or arrest any person without warrant on ground of reasonable excuse..., or enter and search without warrant any premises..., and may for that purpose use such force as maybe necessary".

31 C. Lalhmanmawia/ Lalhmingmawii, 'Mizo Insurgency vis-à-vis Human Rights' *PRESERVE ARTICLES 6*, <http://www.preservearticles.com/201106218318/mizo-insurgency-vis-as-vis-human-rights.html>accessed 30 August 2018.

32 ibid.

33 ibid.

34 Sajal Nag, 'A Gigantic Panopticon: Counter Insurgency Operation and Modes of Discipline and Punishment in North East India',paper presented at Development, Logistics, And, Governance: Fourth Critical Studiesconference, Kokatta (2011) 12 <www.mcrg.ac.in/PP46.pdf> accessed Aug. 30, 2018; also cited in Chhuanvawra v. the State of Assam and others (India).

that the atrocities committed on Mizo women were in utter violation of woman's right to life, dignity and personhood as guaranteed by the Universal Declaration of Human Rights and also in contravention to the objective and spirit of the United Nations Convention on Elimination of All Forms of Discrimination of Women (CEDAW).

1.3 Peace Accord

The Mizo Peace Accord was signed between the MNF and government of India on 30 June 1986, and the formalization of the State of Mizoram took place of February, 1987. In the Memorandum of Settlement reached between the Government of India and the MNF, there are schemes for compensation to be paid to the Mizoram state, to the family or the dependents or the heirs of the MNF martyrs, compensation to be paid for damage crops, building damaged or destroyed during the counter insurgency operations[35]. However, the ruthless, inhuman and atrocious rape of Mizo women seems to have been treated as mere collateral damage during the counter insurgency operations.Because of the impunity given to the security forces by special laws, victims are rendered helpless to seek remedy[36]. Where are the Mizo women who were victims of war crimes like rape, molestation supposed to go for the redressal of the injustices meted out to them during the counter insurgency operations?

1. WOMEN OF NAGALAND AND MANIPUR

The insurgency movements in Manipur and Nagaland are intertwined and inter-related because of the influence of the erstwhile NNC and the NSCN (IM) in both the states. As such insurgency movements in these two states can be seen and interpreted from the perspective of aspirations and dreams of hill people interspersed against with that of the valley. The Naga insurgency has direct influence and interest

35 Siamkhum (n.5), Mizoram Peace Accord, *Memorandum of Settlement*, art. 8 .1 (a).

36 Arafat S., 'Rehabilitation of the Victims of Conflict in the State of Jammu and Kashmir: A Socio- Legal Analysis'(2015) 4 (159) JCS <https://www.omicsonline.org/open-access/rehabilitation-of-the-victims-of-conflict-in-the-state-of-jammu-andkashmir-a-sociolegal-analysis-2169-0170-1000159.php?aid=63100> accessed 30 August 2018.

not only in Nagaland but also in the Naga inhabited areas of Manipur, because of the aspiration for pan-Naga's "*Nagalim"*or "the Naga Homeland"[37]. The peculiar case of Manipur is that there are many other major tribal insurgency groups which are operating in the ethnic and ideological line of insurgency like the Nagas and Mizo insurgency movements[38]. Both the states are declared disturbed and as such the Armed Forces Special Power Act, 1958 is imposed in these two states. It is poignant to analyse that Manipur had witnessed two ethnic wars in the 1990's. One was between Naga and Kuki tribes[39] and the other was between Kuki and Paite tribes[40] erupted because of the perceived notion of who dominates the other in terms of control of locality, taxation and allegiance to greater cause of the Naga ideology[41]. The Naga- Kuki clash dragged on for almost a decade, while the Kuki- Paite

37 Biswas (n. 1)168- 192; Dr. Nehginpao Kipgen, 'Intricacies of Kuki and Naga Ethnocentricism in Manipur'*HUFFPOST, THEWORLDPOST*<https://www.huffingtonpost.com/nehginpao-kipgen/intricacies-of-kuki-and-naga_b_2531115.html> accessed 30 August 2018; Sushil Kumar Sharma, 'Naga Peace Accord and the Kuki and Meitei Insurgencies in the State of Manipur' *POLICY BRIEF, INSTITUTE OF DEFENSE STUDIES AND ANALYSES* (5 January2016) <https://idsa.in/policybrief/naga-peace-accord-and-the-kuki-and-meitei-insurgencies_sksharma_050116> accessed 30 August 2018.

38 Durga Madhab (John) Mitra, 'Understanding Indian Insurgencies: Implications of for Counter Insurgency Operations in the Third World', Strategic Studies Institute (February 2007) 5 <http://www.StrategicStudiesInsitute.army.mil/> accessed 30 August 2018.

39 D. Michael Haokip, 'Kuki- Naga Conflict with Special Reference to the Chandel District of Manipur' Lazar Jeyaseelan (eds.) *Conflict Mapping And Peace Process In North East India,*(NORTH EASTERN SOCIAL RESEARCH CENTRE GUWAHATI 2008) 145- 184; Soutik Biswas, 'Living on the razor's edge'*India Today* (15 October 1993) <http://indiatoday.intoday.in/story/kuki-naga-coflict-recent-massacres-in-manipur-take-state-virtually-to-brink-of-civil-war/1/303114.html>accessed 30 August 2018.

40 Rebecca C. Haokip, *Kuki- Paite Conflict in the Churachandpur District of Manipur* in LAZAR JEYASEELAN (ed.) *Conflict Mapping and Peace Process in North East India,* NORTH EASTERN SOCIAL RESEARCH CENTRE GUWAHATI, (2008)185- 208; Sinlung, 'Kuki- Zomi Ethnic Clash 1997- 98' (THUPUI: VAWISUNTHUPUI CHU (July 2009) <http://thupui.blogspot.in/2009/07/kuki-zomi-ethnic-clash-1997-98.html> accessed 30 August 2018.

41 Biswas (n. 1) 192- 196.

clash was for a period of one year. It is in this backdrop that impact of insurgency on the women folk of Nagaland and Manipur would be discussed.

2.1 Atrocities On Naga Women

The case of the Naga aspiration for self-rule dates back to 1929 when Naga leaders submitted a memorandum to the visiting Simon Commission in Kohima[42]. In 1946 the NNC signed its first agreement with the interim Government of India for vesting India as the guardian power.However, they themselves did a volte-face by advocating the need for a unified independent Nagaland, thereby declared themselves independent on August 14, 1947[43]. In May 1951 when referendum for independence was organized in all Naga inhabited areas it resulted in an overwhelming vote in favour of Naga independence[44].The ensuing mobilization of armed forces by the Union Government led to the beginning of the armed struggle of the Naga, which was later came to be known as the mother of all insurgencies in the North East India.

To quell the NNC led arm struggle the Government of India created village grouping in most of the villages inhabited by the Nagas in 1956-57[45]. The grouping was preceded by burning of the villages so that the villagers and the insurgents could not return[46]. The burning included burning and destruction of their food stock, utensils, timber and livestock. To regularize such relocation, the Government of India in addition to the Armed Forces Special Power Act, 1956 passed the Nagaland Security Regulation 1962[47]. According to S. 5 A (1) of the Regulation, the Governor is empowered to remove all or any class of residents to any other area of any length in the interest of the safety and security of Nagaland. Sections 34 (1) and 36 (1) provides protection

42 ibid.166.

43 ibid.

44 Bela Bhatia, 'Awaiting Nachiso, Naga Elders Remember 1957', *HIMAL SOUTH ASIA* (20 August 2011) <http://morungexpress.com/awaiting-nachiso/> accessed 30 August 2018.

45 ibid. in 1956 thousand of Naga houses were burnt and people were shot and killed.

46 Nag (n. 33) 8.

47 ibid.9.

and immunity to any person or Government for any act committed or any order made in pursuant to the regulation[48].

In village grouping since they were herded into mere bamboo fencing they did not have basic human amenities like clean drinking water, food, space for toiletries etc[49].It is in these poignant circumstances that unprecedented atrocities were committed on Naga women in the name of counter insurgency operations.Recounting the horrific experience during the village grouping one of the survivor in Ungma village narrated that women- married or unmarried would be raped in the fields or jungle on the mere suspicion that they may have given shelter to the insurgents[50]. Women could be simply rounded for interrogation, detained, raped or carried away in vehicle and kept away for weeks or months, and no one could question[51]. In some instances whenever army convoy would come they would stay in churches and carry away women in full public view[52].Incidents of alleged molestation and rape of Mizo women were reportedly continued till 1974.

2.2 Atrocities On the Women Of Manipur

Manipur is a home to the valley people and the hill people. Meitei people represents the valley people while the hill people in a conglomeration multiple tribes among whom the major tribes are the Tangkhul- Naga, Thadou- Kuki, Paite, Hmar, Gangte, Vaiphei etc. While the Meiteis clamor for territorial integrity of the state, the tribal communities are calling for separate administrative arrangements in the hill areas[53]. Thus, in the same yardstick insurgency and counter insurgency related atrocities on the women of Manipur needs to be understood from the experiences and narratives of the hill women or the tribal women distinct from the experiences and the narratives of the valley women or the Meitei women.

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48 Mukotra Munny, *The World Of Nagas* (Northern Book Centre, New Delhi 1988, revised 1993) 71.

49 Nag (n. 33) 8.

50 ibid.

51 ibid.

52 ibid.

53 Mitra (n. 37).

2.2.1 Atrocities On the Hill Women Or Tribal Women

Insurgency and counter-insurgency related atrocities among the tribal women because of the dual incidents of ethnic war in the 1990's between the Naga and Kuki; and the Kuki and Paite are unlike that of the experiences of women of Mizoram and the women of Nagaland[54]. The ethnic violence between Naga and Kuki was escalated because of the taxation of the Kukis by the Nagas and the Kuki resistance to it[55]. The ethnic violence from 1992-1997 resulted in the death of more than 1,000 people[56]. During the mayhem houses were burnt down, 360 villages were uprooted and rendered 100,000 people homeless and displaced[57]. There were instances where some women were tortured and raped before being murdered[58].

The Kuki- Paite clash from June 1997 to October 1998 was direct as well indirect outcome of the Naga- Kuki ethnic conflict. Thousand of Kukis who were displaced have sought refuge in the Paite dominated areas of Churachandpur in 1990s. With passage of time Kuki armed groups started extorting money, kidnapping businessman for ransom and started proclaiming the establishment of Kuki homeland in Lamka, Churachandpur[59]. The other factor was the growing resentment of the Kukis against the Paite community for hobnobbing with the NSCN (IM) and the joining of the Zomi Revolutionary Army (ZRA) and the Zomi Revolutionary Organisation (ZRO) by the Paite in the 1990s[60]. The

54 In the 1990's, five years after the NSCN split in 1985, the Naga insurgency witnessed intense factional war between NSCN (IM) and NSCN (K) factions. And since it was factional war the Indian army did not intervene in the intense fighting.

55 Biswas(n. 1) 192.

56 ibid.

57 HueiyenLanpao, 'Kukis also oppose Muivah's Manipur Visit, says KIM'*Heiyenlan Pao*(5 May 2010) <http://www.hueiyenlanpao.com/news.php?newsid=443> accessed 30 August 2018.

58 Nehginpao Kipgen, 'Politics Of Ethnic Conflict In Manipur' 21- 38 (South Asia Research, SAGE, 2013) vol. 33, 38.

59 Sinlung, 'Kuki- Zomi Ethnic Clash 1997- 98'(*Thupui: Vawisunthupui Chu* 22 July 22 2009) <http://thupui.blogspot.in/2009/07/kuki-zomi-ethnic-clash-1997-98.html> accessed 30 August 2018.

60 Biswas(n. 1) 194.

Kuki- Paite clash resulted in the death of 352 persons, 4670 houses burnt down, over 50 villages uprooted and displaced around 13000 people[61]. There were sporadic incidents of torture, maiming and rape[62].

With regard to the Indian armed forces some reported incidents highlighted the plight of tribal women being raped and used as human shields. One Ms. Kachungla was made to cover an Indian Army personnel with a shawl by placing the muzzle of the gun on her shoulder while the army was entering Huishu village, a Naga-Tangkhul village in Manipur on March 11, 1996[63]. In another tragic case molestation of girls involving a BSF personnel in March 1974 in the Tankhul- Naga dominated villages of Grihang and Nagaprum, one girl Rose who was to be married committed suicide because of the molestation committed on her by the very armed forces who were deployed to protect and preserve life in the area[64].

2.2.2 Atrocities On the Valley Women

The valley women of Manipur who are usually non- tribal had their share of tales of brutality committed on them insurgent related activities and also owing to the misuse of draconian counter insurgency law like the AFSPA. The rape and murder of Manorama Devi, an alleged accomplice of insurgent group by Assam Rifle personnel is a turning point in the life of many valley women who suffers from the direct impact counter insurgency related atrocities in valley. On July 15, 2004, a Manipuri mothers' group called the Meira Paibi stripped in front of the Assam Rifles Head Quarter at Kangla Fort in Imphal to demonstrate their utter frustration at the high handed rape and extra-judicial killing of Manorama by the Assam Rifle personnel[65].It is

61 ibid.

62 Haokip (n. 39).

63 Binalakshmi Nepram Mentschel, 'Armed Conflict, Small Arms Proliferation and Women's Response to Armed Violence in India's North East',Heidelberg Paper In South Asia And Comparative Politics, (Working Paper No. 33, December 2007) <http://archiv.ub.uni-heidelberg.de/volltextserver/7867/1/Mentschel2.pdf>accessed 30 August 2018).

64 ibid.

65 Thounaojam Brinda, 'Democracy on Trial in Manipur'*Imphal Free Press*, (Imphal,13 July 2017) <https://www.ifp.co.in/page/items/41529/

concern and the plight of the unheard voices of these women folk that they were forced to protest nude in front of the historical Kangla Fort which was an utter disregard to the internationally recognized dignity and modesty of women, as well of women who are revered as '*ima*' or mother in the state.

Irom Sharmila the anti AFSPA icon from Manipur was triggered by the Malom Massacre when armed forces indiscriminately fired at civiliansin November 2000, allegedly to avoid insurgents who were about to bomb a parliamentary convoy[66]. In another incident of extra- judicial killing in the heart of Imphal city, one lady by the name Thokchom Rabina who was pregnant was killed in broad daylight in 2009[67]. In a poignant case in 2008, one Angom Langamba was abducted by underground outfit for the purpose. The distraught mother of the abducted child, who herself was a widow, had to call for press conference to highlight the involvement of local armed militant in the abduction of her child[68]. In another case Alice Kamei, a 14 year old aspiring archer by the banned RPF/PLA groups along Sanahanbi Chanu to be recruited as child soldiers[69].

2. ANALYSIS OF THE INTERNATIONAL INSTITUTIONS ON VICTIMS OF TERRORISM

Despite ambiguity of defining victims of terrorism due to lack of consensus among the international community, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of

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democracy-on-trial-in-manipur>accessed 30 August 2018); (Vandana Singh, *the Role Women in Peace- Building with Reference to Manipur State of India*, 351).

66 Amritapa Basu, 'Irom Chanu's Satyagraha- On Political Fast for the Past 11 Years'(*Himalayan Voice* 13 April 2011) 19 <http://thehimalyanvooice.wordpress.com/page/19> accessed 30 August 2018.

67 Sanhita Ambast, 'Unexplained Deaths: Fake Encounters' in Manipur'(*The Diplomat,* 12 February 2016) <https://thediplomat.com/2016/02/unexplained-deaths-fake-encounters-in-manipur> accessed 30 August 2018.

68 Thangzakhup Tombing, 'Legal Pluralism and the Notion of Rights of Child Among the Tribal Communities of the North East India: A Critical Analysis', (2018) vol. 1 (1) CRLPR, NLUA UNICEF, ASSAM 76.

69 ibid.

Power provides that "**victims**" means persons who, individually or collectively, have suffered harm- physical or mental…economic losses or substantial impairment through acts or omission…within member States by proscribing abuse of power[70]. It further held that victims are to be treated with respect and dignity, entitled to access to mechanisms of justice and to prompt redress[71]. Where the Government under whose authority the victimization had taken place through its officials or agents the State should provide for the restitution[72].

In recent development the United Nations initiated the "Global Counter- Terrorism Strategy 2006" whereby under Pillar I and Pillar IV it promoted the need for national systems of assistance for the rehabilitation and restitution of victims of terrorism and their families for the purpose of normalisation their lives thereby ensuring human rights and rule of law[73]. For comprehensive and effective implementation of Pillar I and Pillar IV the Counter- Terrorism Implementation Task Force (CTITF) has formed a working group called Supporting and Highlighting Victims of Terrorism in June 2014[74]. It is further mandated that UNODC assist member States for the establishment of victim's assistance programme[75]. The General Assembly of the United Nations categorises the persons as victims of terrorism as follow:

i) Direct Victims: Natural persons who suffered losses, killed or suffered serious physical or psychological, through direct act of

70 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [1985], Annex. A, A/RES/40/34, 29 November 1985 (UN General Assembly 96th Plenary Meeting).

71 ibid.

72 ibid., where the oppressive Government is no longer in power the successive government should provide restitution to the victims.

73 UN Global Counter- Terrorism Strategy [2006] <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy> 26 November 2018.

74 Supporting and Highlighting Victims of Terrorism, UN Office of Counter Terrorism <https://www.un.org/counterterrorism/ctitf/en/victims-terrorism-support-portal> accessed on 26 November 2018; the portal facilitates the victims, their families and communities on how to access national criminal justice systems or rehabilitation opportunities offered by member states.

75 ibid.

terrorism;

ii) Secondary Victims: Next to kin or dependents of direct victims;

iii) Indirect victims: included innocent victims like public, hostages or by standers eye witnesses, rescue workers

iv) Potential future victims[76].

3. ANALYSIS OF JUDICIAL OPINIONS ON STATE CRIMES

In a poignant case of one Rudul Shah who was illegally imprisoned in Bihar jail for more than 14 years even after he was acquitted by Sessions Court, the Supreme Court observed that respect for the rights of the individuals was the true bastion of democracy and that it was the duty of State to repair the damage done by its officers[77]. In another case involving custodial death of a young man aged about 22 years, the Supreme Court of India held that it was the obligation of the state to ensure that there was no infringement of the indefeasible rights of a citizen's right to life, as guaranteed by Art. 21[78], except in accordance to the procedure established by law[79]. It further opined that duty of care towards an individual's life and liberty, even though he may be in police custody, on the part of the state is strict and admits no exception[80]; and that if the state had committed an offence of taking of life of an inmate who is in the custody of state the defense of "sovereign immunity" in such cases is not available to the state[81].

In the sensational case of illegal detention of Bhim Singh, who himself was member of the Jammu and Kashmir Legislative Assembly by the Jammu and Kashmir Police in violation of Articles 21 and 22 (2) of the

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76 Framework Principles For Securing The Human Rights Victims Of Terrorism, A/HRC/20/14 (4 June 2012) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-14_en.pdf> accessed on 26 November, 2018.

77 *Rudul Shah v. State of Bihar And Another*A.I.R. 1983 S.C.1086 (India).

78 Constitution of India, art. 21 provides that, "No person shall be deprived of his or personal liberty except according to procedure established by law."

79 *Smt. Nilabati Behera alias LaliBehera v. State of Orissa and Ors.* A.I.R. 1993 S.C. 1960 (India).

80 ibid.

81 ibid.

Constitution of India. The Police had in this case detained Bhim Singh in police lock up from September 10 – 14, 1985 without producing him before a Magistrate in a clear cut violation of the provisions of Article 22 (2) of the Constitution[82]. The Supreme Court wondered that if the liberty of even a state legislator could be curtailed with utmost impunity than what was the sanctity of the liberty of lesser mortals[83]. In continuation of the judgment it strongly held that custodians of law and order should not become depredators of civil liberties[84].In the case of Saheli, A Women's Resources Center, Through Ms. Nalini Bhanot v. Commissioner of Delhi Police, Delhi Police Head- Quarters and Ors.[85]where female tenant was molested and her child was manhandled, later died,by the personnel high handed involvement in eviction drive the state was held liable to pay compensation to the victim and her family[86]. In the case of Smt. Kamla Devi v. Government of NCT & Anr. the court while laying down guidelines for compensation of victims of crime opined that a victim of terrorism must be given compensatory relief in no fault situations by State[87].

Supreme Court and other High Courts judgments in these cases categorically upholded the sanctity of individual's life and liberty. It mandated that in cases where the state had perpetrated crime the defense of sovereign immunity is not tenable and that it was duty bound to compensate or pay damages. Therefore, it can be implied when it comes to violation woman's rights, dignity, honour or where a woman was subjected to brutality of crimes during war time or peace time an idea of state crime can be inferred depending on the fact and circumstance of each, and that human life and dignity must be held

82 Constitution of India, art. 22 (2) provides that, "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty- four hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of the magistrate".

83 *Bhim Singh, MLA v. State of J & K and Ors.* A.I.R. 1986 S.C. 494 (India).

84 ibid.

85 AIR 1990 S.C. 513 (India).

86 ibid.

87 *Smt. Kamla Devi v. Government of NCT of Delhi & Anr.* (2004) 114 DLT 57.

above all else except where such liberty is curtailed as per procedure established by law.

CONCLUSION

Insurgency affects the normal functioning of life for man children and woman. However, its impact on the life of women is manifold. When a family is displaced because of reasons of arm conflicts or other forms of violence the burden of resettling the family belies more on the woman since she has to make alternative arrangements for food, shelter etc. In some situation she might have lost her entire family, become widow. In conflict she is most vulnerable as she could be the target of rape by the security forces as well as the non-state actors (insurgent groups)[88]. It is the woman who has to undergo tremendous physical, psychological and mental sufferings in conflict situation[89] owing to loss of loved ones, destruction of house and stigmatization of rape and other insults and other economic hardships. Thus, according Binalakshmi Nepram in armed conflict situation violence against women may be addressed according to the categories of "women relatives of armed activists"; "women relatives of state armed forces"; "women militants or combatants"; "women as shelter provider"; "women as victims of sexual abuse and physical abuse"; "women as peace negotiator"; and "women rights activist"[90].

The Fourth Conference on Women held in Beijing in 1995 resolved the need for participation in conflict resolution at decision making levels and protects women living in situation of armed and other conflicts[91].It further resolved to promote non-violent forms of conflict resolution and reduce human rights abuse[92]. It is interesting to note that Mizo accord does not contain any provision for the rehabilitation of women who

88 Patricia Mukhim, 'Women and Insurgency',*The Telegraph*(29 November 2005),<https://www.telegraphindia.com/1051129/asp/northeast/story_5535042.asp> accessed 30 August 2018.

89 ibid.

90 Mentschel(n. 63) 24- 25.

91 The United Nations Fourth World Conference On Women, Platform For Action, Beijing (September 1995) <www.un.org/womenwatch/daw/beijing/platform/armed.htm> accessed 30 August 2018.

92 ibid.

were brutalized and raped during the counter insurgency operations. Likewise, when the Naga- kuki as well the Kuki- Paite ethnic wars were resolved by way of tribal customary laws under the supervision of the Government of Manipur, the atrocities committed on women and the need for rehabilitation were not part of the resolution. It is believed that the Naga accord will not be any different either.

In the context of victim compensation as per provision of S. 357 (A) of the Criminal Procedure Code 1973 the states of the Manipur and Mizoram had its policy in place whereby victims of rape are paid Rs. 20,000 and Rs. 3 lakh respectively[93]. The Union of India promulgated the "Central Scheme for Assistance to Civilians Victims/ Family of Victims of Terrorist, Communal and Naxal Violence, 2008" which was significantly revised as "Central Scheme for Assistance to Civilians Victims of Terrorist/ Communal/ Left Wing Extremist (LWE)/ Cross Border Firing and Mine/ IED Blasts on India Territory, 2016". Direct victims and families of victims are entitled increased compensation from Rs. 3 Lakhs to Rs. 5 Lakhs under the revised scheme. In the case of Leesha v. the Secretary, Department of Home Affairs Government of Karnataka and Ors.,where a 17 years old PUC student was victim of bomb blast, the Karnataka High Court iterated that there must not be delay in awarding of compensation to the victims of terrorist attacks even though it may not be infringement of A.21 of the Constitution of India in the strict sense of term [94].

The challenges to legally redress the victims of war crimes against draconian provisions of the AFSPA, 1958 which provides that "…no prosecution, suit or other legal proceedings shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercised of powers conferred by regulation",[95] however remains to be addressed

93 Thangzakhup Tombing, 'North East Women and the Nuances of Commercial Sexual Exploitation: Critical legal Analysis with Special Focus on the Tribal Women of Manipur and Mizoram' Chapter in a book titled *Women, Law and Technology*(2018)(under publication).

94 *Leesha v. the Secretary, Department of Home Affairs Government of Karnataka and Ors.*MANU/KA/2458/2016.

95 The Armed Forces Special Power Act, 1958 (India) s. 6.

politically and other wise. Thereby, implying that the armed forces have impudently indulged in "gender terrorism" by raping, mutilating women without any public accountability or the need of scrutiny over their policing action in conflict zones[96].All these abuses appertain to serious abuse of human rights of women and violation of international humanitarian law.

The question remains that how does one justify rape, violation of woman's dignity as part of military strategy? Thus, the absolute impunity with which the dignity and modesty of woman in the name of war and on the excuse of war strategy are enraged needs to be relooked and introspected for the development, rehabilitation of women-social, economic and political, and for the establishment just and egalitarian society. And the only probable platform to redress victims of such indignity is to develop and elaborate the definition of "victim jurisprudence" in tune with the narrative of "state crimes" developed and evolved through Supreme Court judgments and pronouncements for the time being.

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96 Vasundhara Sirnate, 'The Gender Terrorist', (2013) vol. 48 (13) ECONOMIC AND POLITICAL WEEKLY<http://www.epw.in/author/vasundhara-sirnate> accessed 30 August 2018.

HOW *NOT* TO MAKE FEASIBILITY REPORTS: A CRITICAL ANALYSIS OF THE FEASIBILITY REPORT OF THE CHENNAI-SALEM GREENWAY PROJECT

R.G.Suriaprakash[1]

ABSTRACT

The Chennai-Salem Greenway project is a hotly debated policy decision in the State of Tamil Nadu.The State witnessed alleged human rights violations by the police as the process to acquire land started taking place as per the National Highways Act, 1956, much to the opposition of the local people. In this regard, a petition was filed in the Madras High Court (G.Sundarrajan v. Union of India and Ors. W.P. No. 15889 of 2018) challenging the vires of s. 105 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (RFCTLARR Act) to the extent that the exclusion of certain legislations from the provisions of land acquisition under RFCTLARR Act violates Article 14 of the Constitution. However, the Hon'ble Court dismissed the petition holding that the State, in the exercise of the doctrine of "eminent domain" could adopt specified and specialised procedures in case of acquisition under any of the thirteen enactments listed in the Fourth schedule. On the other hand, the feasibility report prepared by Feedback Infra Pvt. Ltd. with regard to the proposed Chennai-Salem Greenway Project has come under severe criticism for having plagiarized and irrelevant contents. Nevertheless, certain observations could be made with regard to i) the theory of eminent domain; ii) public consultations; and iii) the preliminary social impact assessment. This article develops on the report with regard to the above observations and suggests that the petitioner in G. Sundarrajanmight have made some sense, at least at a normative level.

Keywords: eminent domain, impact assessment, normative, public consultation, social impact assessment.

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I. INTRODUCTION – A CASE OVERVIEW OF *G. SUNDARRAJAN*

The Chennai-Salem Greenway project is one of the most contentious issues in Tamil Nadu.[2]Stones were laid by competing authorities along with the police marking the boundaries in various farms across the districts of Salem, Dharmapuri, Krishnagiri and Thiruvannamalai much to the surprise of the residents. Pursuant to such developments, a writ petition was filed before the Madras High Court praying to declare section 105 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter 'RFCTLARR Act') which provides that the provisions of the Act would not apply to 13 other legislations listed in the Fourth Schedule of the Act, of which the National Highways Act, 1956, under which the land acquisition would take place, is also a part and consequently declare the entire land acquisition proceedings with respect to the proposed Chennai-Salem Greenway Project as null and void.

The petitioner argued that the Act had a laudable objective of consultation with the Gram Sabha in case of acquisition proceedings but section 105 of the Act is contrary to the same object as much as the acquisition proceedings and Chapter II, III, and IV do not apply to the thirteen enactments listed in the Fourth schedule. The Counsel also argued that the important provisions of social impact assessment would thereby be not applicable to the thirteen enactments and brought in an Article 14 argument that the affected person would be subject to different procedures just because the land acquired would be used for different purposes. Further, the Counsel argued that s.105 perpetuates discrimination as they have not incorporated the safeguards provided in RFCTLARR Act, 2013. In response, the Counsel for the respondent raised the doctrine of 'eminent domain', arguing that Article 300A prescribes only for an authority of law for land acquisition and the law in the case of Chennai-Salem Greenway project is the National Highway Act, 1956 (hereafter the 'NH Act').

2 Initially, the project was laid out at a cost of Rs. 10,000 crore that would build a 277 km long, eight lane expressway between Chennai and Salem. Several protests have been waged against it, with issues of various human rights violations and arbitrary arrests as well.

Further, he also reminded that by virtue of a notification issued under s. 105(3), the benefits with respect to compensation, rehabilitation and resettlement provided in RFCTLARR Act has been extended to the thirteen enactments and hence there should be no prejudice to the affected persons.[3]The Counsel further argued that just because the NH Act does not prescribe for a social impact assessment, the enactment should not be described as discriminatory. He highlighted s.103 of the RFCTLARR Act, 2013 which provides that the provisions of the Act are only in addition to the other existing laws and hence if s.105 were to be struck down, the affected families would only have to obtain compensation under the NH Act, which is detrimental to them. The Court was convinced of the arguments of the respondent and held that the intention of the legislature to adopt specialised procedures for different purposes is exercisable under the doctrine of eminent domain and thus dismissed the petition.

Firstly, while the case might seem to have no significance, the petitioner has raised several normative questions. As no procedures for social impact assessment (SIA), environment impact assessment (EIA) and consultation with the public is provided in the NH Act, it removes the affected public from the decision making process. Further, even if the doctrine of eminent domain empowers the Government to acquire land through an authority of law, the petitioner has intended that in light of the ecology being affected worldwide, there must be sufficient restraints in the exercise of this power, by mandating EIA, SIA and public consultation as mentioned above.It might be relevant to highlight at this instance the public outcry when the LARR (Amendment) Bill, 2015 was passed by the Lok Sabha. The bill specifically exempted the requirement of social impact assessment studies in case of projects falling under five categories; i) defence; ii) rural infrastructure; iii)

3 'Order under Section 113 (Power to Remove Difficulties) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 to Extend Benefits of Compensation, Rehabilitation and Resettlement Mentioned in First, Second and Third Schedules to the Acts Mentioned in the Fourth Schedule of the Act' (*Press Information Bureau, Government of India*, 28 August 2015) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=126447> accessed 31 October 2018.

affordable housing; iv) industrial corridors; and v) infrastructure projects.[4] It brought the opposition together terming the bill "anti-farmer".[5]

However, the position of law as described by the petitioner is wrong. The notification of the Ministry of Environment and Forests on 14th September 2006 mandates that for new projects or the expansion or modernization of the existing projects, prior environmental clearance is necessary.[6]Further, there are four stages prescribed to the environmental clearance project; i) screening (only for Category B projects and activities); ii) scoping; iii) public consultation; and iv) appraisal.[7]Thus, given that construction of highways is listed under the projects or activities requiring prior environmental clearance, the petitioner's grievances are still redressed by law.[8]

Recently, the feasibility report for the Chennai-Salem Greenway project was available in the public domain released by the National Highway Authority of India.[9]It was criticized for being plagiarised and filled with irrelevant content just to fill up pages.[10] Nevertheless, certain observations could be made of the project with regard to report, especially with respect to the way public consultation and preliminary

4 Indrani Roy Chowdhury and Prabal Roy Chowdhury, 'Holdout and Eminent Domain in Land Acquisition' (2016) 51 Indian Economic Review 1, 7 <https://www.jstor.org/stable/44376233> accessed 1 November 2018.

5 Anumeha Yadav, 'Ordinance on Land Act Brings Opposition Together' *The Hindu* (New Delhi, 30 December 2014) <https://www.thehindu.com/news/national/opposition-slams-ordinance-to-amend-land-act/article6738765.ece> accessed 1 November 2018.

6 'Notification' <http://envfor.nic.in/legis/eia/so1533.pdf> accessed 28 October 2018.

7 ibid 4.

8 ibid 17.

9 'Feasibility Report: Volume 1' <http://www environmentclearance.nic.in/writereaddata/Online/TOR/23_Apr_2018_120542130BG219KZNPFRReport_Optimised.pdf> accessed 28 October 2018.

10 Nityanand Jayaraman, 'Chennai-Salem Expressway: A Feasibility Report That Isn't' (*The Wire*, 21 June 2018) <https://thewire.in/environment/chennai-salem-expressway-a-feasibility-report-that-isnt> accessed 28 October 2018.

social impact assessment was conducted. This paper would proceed in the following manner. It would critically analyse certain portions of the feasibility report that is concerned with i) the eminent domain theory; and ii) public participation and consultation, and how, especially the latter, has been misconceived, atleast according to the terms of the feasibility report. It would also highlight the other (ir) relevant contents of this report and question how the report could ever be made available to the public. Finally, it would put forth a normative contention that, as the petitioner in *G. Sundarrajan* contended, the incorporation of the provisions of RFCTLARR Act, 2013 into all the forthcoming projects might make sense, especially in the light of the changing environmental circumstances.

II. THE FEASIBILITY REPORT OF CHENNAI-SALEM GREENWAY PROJECT

The National Highway Authority of India (NHAI) had appointed M/S Feedback Infra Pvt. Ltd. in order to provide for consultancy services to prepare the detailed project report.[11]The company is appointed to establish the "technical, economic and financial viability of the project" and for this, its scope also includes i) environmental and social impact assessment; and ii) public consultation.[12]Through a 286 page feasibility report, it concluded that the project was "socially feasible".[13] However, several discrepancies exist in the manner in which this project was concluded to be feasible; while this article would not look into the technical aspects of the project, it would highlight the discrepancies and the underlying assumptions with regard to the manner in which public consultation and social impact assessment was conducted.

A. The Doctrine of Eminent Domain Revisited

11 'Feasibility Report: Volume 1' (n 9).

12 ibid 1–2.

13 SV Krishna Chaitanya and B Anbuselvan, 'The Buzzing Corridor: Decoding the Feasibility Report of the Chennai-Salem Express Highway' (*The New Indian Express*, 17 June 2018) <http://www.newindianexpress.com/states/tamil-nadu/2018/jun/17/the-buzzing-corridor-decoding-the-feasibility-report-of-the-chennai-salem-express-highway-1829289.html> accessed 1 November 2018.

Under the heading "Stakeholder Consultation", the company lists down the environmental issues that are to be discussed during consultation.[14] The list contains nothing about the agricultural lands that would be destroyed but focuses directly on issues that might be relevant after the project is commenced; such as drainage, employment to locals during construction and pollution and generation of dust and noise. While it may seem innocuous at plain sight, it reveals the neglect of consulting with the people with regard to the feasibility of the project, reminding us of the consultation v. concurrence debate in the *Second Judges case.*[15] It also gives out a message that the government is determined to undertake this project and the consultations are a mere procedure that is followed.

Chowdhury and Chowdhury equate 'eminent domain' as the permanent dominium of the state over the properties it has jurisdiction upon.[16]It is also described in different terms in different countries such as compulsory purchase, resumption and expropriation.[17]Mahalingam and Vyas observe that such a doctrine is incorporated all across the world, when land is acquired on payment of compensation to the landowners.[18] On their perusal of land acquisition and compensation procedures in different jurisdictions, they reveal that the land acquisition processes "traverse a spectrum" and range from compulsory acquisition to a consultative process.[19] Principle 2 of the Rio Convention also provides that the States have the "sovereign" right

14 'Feasibility Report: Volume 1' (n 9) 10–13. The issues that are listed are i) drainage system and drinking water facilities issues; provision of new bus shelters in lieu of demolished shelters; iii) provision of public toilet facility; employment to local people during construction work; v) provision of footpath in the settlement area; vi) felling of trees; and vii) pollution due to vehicular emission and generation of dust and noise

15 Supreme Court Advocated-on Record Association v. Union of India, (1993) 4 SCC 441.

16 Chowdhury and Chowdhury (n 4) 5.

17 ibid.

18 Ashwin Mahalingam and Aditi Vyas, 'Comparative Evaluation of Land Acquisition and Compensation Processes across the World' (2011) 46 Economic and Political Weekly 94, 95.

19 ibid 96.

to "exploit their own resources pursuant to their own environmental and developmental policies".[20] In India, the right of the State to acquire property is provided in Article 300A which provides that, "No person shall be deprived of his property save by the authority of law". It does not even provide that adequate compensation would be paid in case the land is acquired by the State. Nevertheless, the authority of law i.e. the RFCTLARR Act, 2013 provides for compensation to the affected persons whose lands are taken away.While the eminent domain theory may not be a concern at present, the outright assumption that the public would accept this project is a grave concern.

B. Public Consultation Merely to Meet Legal Requirements?

Fiorino observes that public consultation is probably the only forum where the public gets to interact with the officials over the project.[21]Gauthier *et al.* highlight that public participation makes the entire process democratic, open and transparent which helps identify conflicts at the earliest.[22] Their views over the impact of the project would not only be technical, as the Impact Assessment Reports would be, but would also be political and social; Almer and Koontz resonate this claim when they argue that the specialists cannot speak on behalf of the community who are likely to be replaced.[23] Any argument that the public are not "educated" about the benefits of the project is countered by Kraft's assessment of Not-In-My-Backyard (NIMBY) politics where he observes that the concerns of the public when they are

20 'The Rio Declaration on Environment and Development' <http://www.unesco.org/education/pdf/RIO_E.PDF>.

21 Daniel J Fiorino, 'Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms' (1990) 15 Science, Technology, & Human Values 226, 230 <http://journals.sagepub.com/doi/10.1177/016224399001500204> accessed 16 September 2018.

22 Mario Gauthier, Louis Simard and Jean-Philippe Waaub, 'Public Participation in Strategic Environmental Assessment (SEA): Critical Review and the Quebec (Canada) Approach' (2011) 31 Environmental Impact Assessment Review 48, 49 <http://linkinghub.elsevier.com/retrieve/pii/S019592551000020X> accessed 16 September 2018.

23 Heather L Almer and Tomas M Koontz, 'Public Hearings for EIAs in Post-Communist Bulgaria: Do They Work?' (2004) 24 Environmental Impact Assessment Review 473, 475 <http://linkinghub.elsevier.com/retrieve/pii/S0195925504000058> accessed 16 September 2018.

to be displaced may be "rational and politically legitimate".[24]Further, Principle 10 of the Rio Convention declares that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level".[25] It also improves the overall legitimacy of the project, as there is no likelihood of opposition if the consultation process were properly done.

Under the sub-title "Identification of issues", the report concludes that the people were very "positive" about the project, but raised only certain issues such as i) the need for proper compensation; ii) the safety of school children as schools are located near highways; and iii) need for more bus stops along the highway.[26] The highlight issue raised by the public seems to be their concern whether this project would be taken up, pointing out to the political differences.[27]But these observations strongly contrast the present scenario.Many human rights violations have been reported in the districts of Salem, Krishnagiri and Dharmapuri. For e.g. a senior citizen was allegedly taken to the police van for raising her voice against the police.[28]In another instance, a farmer was arrested in the wee hours and detained for more than 10 hours just for getting into an argument with the officials.[29] The Tamil Nadu police seem to have cracked down on various farmers, activists and journalists who have been opposing this project in a peaceful manner.[30]All these suggest that the sample size of the public

24 Michael E Kraft, 'Citizen Participation and the Nimby Syndrome: Public Response to Radioactive Waste Disposal' (1991) 44 The Western Political Quarterly 299, 301.

25 'The Rio Declaration on Environment and Development' (n 20) 3.

26 'Feasibility Report: Volume 1' (n 9) 11–22.

27 ibid.

28 TS Sudhir, 'Chennai-Salem Highway Row: TN Govt's Strong-Arm Approach to Protests Shows It Has Learnt Its Lessons from Tuticorin' (*Firstpost*, 19 June 2018) <https://www.firstpost.com/india/chennai-salem-highway-row-tn-govts-strong-arm-approach-to-protests-shows-it-has-learnt-its-lessons-from-tuticorin-4543601.html> accessed 28 October 2018.

29 ibid.

30 Divya Karthikeyan, 'Will the Chennai-Salem Expressway Turn Farmers into Migrant Labour?' (*Mongabay-India*, 26 September 2018) <https://india.mongabay.com/2018/09/26/will-the-chennai-salem-expressway-

consultation was either too small or else the consultation was never even conducted. This is not a one-case scenario. Ebisemiju suggests that governments of third world countries do not tend to welcome public debate for reasons of political expediency.[31] In such scenario, as Justice Bawole highlights, public hearings are conducted only to meet the legal requirements rather than real interest to solicit public responses.[32]Cvetkovich and Earle reveal that they are often ineffective, as the public are bogged with technical details of the concerned project which "misses the heart of citizens' concerns"[33] whereas Fiorino argues that the officials tend to regulate and control the process.[34]Saarikoski ultimately concludes that when EIA is reduced to the public reacting to the ready-made reports of the experts, it has lost its credibility.[35]

However, the content of the report is worse than what the above scholars have contended. The report is also filled with irrelevant and unnecessary assessment. For e.g. under the sub heading "Gender and Development", to the question of the key gender issues that are relevant to the project, it talks about how "mobility in Xi'an is already high and the Project will enhance the quality and frequency of transportation services".[36]Jayaraman lashes out heavily at this report questioning the role of women in Xi'an in a greenway corridor in

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turn-farmers-into-migrant-labour/> accessed 28 October 2018.

31 Fola S Ebisemiju, 'Environmental Impact Assessment: Making It Work in Developing Countries' (1993) 38 Journal of Environment Management 247, 252.

32 Justice Nyigmah Bawole, 'Public Hearing or "Hearing Public"? An Evaluation of the Participation of Local Stakeholders in Environmental Impact Assessment of Ghana's Jubilee Oil Fields' (2013) 52 Environmental Management 385, 385 <http://link.springer.com/10.1007/s00267-013-0086-9> accessed 16 September 2018.

33 George Cvetkovich and Timothy C Earle, 'Environmental Hazards and the Public' (1992) 48 Journal of Social Issues 1, 13 <http://doi.wiley.com/10.1111/j.1540-4560.1992.tb01942.x> accessed 16 September 2018.

34 Fiorino (n 21) 237.

35 Heli Saarikoski, 'Environmental Impact Assessment (EIA) as Collaborative Learning Process' (2000) 20 Environmental Impact Assessment Review 681, 682 <http://linkinghub.elsevier.com/retrieve/pii/S0195925500000597> accessed 16 September 2018.

36 'Feasibility Report: Volume 1' (n 9) 11–17.

South India.[37]To the question of whether the project has the potential to promote gender equality, the response is just a single line; "there is no serious gender equality or empowerment issues related to urban transport".[38]There are no further texts in this regard. Clearly, this is not only a procedural lapse, but the inability to write a basic report. The allocation of mere half a page to the issues of gender and development shows the callousness on the part of the Government who uploaded the report even without checking its contents. Another anomaly in the report is the sum allocated in the estimated budget for Rehabilitation and Resettlement activities. For e.g. a sum of Rs. 20,00,000 is allocated in order to facilitate HIV/AIDS awareness.[39]It also states and I quote, in order to highlight its absurdity,

"During consultation the issue regarding to HIV/AIDS have been discussed with truck drivers and local people like awareness about disease, medium of propagation, information, preventive measures, and use of contraceptives. The presence of infected person, line of treatment, measure precautions and presence of commercial sex worker in the area have been asked during the consultation".[40]

There is no reason firstly why consultation regarding HIV/AIDS needs to done for a green expressway and secondly why Rs. 20,00,000 needs to be allotted for the same. It highlights nothing but the hurriedness in which the project is carried out.

C. Concerns of Plagiarism

The report does not seem to be a diligent effort to analyse the situation of the project area but is an amalgamation of content from various sources merely to fill pages.[41]The issue of plagiarism is evident even

37 Jayaraman (n 10).*See also* IANS, 'Salem-Chennai Expressway to Benefit Women in China?' *Business Standard India* (23 June 2018) <https://www.business-standard.com/article/news-ians/salem-chennai-expressway-to-benefit-women-in-china-118062300482_1.html> accessed 28 October 2018.

38 'Feasibility Report: Volume 1' (n 9) 11–17.

39 ibid 9–2.

40 ibid 11–18.

41 Jayaraman (n 10).

on a plain reading of the report. For e.g. the content under the title "Socio-Economic Characteristics" begin with, "Tamil Nadu is one of the 28 states of India".[42] Clearly, this report was released only in the month of April, 2018 and there are 29 states in India. The second sign of plagiarism is the sub-title "Land Acquisition Act, 1894" which discusses about the applicability of the Act and its limitations.[43]It is to be noted that the Act which governs acquisition in this regard is the National Highways Act, 1956 and not Land Acquisition Act, 1894 and in case of compensation, rehabilitation and resettlement, the RFCTLARR Act, 2013 comes into force.

Given that the report has concluded that the project is socially feasible, it raises grave concerns in the manner in which it arrived at such conclusion. The serious allegations against its content make it unworthy and unreliable.

III. CONCLUSION

Ever since India had undertaken a neo-liberal economic approach, the protection of agricultural lands has been sidelined and the focus was on the growth of the industrial sector.[44]Competition being a major feature of capitalism has meant that the states have competed among each other in order to attract investments and have provided for various benefits to companies in order for them to invest their money in that state.[45]While such a development is inevitable, it should not come at the cost of environment. Appiah-Opuku contends that several of the projects undertaken without conducting EIA or SIA studies have not only been destructive to the environment but also unsustainable.[46]But sometimes, even if EIA studies are done

42 'Feasibility Report: Volume 1' (n 9) 11–15.

43 ibid 11–25.

44 Avinash Kumar, 'The Battle for Land: Unaddressed Issues' (2011) 46 Economic and Political Weekly 20, 20.

45 Maitreesh Ghatak and Pariksheet Ghosh, 'The Land Acquisition Bill: A Critique and a Proposal' (2011) 46 Economic and Political Weekly 65, 67.

46 Seth Appiah-Opoku, 'Environmental Impact Assessment in Developing Countries: The Case of Ghana' (2001) 21 Environmental Impact Assessment Review 59, 59 <http://linkinghub.elsevier.com/retrieve/pii/S0195925500000639> accessed 16 September 2018.

satisfactorily, the concerns raised are not incorporated fully as other non-environmental or political considerations would factor in.[47] This is where an institutionalised channel of public hearing could play a role. As the petitioner in *G. Sundarrajan* contended, section 7 and section 8 of the Act is the soul of the land acquisition. Section 7(1) provides, "The appropriate Government shall ensure that the Social Impact Assessment report is evaluated by an independent multi-disciplinary Expert Group, as may be constituted by it". If it were to be applicable in this case of Chennai-Salem Green Expressway, the report would have never been in public domain and the consultation process would have been done in a better manner. Further, section 6 of the Act provides that the Social Impact Assessment report and the Social Impact Management Plan be available to the public in the local language not only uploaded but also at the office of the Panchayat/ Municipality/ Municipal Corporation and the offices of the District Collector, the Sub-Divisional Magistrate and the Tehsil. With regard to the Social Impact Assessment Study, as section 4 prescribes, it must be done in consultation with the Panchayat, Municipality or Municipal Corporation, as the case may be. When such studies are conducted through the local self-governments, it not only gives effect to the 73rd and the 74th amendment, but also ensures that all the stakeholders are informed of the same. Further, the Act also provides for consent requirements at 70% and 80% in case of public-private and private projects respectively vide section 2(2); thus, the officials would be much prepared in order to satisfy the claims of the public which is required for every Social Impact Assessment Study.Section 10 also provides that irrigated multi-cropped land may be acquired only as a last resort; it is a laudable provision as India has been facing severe droughts and floods over the last few years and taking away of such land would leave no scope of agriculture in the future.

It is inevitable that, as India is making inroads into capitalism, it would only intend to grow economically. But such development must

47 Stephen Jay and others, 'Environmental Impact Assessment: Retrospect and Prospect' (2007) 27 Environmental Impact Assessment Review 287, 291–293 <http://linkinghub.elsevier.com/retrieve/pii/S0195925506001338> accessed 16 September 2018.

not be at the cost of the environment. The Global Footprint Network reveals that we are currently in an upward scaling ecological deficit; the footprint of the population exceeds its bio-capacity.[48] With the exception to the ozone layer depletion, we haven't been able to "make sufficient progress in generally solving these foreseen environmental challenges, and alarmingly, most of them are getting far worse".[49]In such cases, merely mandating EIA for new projects may not be suffice, but having them done institutionally may additionally help in ensuring that the projects are undertaken, i) with the public's support and ii) without harming the environment. Thus, if the acquisition procedures under RFCTLARR Act, 2013 is made applicable to the upcoming projects, it would not only ensure public's support, but also provide a much needed legitimacy.

48 'Open Data Platform' (*Global Footprint Network*) <http://data.footprintnetwork.org/#/countryTrends?cn=5001&type=BCtot,EFCtot> accessed 16 April 2018.

49 William J Ripple and others, 'World Scientists' Warning to Humanity: A Second Notice' (2017) 67 BioScience 1026, 1026.

AN ANALYSIS ON THE FUNCTIONING OF STATE POLLUTION CONTROL BOARD OF ASSAM IN RESPECT OF HAZARDOUS WASTE MANAGEMENT

Bijeta Chetry, [1]

Abstract

The State Pollution Control Board of Assam shall have to exercise all or any other function through standards and guidelines provided by Ministry of Environment, Forest and Climate Change, State Government and Central Pollution Control Board pertaining to the Hazardous Wastes Management Rules from time to time. Despite the Supreme Court of India and National Green Tribunal consistently voicing concern over the functioning of many State Pollution Control Boards across the Country, unrestrained irregularities in the Pollution Control Board of Assam hampered the smooth functioning of the board in respect of Hazardous Wastes Management for a decade. The functioning of the State Pollution Control Board of Assam had over the years suffered a lot as it was not manned by competent persons. At present there are 71 hazardous waste generating units in Assam which has generated 5,217.107 metric tons per annum (MTA) of landfill able waste, 326.10 (MTA) of incinerable waste and 22,990.533 (MTA) of recyclable waste. There is no common treatment, storage and disposal facility in Assam, despite the Supreme Court's direction in this regard. Though the Pollution Control Board of Assam monitors those industries but could not detect irregularities that leads to failure to take action against non-compliance of the legislations.

Key words: *Board, function, Hazardous wastes, industries, irregularities*

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I. INTRODUCTION

Since 1970s, the enactment of strict environmental legislations in developed countries had raised the disposal cost of hazardous waste.[2]At that time shipping trade in hazardous waste had grown rapidly and made transboundary movement of hazardous waste more accessible. As a result of Khian Sea waste disposal incident[3],the Basel Convention was adopted in 1989, for the Control of transboundary movement of hazardous waste and ensuring sound management of wastes. An amendment to the Convention, the "Basel Ban," in 1995, has been ratified by the European Union (EU), Organization for Economic Co-operation and Development (OECD) member states, and Liechtenstein of abstain from exporting hazardous wastes for final disposal or recycling to all States. It has made it legally binding on all EU member states. Norway and Switzerland too have implemented the Basel Ban in their legislation.

India as a Party to the Basel Convention is obliged to regulate and minimize the import of hazardous waste or other wastes for disposal or re-cycling and also to prohibit export of waste to parties, which have prohibited the import of such wastes. The Bhopal gas tragedy forced the Government of India to enact the Environment (Protection) Act 1986. Empowering under section 6, 8 and 25 of the Environment (Protection) Act 1986, the Central Government of India notified the Hazardous Waste Management Rules 1989 to direct the occupier generating hazardous waste to take all practical steps to ensure that such waste are properly handled and disposed off without any adverse effects which may result from such wastes.The occupier shall also be responsible for proper collection, reception, treatment, storage, and

2 See the Resource Conservation and Recovery Act 1976, which is the principal federal law in the United States that governs the disposal of solid waste and hazardous waste

3 The cargo ship Khian Sea was loaded with waste incinerator in Philiadelphia on August 31, 1986 to send to New Jersey City which previously accepted such waste but that State refused to accept any more waste after. The company handling the waste intended to dump the ash in the Bahamas. But after the refusal of Bahamas Government the Khian Sea searched all over the Atlantic for a place to dump its cargo and also failed to return to Philadelphia.

disposal of these wastes either himself or through the operator of a facility.

The State Pollution Control Board of Assam has been designated with wider responsibilities touching across almost every aspect of hazardous wastes generation, handling and their safe disposal. The State Pollution Control Board of Assam has played a very significant and pivotal role for the purpose of prevention, control, and abatement of all forms of environmental pollution in the State. The pollution Control Board of Assam, set up under the Water (Prevention & Control of Pollution) Act 1974, is entrusted with the implementation of Hazardous Waste (Management & Handling) Rules, 1989 under the Environment (Protection) Act, 1986.The boards has been constituted under the Water (prevention and control of pollution) Act 1974 by the State Government at State level to exercise the powers conferred on and perform the functions assigned to the boards under the Act.[4]Every State boards shall be a body corporate with the name specified by the State Government in the notification under sub-section(I) having perpetual succession and a dispose of common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property and to contract, and may, by the said name, sue or be sued.[5]The State Pollution Control Board of Assam has granted time to an industry, to implement time bound programme, standards and conditions to treat the environmental pollutant.Several provisions are incorporated in the Hazardous and Other Waste (Management and Transboundary Movement) Rule, which empowered the State Pollution Control Boards for the proper management, handling and transboundary movement of Hazardous waste in India.

The real impetus on implementation of Hazardous wastes management came only after direction of Hon'ble Supreme Court on the subject of Hazardous Waste Management of India. The Supreme Court directed that the industry not having valid authorization under Hazardous Wastes (management & Handling) Rules, 1989 will not operate and the State Pollution Control Boards and Committees have submitted details

4 Water (prevention and control of pollution) Act 1974,s 3

5 Water (prevention and control of pollution) Act 1974, s 4(3)

of hazardous waste generation. Therefore, the power and function of a State Pollution Control Board has much more importance for implementation of Hazardous Wastes Management Rules. Hence, the present study attempts to investigate the functioning of State Pollution Control Board of Assam in respect of Hazardous Wastes Management.

II. RESEARCH METHODOLOGY

In this study the researcher applied both doctrinal and non-doctrinal Method of Research. Empirical evidences are collected and analyzed qualitatively. Through this study it has been tried to investigate the functioning of the State Pollution Control Board of Assam in respect of the Hazardous Wastes Management. The Methodology adopted in this paper comprises of primary and secondary sources. The primary sources are the direct observations or experiences and verbal interaction with the officials of State Pollution Control Board of Assam. Secondary sources are materials collected from various research articles published in this area, relevant books, other journals, Governmental publications, Reports of various Commissions, unpublished research work, past research work in the related field and using of internet etc. In this study descriptive analysis has been carried out and the findings have been represented textually.

The objectives of the present research work are to find out whetherthe existing power and function of the State Pollution Control Board of Assam is sufficient in respect of Hazardous Wastes Management; whether there are regularities in the functioning of the State Pollution Control Board of Assam.

III. MEANING AND CONCEPT OF HAZARDOUS WASTE

Hazardous waste means any waste which by reason of characteristics such as physical, chemical, biological, reactive, toxic, flammable, explosive or corrosive, causes danger or is likely to cause danger to health or environment, whether alone or in contact with other wastes or substances, and shall include waste specified under the column and classes of Schedule I,II.III of the Rules.[6]

6 Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016, Rule 17.published in the Gazette of India,

Hazardous Waste management is a very significant and controversial issue in India. Before 1989 there was no legal mechanism in India to regulate hazardous waste generated by households, hospitals, industries and plants. In the year 1989, the Central Government of India notified Hazardous Waste Management Rules 1989, under the provision of Environmental (Protection) Act 1986, to direct the occupier generating hazardous wastes to take all practical steps to ensure that such wastes are properly handled and disposed of without any adverse effects which may result from such wastes and the occupier shall also be responsible for proper collection, reception, treatment, storage and disposal of these wastes either himself or through the operator of a facility. Subsequently, these Rules have been amended later for several years.

IV. CONSTITUTION OF THE STATE POLLUTION CONTROL BOARD OF ASSAM

The State Government nominates the members of Pollution Control Board of Assam representing various State Government Departments, corporations, local authority and other institution. The board originally constituted as per Section 4 of the Water (prevention & Control of Pollution) Act, 1974 on 2nd June, 1975, was reconstituted during 1981, 1982, 1984, 1985, 1986, 1991, 1993, 1994, 1996, 1997, 2000, 2005 and 2008.[7] It is the main agency responsible for the administration and enforcement of legislation relating to environment in the State. The board may initiate action plan or implementation programmes to prevent, reduce, minimize the generation of hazardous wastes as per law pertaining to pollution.

The Board shall consist of seventeen members including the Chairman and the Member Secretary. A member of a Board, other than a member –secretary shall hold office for a term of three years from the date of his nomination. He shall continue his office even after expiration of his term until his successor enters upon his office. A member of a Board may be removed before expiry of his term by the State Government

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extraordinary part II, s 3(i)

7 <www.pcbassam.org.in>accessed 03 March 2018

after giving reasonable opportunity of show cause. A member of a Board may at any time resign his office by writing under his hand addressed; in case of chairman, to State Government and; in any other case to the chairman of the Board, and thereafter the seat of that member or the chairperson shall become vacant.

A member of a Board shall be deemed to have vacated his seat if he is absent without reason sufficient in his opinion of the Board from three consecutive meetings of the Board. A member of a board shall be eligible for re-nomination. These members of the board shall be disqualifed on any of the ground mentioned in section 8 of the Water (prevention & Control of Pollution) Act, 1974. The board shall meet at least once in every three months and shall observe such Rules of procedure in its meetings as provided under the Air (Prevention and Control of Pollution) Act 1981. The Chairman may also convene a meeting at any time he thinks fit for an urgent work to be transacted.[8]The board constituted by the State Government under this Act shall stand dissolved and the Central Pollution Control Board shall exercise the power and perform the functions of the State Pollution Control Board.[9]The State Pollution Control Boardof Assam is working with one Head Office[10], eight Regional Offices[11], and a Central Laboratory at Guwahati ,four Regional Laboratory[12].

V. FUNCTIONING OF STATE POLLUTION CONTROL BOARD OF ASSAM

To understand and analyze the implementation of the Hazardous Waste Management Rules, the powers and functions of the Board will be discussed in the light of the Hazardous and Other Waste (Management Handling and Transboundary Movement) Rule 2016.

The State Pollution Control Board of Assam has been empowered

8 Air (Prevention and Control of Pollution) Act 1981, s 10

9 S.C. Shastri, *Environmental Law*, (Eastern Book Company, Lucknow, 3rd edn) 271

10 Guwahati

11 Guwahati, Dibrugarh, Sibsagar, Golaghat, Tezpur, Nagaon, Bongaigaon and Silchar.

12 Sivsagar, Tezpur, Silchar and Bongaigaon.

to grant authorization to every person engaged in generation, processing, treatment, package, storage, transportation, use, collection, destruction, conversion, offering for sale, transfer or the like of hazardous waste, after inquiry as it considers necessary and on being satisfied that the applicant possess appropriate facilities for collection, storage, packaging, transportation, treatment, processing, use, destruction, recycling, recovery, pre-processing, co-processing, utilization, offering for sale, transfer or disposal of the hazardous and other waste as the case may be, after complying with all other guidelines specified by the Central Pollution Control Board from time to time, which shall be valid for a period of five years.

The State Pollution Control Board of Assam may, in case of application for renewal of authorization, check the violation of the conditions specified in the authorization earlier granted and same shall be recorded in the inspection report. The Board may refuse to grant authorization to any applicant for non-compliance of the provision of the Hazardous Waste Management Rules. The State Pollution Control Board of Assam shall maintain a register containing particulars of the conditions imposed under these rules for management of hazardous and other waste and it shall be open for inspection during office hour to any interested or affected person.

The State Pollution Control Board of Assam shall have power to suspend or cancel an authorization that has failed to comply with the provisions of the rules or Acts after giving a reasonable opportunity of being heard and recording the reason of such cancellation as it considers necessary in the public interest. The Board shall give direction to the holder of the authorization for the safe storage and management of the hazardous and other waste that shall be binding upon him. The State Pollution Control Board may extend the period of ninety days for storage and management of the hazardous and other waste in some special circumstances.[13]

Inventorization of hazardous wastes is an important function of State Pollution Control Board of Assam. Rule 20(3) of the Hazardous and

13 The Hazardous and Other Wastes (Management and Transboundary) Rules 2016, Rule 8

Other Wastes Management Rules stipulates that the State Pollution Control Board based on the annual returns received from the occupier and operator of the facility for disposal Hazardous and Other Wastes shall prepare an annual inventory of the wastes generated; wastes recycled, recovered,utilized including co-processing;wastes re-exported and wastes disposed and submit to the Central Pollution Control Board by the 30th day of September every year. The State Pollution Control Board shall also prepare the inventory of hazardous waste generators, actual users, and common and captive disposal facilities and shall submit the information to Central Pollution Control Board every two years.

Another significant function of the board is monitoring of compliance of various provisions and conditions of permissionincluding conditions of permission forissued by Ministry of Environment, Forest and Climate Change for exports andimports. Actual users intending to import or transit for transboundary movement of hazardous and other wastes shall send a copy of the application to the concerned State Pollution Control Board for information and the acknowledgement in this respect. The State Pollution Control Board after examining the application for imports shall forward with recommendation and requisite stipulations for safe transport to the Ministry of Environment, Forest and Climate Change along with the application. Under the Hazardous Wastes Management Rules, 1989 and its subsequent amendments, the conditions and guidelines imposed by the Environment, Forest and Climate Change, State Government and Central Pollution Control Board regulate the generation, import, export, handling and disposal of hazardous Wastes and the frequency of monitoring of such Wastes.

Implementation of guidelines and standard operating procedures for recycling, utilization, pre-processing, co-processing of hazardous and other wastes is a vital function of State Pollution Control Board of Assam to prevent or reduce or minimize the generation of hazardous and other wastes. The board has implemented plans and programmes initiated by the Ministry of Environment, Forest and Climate Change, State Government and Central Pollution Control Board on hazardous and other wastes management activities.For implementation of

conditions and guidelines imposed by the State Government and Central Pollution Control Board and its mandate, the Pollution Control Board of Assam earns revenue comprising of Grants in aid from Ministry of Environment Forest and climate change, Central Pollution Control Board, State Government, consent fee, authorization fee, interest earned, etc.

The occupier, importer or exporter and operator of the disposal facility shall be liable for all damages caused to the environment or the third party due to improper handling and management of the hazardous and other waste. Such liable person shall have to pay financial penalties as levied for any violation of the provisions under these rules by the State Pollution Control Board with the prior approval of the Central Pollution Control Board. Any person aggrieved by an order of suspension or cancellation or refusal of authorization or its renewal passed by the State Pollution Control Board, may prefer an appeal to the Appellate Authority, namely, the Environmental Secretary of the State.

The State Pollution Control Board of Assam shall have to exercise all or any other function under these Rules assigned by Ministry of Environment,Forest and Climate Change, State Government and Central Pollution Control Board pertaining to the Hazardous Wastes Management Rules from time totime.

The Board exercises its power and functions through conditions and guidelines imposed by the Ministry of Environment, Forest and climate change, State Government and Central Pollution Control Board while granting consent for project and plan to be established and operated in the State.

VI. IRREGULARITIES IN THE FUNCTIONING OF THE BOARD

Despite the Supreme Court of India and National Green Tribunal consistently voicing concern over the functioning of many State Pollution Control Boards across the Country, unrestrained irregularities in the Pollution Control Board of Assam hampered the smooth functioning of the board in respect of Hazardous Wastes Management for a decade. The functioning of the State Pollution Control Board of Assam had over the years suffered a lot as it was not manned by competent persons.

Some of the officers were at the same table for over five to six years, which lead to complacency and inefficiency. There were complaints against a section of the staff as well.

After a long term controversy with the National Green Tribunal, the Supreme Court of India agreed that appointments in State Pollution Control Boardsshould not be made casually or without due application of mind, considering the duties, functions and responsibilities of the State Pollution Control Boards. After these interventions the Assam government recently appointed an IFS officer as Chairman-in-charge while the post of member secretary has been vacant for more than three years. The last board meeting too was held more than three year ago, whereas meetings are mandate to be held once in three months. The Central government had also repeatedly been urging the State governments, including the Assam government, to appoint people who could add value and stature to the State Pollution Control Boards and utilize their experience in preserving the environment but with little response.[14]

Indeed, the last one decade of so has been a spurt in highly polluting industrial units such brick, coke and cement manufacturing units in gross violation of environmental norms and in close proximity to human settlements and cropland. The damaging impact of these polluting units that had come up taking advantage of the concessions under the earlier industrial policies are being severely felt now. These industries also managed to grab the lion's share of various subsidies without bothering to pass on some of the benefits to the consumer. There have been ten private laboratories working for last eight years without following any norms, which are derecognized recently by the board. The Hazardous Wastes generating industries seeking authorization certificate has approached these private laboratories to diminish the test report of Hazardous Wastes.

The role of the Pollution Control Board of Assam in this regard has been most deplorable, as it chose to turn a blind eye to the growing pollution caused by such units. Indeed, the grievances against the

14 Sivasish Thakur, 'PCBA Suffering due to Lack of Competent People at Helm' *The Assam Tribune*(Guwahati,3 July2018) 1-4

Pollution Control Board of Assam have been many, as the interventions in diverse spheres have been minimal. Now the State Government is planning to effect some changes in the functioning of the Pollution Control Board of Assam in order to make it effective and efficient. But in order to be really meaningful, the changes must ensure that the pollution control authority discharge its chief function- that of coming down hard on the pollution causers- without fear or favor. The government is also putting emphasis on the revenue generation aspect of the Pollution Control Board of Assam but that is not what its mandate is. All over India, a general grievance against the State Pollution Control Boards is that they are happy to impose fines on polluting units and allow those to operate freely. Such an approach stands to negate the primary objective of the Pollution Control Boards. If necessary, the relevant laws and rules concerning monitoring of and action on pollution should be changed.

VII. DISCUSSIONS

Grant of authorization for managing hazardous and other wastes is a vital power of State Pollution Control Boards under Rule 6 of the Hazardous and Other Waste (Management and Transboundary) Rule 2016. Whether State Pollution Control Board of Assam inquires all respects for authorizations, is a matter of consideration. What are the grounds or conditions of considerations and satisfaction, as per rules, of the State Pollution Control Board about the applicant's possession of appropriate facilities for collection, storage, packaging, transportation, treatment, processing, use, destruction, recycling, recovery, pre-processing, co-processing, utilization, offering for sale, transfer or disposal of the hazardous and other waste, is not mentioned in the existing Rules.

In many cases, the State Pollution Control Board has granted authorization without confirming the fact that, whether the operator has adequate facility for treatment, storage and disposal of hazardous wastes. At present there are 71 hazardous waste generating units in Assam which has generated 5,217.107 metric tons per annum (MTA) of landfill able waste, 326.10 (MTA) of incinerable waste and 22,990.533

(MTA) of recyclable waste. There is no common treatment, storage and disposal facility in Assam, despite the Supreme Court's direction in this regard in 2003.Therefore huge quantity of hazardous waste lying in the units for years after years and this may cause serious risk.Some of the industries are functioning without obtaining authorizationfrom the Pollution Control Board of Assam.[15] However, there was a shortfall of mandatory inspection of industries conducted by the State Pollution Control Board of Assam. For example; in four out of nine industries jointly inspected along with Audit, effluent treatment plants were either not installed or not functioning, resulting in discharge of untreated effluents containing oil, grease etc. into the water bodies. If this is plight of Guwahati's environment then we can imagine the impact of hazardous wastes generating industries wreaking more havoc on the fragile environment of other cities and towns of Assam.

The Performance Audit revealed that though the Pollution Control Board of Assam was not short of funds, it had not fulfilled its role effectively. The board instead of focusing on strengthening its technical manpowerfor carrying out the essential inspection of industrial establishments and scientific analysis, the Pollution Control Board of Assam had a disproportionately large nontechnical staff which resulted in huge arrears in mandatory inspections. However, The Supreme Court of India in a case ordered that "Having regard to the facts and circumstances of this case and particularly in view of the fact that thousand kiloliters of such waste lubricants are recycled for its reuse, it is necessary that all authorities must strictly comply with the provisions of the said Rules. It further directed that in the event if any person is found to be unauthorized handling such hazardous waste products and or if any person authorized therefore violates any of the terms and conditions or directions or any law operating in the field, the State Pollution Control Board should take strict view of the matter and shall take steps for cancellation of their authorization"[16]. Thus the State

15 Comptroller And Auditor General Of India, Report no.3 of 2016, (Government of Assam), *performance audit of'Environmental Degradation in the greater Guwahati Area with special emphasis on the role of Pollution Control Board, Assam*

16 *K.Purusdhotam Reddy v. U.O.I* [2001] *Writ Petition No.29629/1998*[A.P. High Court 2001]

Pollution Control Boards must at regular intervals renew the licenses, and if the industry is violating any norm, the license granted must be cancelled.The consent of the Board is mandatory for establishment of a facility or process plant wherein the processes incidental to the generation, handling, collection, reception, treatment, storage, reuse, recycling, recovery, preprocessing, co-processing, utilization and disposal of hazardous and, or, other wastes. The consent is given for a particular period, which is mandatory to be renewed regularly. Fees are charged by the Pollution Control Board of Assam for issue of Consents and regular inspections are required to be carried out to ensure compliance by the operator of disposal facility.

Some provisions of the new Rules of 2016 empower the State Pollution Control Board with discretionary power; such as Rule 8 of the new Rule of 2016 provides that the State Pollution Control Board may extend the storage period of Hazardous waste on justifiable ground. Such provisions of the new Rules may affect from defectiveness.

The Hon'ble Supreme Court of India directed the Central Government to constitute a Monitoring Committee to oversee timely compliance of its directions given in the Writ Petition. The Apex Court directed the State Pollution Control Boards in India to issue closure direction to the units operating without any authorization or in violation of conditions of operations issued under Hazardous Wastes Rules, 1989. The court issued Direction regarding display of relevant information on Hazardous Waste by concerned Units. The Court directed for Preparation of States Inventories regarding waste Dump Sites and Rehabilitation Plan by the concerned State Pollution Control Board. The Supreme Court directed to the Central Government to fix time frame for implementation of Rehabilitation Plan by State Pollution Control Board. Furthermore, the Central Pollution Control Board vide letter dated 29/07/2016 forwarded the format for submission of the annual inventory and develop online portal "SPCB Sanyojan" for submission of the same. Despite this the State Pollution Control Board of Assam has not sent the annual inventory as per the prescribed format which was required to be sent to Central Pollution Control Board by 30th September 2017 and thereafter by 30th day of September

every year[17]. It shows that State Pollution Control Board of Assam has not complied with the provisions of Hazardous and Other Wastes Management Rules. Environmental awareness programmes launched by the board in the nature of formal and informal education, booklets and newsletters are not easily accessible by the public.

VIII. CONCLUSION

Findings of the study

The present study reveals that the power and function of the State Pollution Control Board of Assam is of great importance in proper handling, dispose and transboundary movement of hazardous wastes. Thus it is need of hour to strengthen the existing infrastructure with introducing policies on restructuring of existing Pollution Control Board of Assam. Due to the lack of effective mechanisms,the current problem is that the enforcement mechanism lacks teeth and has failed in curbing the improper handling of Hazardous Wastes. Thus, there is need to empower Pollution Control Board of Assam to impose a fine against the violators of the provisions of Hazardous Wastes Management Rules.The study finds that the overall power and function of the State Pollution Control Board of Assam is not sufficient in the matter of Hazardous Wastes Management though the Pollution Control Board of Assam was not short of funds, it had not fulfilled its role effectively. Thus, the necessity is of improving the functioning of the regulatory system by making changes in working conditions of the State Pollution Control Board of Assam so as to implement the Hazardous Wastes Management Rules in Assam.

Suggestions and concluding observations

There are still problems of hazardous waste not being managed in sound environmental conditions, improper dumping and lack of proper treatment and disposal facilities. The existing Rules need a strict and effective monitoring and implementation strategy that will lead to proper collection mechanism, sound recycling technologies, adequate and scientifically designed disposal sites. The State Pollution Control Boards accord authorization to the actual user for handling, transport, treatment, storage or disposal of hazardous wastes in India

17 Show cause notice dated 22/12/2017 F. No. B -29016(sc)/1/17/ HWMD/15057-15090

under Rule 11(6) of the Hazardous Wastes (Management & Handling) Rules. The Pollution Control Board of Assam should have identified hazardous wastes generating industries which had been operating without valid authorization and should take penal action against the violators under Environment (Protection) Act.Though the Pollution Control Board of Assam monitors those industries but could not detect such irregularity that leads to failure to take action against non-compliance of the legislations. Pollution Control Board of Assam had not installed necessary software and hardware for centralized data collection, analysis and corrective action. The Pollution Control Board of Assam should prepare a time-bound action plan for implementation of Hazardous Wastes Management Rules. The Board should monitor the compliance of provisions and conditions of authorizations in order to have a proper assessment and reliable database of generation of hazardous wastes. The Board has not mentioned the details of conditions imposed while granting authorization to any agency. The Board did not have any information about the disposal or recycling of hazardous waste generated.

The State Pollution Control Board of Assam is required to undertake a continuing programme to identify the sits and compile and publish periodically an inventory of disposal sites within the state for the disposal of hazardous wastes. The Boards should maintain updated information of all hazardous waste generating industries, recyclers, etc. and details of disposal of such waste. It has been made mandatory for each State generating more than 2,000 (MTA) of hazardous waste to have aCommon Treatment, Storage and Disposal Facility. Despite the Supreme Courts direction for construction of treatment, storage and disposal facility, there is no Common Treatment, Storage and Disposal Facility in the Assam. In order to ensure scientific disposal of hazardous waste, the Board should insist on installation of Common Treatment, Storage and Disposal Facility. The State Government shall also set up an on-site facility for treatment, storage and disposal of hazardous wastes for captive use and it shall be governed by the authorization procedure as laid down in Rule 5 of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules 2016.

ABOLITION OF CONTRACT LABOUR IN INDIA: A STUDY OF JUDICIAL TRENDS

Tathagat Sharma[1]

Prince Raj[2]

Abstract

The origin of Labour related Legislations in India had started to contemplate the minds of the legislators back in the pre-independence era, wherein with the advent of labour regulations across Europe and the rise of Labour Party in UK, liberal views in favour of Labourers of the time started coming up in across The British Empire, India was not left untouched by it either. With the advent of Trade Unionism in the Country and the Growing status of Mill Workers and Port Unions across different Indian Cities, demands for certain rights to be granted for their security were raised. Upon the increasing number of Industries, the shortage of permanent working labour was felt, which in turn paved the way for Contract Labour to come up, initially a good practice, it started as a necessity, became a resort for the Industrialists to avoid formalization of relations with the workers thereby paving the way for their harassment, these developments prompted the government to look into drafting favourable labour regulations in the light of the Welfare state policy that India was following at the time. With favourable policies in place the growth of Industry was felt as the next major step towards development but on the advent of the LPG Policy, the two locked horns and came head to head as the rights of the Industries couldn't go hand in hand with the Liberal Right to the Workers, thus paved the way for Judiciary to adjudicate the matter under its prudence. But the issue under question was so delicate that the Judiciary itself had different factions supporting different sections of the Society, thus progressed the story of Judicial Trends in relation to Abolition of Contract Labour in the Country and their Absorption.

***Keywords*:** Contract Labour, Industrialists, Workers, Abolition, Absorption etc.

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INTRODUCTION AND HISTORICAL ANALYSIS

The Governing law with respect to Contract Labour in India is the Contract Labour (Regulation and Abolition) Act, 1970 (Herein After as 'CLRA'). The Legislation was drafted with respect to the growing practice of Contract Labour in the country wherein, the trend of employing contract labour has been growing despite the intricacies involved. The reason for the growth can be devoted to the various advantages associated with the practice of Contract Labour ranging from Comparatively lower wages to flexibility in terms of terminating the relationship[3].

The very first time wherein the attention of the Government was drawn to the abuses and problems related to Contract Labour in India, was in 1929 when the Royal Commission (also known as the Whitely Commission) was appointed by the then British Government to study all the aspects related to labour in India[4], the Commission submitted its report in 1931, highlighting the presence of a 'jobber' who was an intermediary between the employer and the employee and was the chief reason for the disparities in the wages, since the Trade Union system wasn't that empowered in India at that time, the commission, though had recommended measures to reduce the influence of this Jobber but nothing substantial turned out onto the recommendations[5].

One of the primary reason to come up with Contract Labour reform was because of the apparent lack of knowledge amongst the British Employers regarding the problems faced in the Indian Society. These problems included low status of Factory workers in the society, lack of labour mobility, caste and religious taboo, language barriers etc. They were unable to either understand or solve these problems thereby justifying their reliance on the Middleman, i.e. the 'Jobber' for recruitment and control of the labour force. Added to the misery of labour was the fact that *Workmen's Breach of Contract Act, 1859* made

3 Manishi Pathak,"An overview of the Contract Labour related laws in India" (2017) NLS Bus. Law Review 20

4 Dr.VG Goswami,*Labour and Industrial Laws: Social Security Legislations in India*(9th edn, Central Law Agency 2011) 700

5 Ibid

them criminally liable in the case of Breach of Contract[6].

Subsequent developments, including the Bombay Textile Labour Enquiry Committee, the Bihar Labour Enquiry Committee, the Rege Committee in 1946 and the Second Planning Commission in 1956 maintained the need to abolish the system of Contract Labour wherever it was possible and recommended conditions to regulate the terms of employment wherever it was not possible to completely abolish the Contract Labour System. It is to be noted that neither of the aforementioned committees recommended for absorption of Contract Labour, however they were mindful of the displacement of labour if the Contract Labour system was abolished, thereby justifying their actions by recommending for alternative employment and priority on employment to Contract Labourers[7]. One of the major achievement for these committee was their ability to widen the definition of 'Workers' in Factories Act, 1948, The Mines Act, 1952 and the Plantations Labour Act, 1951 to include Contract Labour within the ambit of the definition of Workers[8].

Inspired by the Judgement of the Court in *Standard Vacuum Refining Co. of India* v. *Workmen*[9] the National Commission on Labour submitted in its report in 1969 that the Contract Labour system be abolished in cases where the work was:

1. Perennial and must go on from day to day basis
2. incidental and necessary work of the factory
3. sufficient to employ a considerable number of wholetime workmen
4. being done in the most concerns through regular workmen.

The commission had also recommended to abolish the practice and role of 'Middleman' in transactions involving contract labour, the same was given a Judicial Validity by the apex court in the case of *Secretary H.S.E.B* v. *Suresh and Others*[10].

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6 Report of the 'National Commission of Labour', 1969 available at http://www.doccentre.org/docsweb/LABOURLAWS/IIlabourcomm.htm accessed on 21st April 2018

7 Ibid

8 Paramita Ray,"Contract Labour System in India: Issues and Perspectives"(2016) 297 IJLLJS 3, 3

9 *Standard Vacuum Refining Co. of India* v. *Workmen*AIR 1960 SC 948

10 *Secretary H.S.E.B* v. *Suresh and Others*(1999) 3 SCC 601

The recommendations of the committee seems to have been inspired by the Chairman of the Commission Justice Ganjendragadkar who was also the pronouncing judge in the Standard Vacuum Refining Case[11], who had pointed out the advantages that the Contract Labour system had to the Employer and the disadvantages that it bought to the Contract Labours whose status was under question in the said judgement.

At the time of the introduction of the Contract Labour (Regulation and Abolition) Bill in the Lok Sabha in 1967 emphasis was laid upon the extension of facilities to the Contract Labour, the same facilities which were being enjoyed by regular labour force of the industry, in cases where the abolition of Contract Labour wasn't possible altogether[12].

The present-day scenario points to a significant and continuous growing trend in which a company engages the services of employees belonging to a third party i.e. a contractor, factors like Cost effectiveness, higher productivity, flexibility in employment, facilitation for focusing on core competencies etc. constitute as advantages that encourage Contract Labour over Regular Work force[13].

There has been a gradual increase in the employment of contract Labourers in India, which is reflected in the following table[14]:

Year	No. of Contract Labourers
2013-14	1967747
2014-15	1903170
2015-16	2092673

Owing to these trends the Chief Labour Commissioner expressed his concerns in the words that "The increasing trend of hiring employees

11 Supra note 7

12 Avtar Singh & Harpreet Kaur, *Introduction to Labour and Industrial Laws*(4th edn, Lexis Nexis,2016) 964

13 Aparajita Tayal, "Contract Labour and The New Economic Policy: Is the Harmonization Possible?" (2004) July PL (Jour) 13

14 Ministry of Labour and Employment, Press Information Bureau- Violation of Contract Labour (April 10th, 2017 5:43 PM) available at http://pib.nic.in/newsite/pmreleases.aspx?mincode=21 accessed on 21st April 2018

on contract, both in private set up as well as Government set up, is a matter of concern especially since there is a difference between paid contract and salaried contract"[15].

The Establishment or employer (generally referred to as 'principle employer' under the CLRA) is a person/firm/company etc. who engages contract labour, and the person providing the contract labour under a contract to supply labour or manpower (referred to as Contractor under CLRA), the relationship shared by the Two entities is referred to as 'Contract Labour Arrangement'. The workers that are provided by the Contractor to the Employer are referred to as 'Contract Labour'[16].

ANALYSIS OF INTRICACIES PROVIDED UNDER SECTION 10 OF THE CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970

Section 10 is the governing section wherein the CLRA specifically provides for 'Prohibition of Contract Labour', the section reads as:

1.) *Notwithstanding anything contained in this act, the appropriate Government may, after consultation with the Central Board, or as the case may be, a State Board, prohibit, by notification in the official Gazette, employment of contract labour in any process, operation or other work in any establishment.*

2.) *Before issuing any notification under Sub Section 1 in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the Contract Labour in that establishment and other relevant factors, such as: -*

(a) *whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacturer or occupation that is carried on in the establishment;*

(b) *whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacturer or occupation carried on in that establishment;*

15 AK Nayak, 'High Contract Labour a matter of Concern'*The Times of India* (New Delhi 19 May 2017)

16 Supra note 1

(c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;

(d) whether it is sufficient to employ considerable number of whole time workmen.

Explanation- if a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final.[17]

A plain reading of the act would construe the fact that the legislative intention was never to abolish the contract labour altogether, since there are a number of fields wherein the abolition of contract labour in its entirety is not possible, the act therefore provides for continuation of Contract Labour[18], provided however that the continuation of Contract Labour must be invariable or necessary in the interest of the industry concerned[19].

The Andhra Pradesh High Court in the case of *Sirpur Paper Mills Ltd.* v. *Commr. Of Labour*[20]has specifically envisaged that the CLRA was brought into existence to regulate the supply of contract labour force and to prevent the exploitation of Labourers. Provisions were made for the protection of rights of contract labour and both the labour contractor and the principle employer were made the parties responsible to ensure the same.

The act as a whole does not envisions to abolish contract labour in its entirety by as can be read clearly only provides for Abolishing it as far as practicable and practical[21].

As a matter of Judicial Prudence, the apex Court has inexpress

17 Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970

18 Supra note 2, pp. 702

19 Ibid

20 *Sirpur Paper Mills Ltd.* v. *Commr. Of Labour*2010 SCC OnLine AP 656

21 *RK Panda* v. *Steel Authority of India*, infra note 18; The State Board was of diverse views with respect to the abolition of contract labour due to the different interests of various groups, thereby Govt. took a decision without any recommendation, the SC held that the Requirement of Consultation stood satisfied.

terms stated in *BHEL Workers Assn.* v. *Union of India*[22]that Contract Labourers are entitled to the same wages, holidays, and conditions and hours of work and service that are enjoyed by the workmen directly employed by the Principle employer, in same or similar kind of work.

Consultation as has been used in Section 10 of CLRA doesn't necessarily mean Concurrence[23].

The state board or the central board as the case maybe shall give a recommendation to the 'Appropriate Government' as the necessary condition but its applicability is to be determined by the Government itself.

The Government's Consultation with the board is a condition precedent[24] but isn't binding on the Government either state or central[25].

Only an appropriate Government is entitled to prohibit the practice of Contract Labour, not the High Court[26] nor the Industrial Tribunals[27] neither the Labour Court[28].

The Question mark on Absorption?

One of the interesting question that had come up following the provisions related to abolition of Contract Labour was the question of Absorption. A natural response to the same was, as a matter of prudence those who have been left unemployed by the act of the Government, but for their own benefit, should under ordinary circumstance be provided with a means of employment to sustain their lives, and the easiest way to do so was to employ them back in the industry from where there employment was abolished in the capacity of a Contract Labourer with proper frameworks applied and securities ensured, but this felt as more of a moral responsibility, could it be converted to a legal responsibility on part of the Employer?

22 *BHEL Workers Assn.* v. *Union of India*(1985) 1 SCC 630

23 *L&T McNeil Ltd.* v. *Govt. of Tamil Nadu*, (2001) 3 SCC 170

24 *Zenith Industrial Services* v. *Union of India*, (1989) 2 LLN 647

25 *Barat Fritz Werner Ltd.* v. *State of Karnataka*, (2001) 4 SCC 498

26 *Cipla Ltd.* v. *Maharashtra General Kamgar Union*, (2001) 3 SCC 101

27 *Vegoils (P) Ltd.* v. *Workmen*, (1971) 2 SCC 724

28 *Hari Shankar Sharma* v. *Artificial Mfg. Corpn. Of India*, (1997) 2 Cur LR 631

The Hon'ble Apex Court answered this Question in negative in the case of *Dena Nath* v. *National Fertilizers Ltd.*[29] wherein the court stated in expressed terms that the Principle Employer can't be required to absorb the Contract Labour which is abolished.

On slightly different circumstances the question of Absorption was again raised before the apex Court in *Gujarat Electricity Board, Thermal Power Station, Ukai, Gujarat* v. *Hind Mazdoor Sabha*[30] this time the Court had a different opinion onto the same issue, without overruling the previous judgement, the court this time, appointed a committee and based on the committee's recommendations most of the Contract Labourers were subsequently absorbed in the Power Plant[31].

These two contradictory judgements, left a confusing void amongst the minds of the Labourers as well as the Lawyers, as to what was the judicial precedent and the Binding authority over the issue of Absorption, as a matter of Practice, the Decision in the *Dena Nath Case*[32]was accepted as binding owing to its Higher Bench strength, thereby disallowing any attempt made at Absorption.

But the question was finally settled by the Apex Court in the Case of *Air India Statutory Corporation and other* v. *United Labour Union and others*[33]which shall be looked into its details in the subsequent chapter, interestingly come the year 2001 the judgement of Air India Statutory Corporation was again overruled by the Apex Court in the case of *Steel Authority of India* v. *National Union of Water Front Workers*

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29 *Dena Nath* v. *National Fertilizers Ltd*(1992) 1 SCC 695

30 *Gujarat Electricity Board, Thermal Power Station, Ukai, Gujarat* v. *Hind Mazdoor Sabha*(1995) 5 SCC 27

31 The Committee was setup to investigate the facts and circumstances and make recommendations accordingly. Interestingly it is prudent to note here the observations of the Committee based on which it made its recommendations: The Committee found that 1500 workers hailing from a particular Adivasi Community had been exploited for a continuous period of 20 years by the Contractor, before the abolition of Contract Labour, for their long allegiance and noticing the fact that they had served the Board for 20 years the Committee made its recommendations

32 Supra note 27

33 Infra note 32

and others[34]*,* both of these cases shall be looked in their details in the subsequent chapter.

CASE ANALYSIS

Air India Statutory Corporation and others v. United Labour Union and Others[35]

Facts of Case:

The appellant i.e. the Air India Statutory Corporation was a statutory authority under the International Airport Authority of India Act, 1971. Once the same act was repealed it was amalgamated with the National Airport Authority under the Airport Authority of India Act, 1994, in the name of IAAI.

The appellant had engaged the United Labour Union's members for the purpose of Sweeping, Cleaning, dusting and watching over the buildings owned and occupied by the corporation. The Appellant had obtained a certificate of registration from the Regional Labour Commissioner under the act. Subsequently, the Central Govt. exercising its power under Section 10 of the CLRA, on the recommendations of the Central Board issued a notification on 9/12/1976 prohibiting 'employment of contract labour on and from 9/12/1976 for sweeping, cleaning, dusting and watching of buildings owned or occupied by establishments in respect of which the appropriate government under the said act is the Central Government'. The Regional Labour Commissioner, Bombay by a letter dated 22/05/1973 had revoked the registration. By the amendment act 46 of 1982, the Industrial Dispute Act, 1947 was made applicable to the appellant and was brought on the statute book specifying the appellant as one of the industries in relation to which the Central Government is the appropriate Government and the appellant has been carrying on its business 'by or under the authority' with effect from 28/01/1982.

Since the appellant had not abolished the contract system and failed to enforce the notification of the Government of India dated 9/12/1976,

34 Infra note 36

35 *Air India Statutory Corporation and other* v. *United Labour Union and others*(1997) 9 SCC 377

the respondents filed a writ petition for direction to the appellant to enforce forthwith the aforesaid notification abolishing the Contract Labour System and to direct the appellant to absorb all the employees doing the said work for the appellant establishment with effect from the respective dates of their joining as Contract Labour, with all consequential rights/ benefits, monetary or otherwise.

*Issues and Held***:**

The court in its very initial statements expressly mentioned that there is no express provision in law in relation to automatic absorption of the employees whose contract labour system stood abolished, but in a proper case the Court being the Sentinel of the 'qui vive' is required to direct the appropriate authority to act in accordance with law and submit a report to the court and based thereon proper relief should be granted. The court also overruled the decisions in the Dina Nath and Gujarat Electricity Board Case, and held that Art. 226 of the Constitution acts the binding authority in directing the Employer to absorb the Contract Labourer, after its abolition, even though some of the Contractors have violated Section 12 of the CLRA and the appellant themselves have violated Sec. 7 of CLRA, the Court subsequently in its pronouncement upheld the verdict of the Bombay High Court and said that the Employees should automatically be absorbed by the Employer.

RK Panda and others v. Steel Authority of India and others[36]

Facts of Case:

The writ petition was filed by the on behalf of the Petitioners, alleging that the petitioners have been employed by the respondent at its Rourkela Plant, employed in jobs which were perennial in nature and identical to the ones being done by the regular employees of the respondent. Thereby making them entitled to same pay as that of regular employees and entitled to be treated as regular employees. The Petitioners asserted that they had been working for the plant ranging for a time period of 10 to 20 years under different contractors, whereby

36 *RK Panda and others* v. *Steel Authority of India and others*(1994) 5 SCC 304

even though the contractors used to change but, while awarding a new contract, one of the terms incorporated in the agreement was '*the incoming contractors shall employ the workers of the respective outgoing contractors subject to the requirements of the job*' The petitioners demanded for regularization of their position and absorption for the same.

Issues and Held:

The court pointed out to the trend amongst Contract Labourers that '*after having worked for some years, they make a claim that they should be absorbed by the principle employer and be treated as the employees of the employer especially when the principle employer happens to be the Central or the State Government or any entity that can be included in the definition of state under Article 12 of the Constitution*'.

The Court while relying on the case of *Mathura Refinery Mazdoor Sangh* v. *Indian Oil Corpn. Ltd.*[37]stated that if the Contract Labourers are found to have no direct connection with the refinery, then the order to absorb can't be granted. The court pointed out that with the passage of time, and purely to safeguard the interest of the employees, many employers while renewing the contracts have been insisting that the new contractors continues with the old Labourers, such a clause however is benevolent and inserted solely to safeguard the source of livelihood of the employees and can't be used as an excuse to have the right to regularization. The question of regularization differs from case to case basis and the burden of proof to prove their direct relationship with the employer lies on the shoulder of the Contract Labourers. As such at what time a direct link was established between the Employer and the Employee and the need of contractor was eliminated, needs to be produced before the Competent Court on material.

Further in the light of eminent modernization of the Rourkela Plant which was to result in retrenchment for a major number of Labourers resulted in the Respondent offering employees voluntary retirement or continuing with the service, the court in the light of the eminent circumstances held that:

37 *Mathura Refinery Mazdoor Sangh* v. *Indian Oil Corpn. Ltd* (1991) 2 SCC 176

1. All Labourers continuously working with the Plant for more than 10 years shall be absorbed as their regular employees, subject to being medically fit and their age being less than 58 years which is the age of Superannuation under the Respondent.

2. While absorbing them as regular employees their inter se seniority shall be determined department/job wise on the basis of their continuous employment.

3. They will not be entitled to the difference in their contractual and regular wages till the date of their absorption. After absorption as regular employees, they shall be paid wages, allowances etc. on a par with their counterparts, if for any job regular employees wage is not fixed, they should be paid the minimum rate payable for unskilled workman.

4. The benefit of absorption shall not extend to the contract Labourers who in terms of this court's order referred to above have taken a voluntary retirement on payment of retrenchment compensation.

Steel Authority of India v. National Union of Water Front Workers and others[38]

Facts of Case:

The appellant is a Central Government Company with its Branch Managers, are engaged in the manufacture and sale of various forms of iron and steel materials across its plants located in different cities, its business includes export and import of several products and by products through Central Marketing Organization. The work of handling the goods in the stockyards was entrusted to the Contractors after calling tenders. The West Bengal Government issued a notification dated 15/07/1989 whereby it prohibited the employment of Contract Labour in four specified stockyards of the appellant in Calcutta city. On representation the Govt. kept the notification in abeyance for six months and further extended it for short durations of time but didn't extend it after 31/08/1994.

38 *Steel Authority of India* v. *National Union of Water Front Workers and others*AIR 2001 SC 3527

Issues and Held:

The respondent union made a representation before the Calcutta High Court for the cause of 353 Contract Labourers, seeking a direction for absorption of the Contract Labour in their regular establishments in view of the prohibition notification and further prayed that the notification of abeyance be quashed. The Single Judge bench quashed the order of Abeyance and its subsequent orders and directed the contract labour to be absorbed and regularized from the date of prohibition.

There were three points of Contentions that were raised by both the Parties:

1. What is the Correct interpretation of the expression 'Appropriate Government'?
2. Whether the notification dated 9/12/1976 by the Central Government under Sec. 10(1) of CLRA is valid and applies to all Central Govt. Companies
3. Whether Automatic Absorption of contract Labour working in the establishment of the principle employer, follows on the issuance of a valid notification under the Sec. 10 (1) of CLRA?

The Court categorically answered all the three questions wherein, for the first question it was argued that the State Government wasn't even the competent authority following the Central Government Notification on 28/01/1986, the case of *Heavy Engineering Mazdoor Union* v. *State of Bihar*[39] was negated in its entirety based upon several cases such as *Hindustan Aeronautics Ltd* v. *Workmen*[40] along with *Rashtriya Mill Mazdoor Sangh* v. *Model Mills*[41] and *CV Raman* v. *Bank of India*[42] and *RD Shetty* v. *International Airport Authority*[43]. It was held by the Court that the definition of State would include any Company Registered under the Companies Act and any Society Registered under

39 *Heavy Engineering Mazdoor Union* v. *State of Bihar*(1969) 1 SCC 765

40 *Hindustan Aeronautics Ltd* v. *Workmen*(1975) 4 SCC 679

41 *Rashtriya Mill Mazdoor Sangh* v. *Model Mills* (1984) Supp. SCC 443

42 *CV Raman* v. *Bank of India*(1988) 3 SCC 105

43 *RD Shetty* v. *International Airport Authority*(1979) 3 SCC 489

the Societies Act would qualify as 'State' thereby if under control of the Central Government would satisfy the requirement of 'Appropriate Government' as was held in the *Air India Case.*

The Court expressly rejected the question of sustenance of the notification of the central Government stating that the Government had been mindless in ignoring the requirements under the Section 10 of CLRA except for consultation with Central Advisory Board, the court rejected the Validity of the Notification based upon Sub Section (2) of Section 10 of CLRA.

On the third question, it was argued that there was never a master and servant relationship between the Respondent and the Appellant, but a counter to that was produced in the form of the Contractor being an agent of the Principle Employer to engage Contract Labour, which binds him and create a relationship between them, thereby rendering the only effect under Section 10 as removing the middleman and maturing the relationship between the Employer and the Employee, this was backed by the Judicial Precedents in the cases of *Maharashtra Sugar Mills Ltd.* v. *State of Bombay*[44] and *Shivnandan Sharma* v. *Punjab National Bank Ltd.*[45].

The Court was satisfied with the Submissions of the Appellant and gave reference to the reports of the National Commission on Labour and the Joint Committee of Parliament, whereby it mentioned that neither of the detailed study mentioned about automatic absorption and mentioned that had it been the intention it would have been mentioned in any of the report, the committee were indeed mindful of the Cost Deficits that such an action would have created.

Oil and Natural Gas Corporation Ltd. v. Petroleum Employees Union and others[46]

Facts of Case:

The appellant was a Government of India undertaking company, its

44 *Maharashtra Sugar Mills Ltd.* v. *State of Bombay*AIR 1951 SC 313

45 *Shivnandan Sharma* v. *Punjab National Bank Ltd*AIR 1955 SC 404

46 *Oil and Natural Gas Corporation Ltd.* v. *Petroleum Employees Union and others*2003 (2) LLN 501

area of operation being exploring natural gas and oil in different parts of the country. In Maharashtra its main task was to conduct off shore drilling at the site of Bombay High. At its site the appellant employs more that 2000 workers, including the workers at its administrative offices across the State of Maharashtra, the number 2000 includes a large number of contract Labourers as well.

On 8th September 1994 in the light of the recommendations made by the Committee to study the working of Labour Contract System in jobs related to maintenance, Utility installations, firefighting, electricians, plumbers, floor decoration, sewerage plant, electronic and telecom operations, loading and unloading crane labour etc. The Union of India issued a notification prohibiting the employment of contract labour for various works under the aforesaid categories and:

Clerks (including accounts), typists, steno typist, data operators, computer operators, store keepers, boiler operators, attendants/ helpers/peons, audio operators, drivers etc.

The Petroleum Employees Union and The General Employees Association filed a writ petition in the Bombay High Court praying for declaration of the workers referred under the Notification as direct and regular workers and absorption for the same.

The learned Single judge allowed the petition and directed the employer to absorb the workers in the light of Supreme Court's pronouncement in the case of *Air India Statutory Corporation*[47]. Subsequently upon appeal, the court in the light of *Hindustan Petroleum Corpn.*v. *General Employees Association*[48] granted an interim order, directing the appellant not to terminate the services of any of the employee except for the grounds permissible under the Industrial Disputes Act for misconduct, the appellant was further directed to treat the workers as direct employee until further directions of the court.

Issues and Held:

The argument made by the appellant was simple as such, they argued

47 Supra note 33

48 *Hindustan Petroleum Corpn.* v. *General Employees Association*(1995) 1 SCC 574

that the Decision of the learned Single Judge was based upon the Judicial Precedent of the Hon'ble Apex Court in *Air India Statutory Authority,* thus was in accordance with law when it was rendered but subsequently the very precedent upon which the Judgement was based upon has been overruled by the Supreme Court in the case of *Steel Authority of India*[49].

On this the respondent argued that the Judgement rendered in the SAIL case was prospective in nature not retrospective, wherein the express work prospective has been used as:

"*We overrule the judgement of this court in Air India Case prospectively and declare that any direction issued by an industrial adjudicator/ any court including the High Court, for absorption of contract labour following Judgement of in Air India Case, shall hold good and that the same shall not be set aside, altered or modified on the basis of this judgement in cases where such a direction has been given effect to and it has become final*"

The respondent argued that the workers under the present case have already been absorbed and have been given benefits of service thereby their position has become final, following the Supreme Court's Verdict in the Air India Case, thereby the reasoning of Judges in the SAIL Case would apply to them with prospective effect, and their status can't be disturbed.

The Court rejected the submission of the respondent and held that, the language of the SAIL judgement is unambiguous, stating that the Judgement speaks for *'absorption not to be set aside in cases where the absorption has been implemented and has become final. In other words, if absorption has taken place in pursuance of a direction of the court which has been implemented and was final. In the present case, it is clear that though an interim order was given, such a direction has been implemented on a pending appeal and the decision wasn't final'.*

They court finalizing its verdict declared that they are setting aside the decision of the learned Single Judge not because of the reason that there was any error of law but because of the supervening

49 Supra note 35

circumstances that have arisen thereafter. The learned Sessions judge was absolutely right with his reasoning and the judgement in the light of the *Air India Statutory Corporation case,* which was the good and binding law at the time, but after the overruling of the said judgement in the *SAIL case* the latter became the law at the date of hearing and final decision therefore, the court can't overlook the judgement in the SAIL Case. Therefore, the Principal Employer can't be required to order absorption of the Contract Labour working in the concerned establishment. The workmen thereby were not entitled to automatic absorption.

CONCLUSION

The Contract Labour system in India was a product of necessity, wherein during the early age of Industrialization in India, recordkeeping and formalization of ties wasn't either a big requirement nor a grave concern or practicable for the employer and the employee alike, but with the passage of time, as the laws became rigid the lack of regulations for Contract Labour resulted in unjustified exploitation of the Labourers, because of their status being in the Doldrum, the Government at that time after much deliberations came up with much needed solutions to the problem of the Hour but the solutions that were deliberated upon were either already obsolete or became obsolete with the passage of time as new problems started emerging.

The Question of absorption was one such major problem, wherein the Labourers and the Employers were clueless alike, from a utilitarian perspective, the concern of the Labourers were justified as they were fast losing their jobs to the Abolition of Contract Labour System, even though the abolition was ensured to prevent the exploitation of such workers, the subsequent abolition was resulting in a lack of source of livelihood for these same workmen. It seemed only justified to allow for absorption so as to sustain the welfare state that India stood for and providing a continual source of Income for the dejected Labourers.

But the problem arose, when a lateral shift was observed in the Indian Economy wherein we shifted from a welfare centric economy to a market economy, wherein after the Liberalization, Privatization and

Globalization policy that the Government adopted, to attract investors in the Indian Economy, the responsibility to ensure better rights and their safeguards to these market players again rested on the Shoulders of the Government

That paved the way for the debate between the rights of the dejected and the rights of the industries to happen, judiciary from time to time, adjudicated in between trying to form a balance between both the group of Rights, but subsequent pronouncements which prima facie looked as contrary to each other, created a major hurdle for a concrete mechanism to take shape.

As a matter of Prudence and Natural Law, the Court finally gave a settling verdict in the SAIL case wherein, until earned the fruits of hard work can't be tasted by anyone as a matter of gift. The Court pronounced that Absorption isn't a natural right and doesn't come automatically to any person, for absorption to happen certain criterions need to be ticked upon, until fulfilled Absorption would only remain a distant dream for the Contract Labourers across the Country.

LOOKING AT THE RIGHT TO PRIVACY THROUGH THE PRISM OF PERSONAL LAWS

Sandeep Jain[1]

Abstract

The right to privacy has seen its incredible evolution and emergence in the recent past. Though, it has always existed and recognized in a dormant manner, it has pervaded the active realm of legal discussion recently. It has been recognized and respected across jurisdictions and occupies a supreme place in the each sphere of the life of every individual. This right becomes crucially important in the domain of personal laws due to the nature of disputes involved therein. The proposition of the personal laws, not being subject to the constitutional limitations, puts the status of the fundamental right to privacy in serious jeopardy by allowing the personal laws to openly flout or disregard the fundamental right to privacy. Hence, the paper explores the dimension of the right to privacy in the international and national scenario and assesses the position of the personal laws within the constitutional framework. The paper then evaluates the extent to which the right to privacy has been respected, recognized and protected in the province of personal laws. The paper underscores the clashes of the right to privacy with open court principle and freedom of press and stresses on the difficulties raised by respecting the right to privacy within the arena of personal laws. The paper also highlights the progressive steps like the in-camera proceedings which the modern jurisdictions have undertaken in order to reconcile the clashes and makes further suggestions that may be implemented in order to achieve the proper balance between fundamental rights and cardinal principles of justice.

Keywords:*Right to privacy, Personal Laws, In-camera Proceedings, Open Court Principle, Freedom of Press.*

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I. INTRODUCTION

In the modern world, if we have to pin point a particular right that has emerged and evolved beyond every possible scope of imagination, it has to be the right to privacy. The right to privacy has travelled a long journey through ups and downs before being unanimously regarded as a fundamental human right, which forms the very essence of a dignified human life across different jurisdictions. In the Indian constitutional framework, though, the right to privacy has not been explicitly worded, it has been construed to come within the ambit of right to life and personal liberty as enshrined under Article 21 of the Indian Constitution, which is often regarded as the 'heart of the Constitution' by the active participation of the judiciary. After a long journey of being asserted as and denied the status of fundamental right, the right to privacy has been declared to be a fundamental right under Article 21 of the Constitution[2] through the unanimous judgment of a nine-judges-bench of the Supreme Court of India in the landmark judgement of *Justice K. S. Puttaswamy (Retd.) & Anr. v Union of India & Ors*.[3] Hence, anything and everything which goes against this fundamental right, can be outrightly rejected as a violation of Part III of the Indian Constitution, and hence, unconstitutional.

The importance of the right to privacy in any sphere of life cannot be undermined. However, it becomes particularly significant in the arena of personal laws as deeply personal facts about human relations within a family are exposed for judgment by a third party. Personal laws basically refers to the set of laws governing the institution of family and affairs closely related to it, like marriage, adoption, property rights, divorce, etc. as per the religious norms. The personal law deals with issues, which are too personal to a person that greatly shapes his personality and reputation in the society, and since, reputation of a man is largely shaped by the world's conception of him, the idea of privacy becomes of paramount importance in cases dealing with the above issues.

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2 The word '*Constitution*' hereinafter refers to the '*Indian Constitution.'*

3 (2017) 10 SCC 1.

The right to privacy has been given vital position in the International Charters, viz. Article 12 of Universal Declaration of Human Rights, 1948;Article 17 of International Covenant on Civil and Political Rights, 1966 and Article 8 of European Convention on Human Rights, 1950. However, too much privacy stands in contravention to the freedom of press as implicitly granted under Article 19(1)(a) of the Indian Constitution which creates a serious jeopardy as the two sides are equally important being fundamental and basic structure of the Indian Constitution.The Freedom of Press, though not explicitly worded in the Indian Constitution, has considered to be implicit under Freedom of Speech and Expression as envisaged under Article 19(1)(a) of the Indian Constitution. This has been emphasized in a plethora of judgements.[4]This paper attempts to explore the concept and dimensions of right to privacy and look at it through the prism of personal laws. The paper attempts to reflect the controversy that arise between the notion of right to privacy, on one hand and various others like freedom of press, open court principle on the other hand. The core concern of the paper is to consider the extent to which the right to privacy has been recognized, respected and protected by the sacred personal laws.

II. EXPLORING THE DIMENSIONS OF RIGHT TO PRIVACY WITH SPECIAL REFERENCE TO THE INDIAN CONSTITUTION

According to Black's Law Dictionary, privacy means '[R]ight to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned.' The right to privacy is a contested term that has been interpreted by many in the legal profession. Brandeis and Warren's influential article titled, *'The Right to Privacy'* famously described this right as *'the right to be left alone'*.[5]Legal scholars and judges alike have since built on

4 *RomeshThapar v State of Madras*, AIR 1950 SC 124; *Union of India v Association for Democratic Rights*, (2002) 5 SCC 294; *Indian Express Newspapers v Union of India*, (1985) 1 SCC 641; *Sakal Papers v Union of India,* AIR 1962 SC 305 and others.

5 S Warren & L Brandeis, 'The Right to Privacy'(1890) 4 Harvard Law Review 193.

this basic idea with theorists, such as Parent who professed that the right to privacy includes the ability to control information about oneself.[6] Meanwhile, Bloustein infuses notions of human dignity into the right to privacy by blending the right with the principle of inviolate personality.[7] He argues that the right to privacy includes the individual's independence, dignity, and integrity.[8]

1. Right To Privacy & International Charters:

The right to privacy was recognized as a significantly important human right and has been accorded its due position in various International Charters. the earliest International Charter that can be cited in this regard would be the very fundamental document pertaining to human rights, viz. Universal Declaration of Human Rights of 1948 which enshrines this right under Article 12 that prohibits all forms of unreasonable intervention with privacy, home, family, correspondence and such similar attacks on the reputation and honour of every human being and provides a right against such interventions. Further, the International Covenant on Civil and Political Rights 1966 (to which India is a party) also incorporates this right under its Article 17 in somewhat similar terms and to the same extent by providing a restriction against unlawful and arbitrary intervention with a person's privacy, home, family, correspondence, and such similar attacks on his honour and reputation. However, the European Convention on Human Rights of 1950 goes a step further in this regard under its Article 8 by recognizing every person's right to respect for his private and family life, home, correspondence and specifically providing the conditions under which this right can be curtailed or interfered with. A brief overview of these International Charters amply highlights the importance that has been accorded to the right of privacy across jurisdictions as a basic defining right of every human being. It unambiguously shows the unanimous stand of the states that the paramount right of privacy shall not be

6 W A Parent, 'Privacy, Morality and the Law' [1983] Philosophy and Public Affairs 269, 272.

7 E J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' [1964] NYULR 964, 971.

8 ibid.

curtailed by anyone, even the states except in accordance with proper law and that too only in unavoidable or compelling circumstances. The right to privacy, like various other rights, is not an absolute right and has certain inherent limitations. However, being a defining right, it cannot be curtailed or limited in ordinary circumstances. It can be limited only according to a proper law and in circumstances that make it essential, such as public order, security of the state and others.

2. Right To Privacy In The Indian Constitutional Framework:

Law, in its eternal youth, must grow to meet the demands and the needs of the contemporary society. The Constitution is often regarded as an organic document, because it is not static, rather it continues to develop as an organism as the circumstances stipulate. The right to privacy has not been enshrined within the Indian Constitution explicitly. But, through the impending trends of judicial activism, it has been held to be one of the many rights imbibed within the umbrella right to life and personal liberty as enshrined within the Article 21 of the Constitution.

In the landmark case of *Kharak Singh v State of Uttar Pradesh,*[9] the Supreme Court for the first time was faced with the question to determine the status of right to privacy within the framework of the Indian Constitution. The Apex Court declared that the UP Police Regulations[10] as unconstitutional because it violated Article 21 of the Indian Constitution through a direct clash with a person's right to privacy. The court held that privacy was a fundamental right of every human being and violation of the same goes against the spirit of the Constitution. It was expressed that the right to privacy constitutes a sub-set to the right to protection of life and personal liberty. Here, the Court had equated privacy to personal liberty.

In the case of *Govind v State of Madhya Pradesh,*[11] Mathew, J. accepted the right to privacy as a fundamental right within the Indian Constitutional framework and enunciated that the right to privacy

9 AIR 1963 SC 1295.

10 Uttar Pradesh Police Regulation, Regulation 236.

11 AIR 1975 SC 1378.

actually emanates from a combination of Articles, which includes Arts. 19(1)(a), 19(1)(d) and 21. However, the Court also stated that just like other fundamental rights, right to privacy is also not an absolute right and is bound and limited by the Constitution. Hence, the fundamental right can be curtailed in the face of compelling public interest or public health or security. Thereby, the Court by attaching the riders to this right, allowed the surveillance by domiciliary visits and held that it is not necessary that these would always be an unreasonable violation of privacy of a person. The Apex Court justified the surveillance as striking a balance on the right to privacy by stating that the right extends to persons and not to places.

Again, questions pertaining to the same came to the front in the landmark case of *R. Rajagopal v State of Tamil Nadu,*[12] also known popularly as the Auto Shankar Case. The case revolved around the publication of an autobiography of one of the convicts which amply highlighted the connection and the bond between the prison authorities and a few prisoners and highlighted the deplorable conditions in which the prisoners were forced to survive in. the publication was however became a far-fetched reality as the right of a prisoner to privacy was questioned. Answering to the confusion, the Apex Court declared that right to privacy may not be explicitly worded but still it is implied under Article 21, and one of its dimensions refers to the right to be left alone. The court further clarified that that this right to privacy is a fundamental right and extends even to the prisoners of a jail.

Thus, on an analysis of the above provisions and various cases, it may be observed that right to privacy forms the very basis and fundamental of a dignified human life. That is why, not only the International Charters, but even the Indian Constitution has given a supreme place to this right by giving it the status of a 'fundamental right' as culled from Article 19, 21 and Directive Principles of the State Policy. Finally, all the remaining air of confusion was removed by the landmark judgment of *Justice K. S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*[13] which discussed all the previous judgments on the issue and

12 AIR 1995 SC 264.

13 *Justice K. S. Puttaswamy* (n 2).

held that the right to privacy constitutes a fundamental right under Art. 21 of the Indian Constitution.

III. EVALUATING THE POSITION OF PERSONAL LAWS WITHIN THE INDIAN CONSTITUTIONAL FRAMEWORK

According to the Black's Law Dictionary, Personal Laws are defined as '[T]he portion of law which constitutes all matters related to any individual, or their families'.[14]According to Webster's Dictionary, Personal law refers to, '[L]aw that applies to a particular person or class of persons only wherever situated - distinguished from territorial law'.[15]However, these definitions seem to be very vague and general. In this regard, Cretney has aptly observed that any definition of family law or personal law must incorporate a wide variety of elements, forms, and functions in order to be complete and comprehensive and has to deal with the issues of status and then the various rights and obligations that flow from a particular status.[16] This is because unlike other areas of law, in personal laws, rights are determined according to the status of an individual and here, the rights do not determine the status of a person. The functions of the personal laws as attributed to it by John Eekelaar clarifies to a great extent the meaning and concept of personal laws. The functions as highlighted are:

a) Providing mechanisms and rules for adjusting relationships between family members when family units break down;

b) Providing protection to individuals from possible harms suffered within the family; and

c) Supporting the maintenance of family relationships.[17]

However, the core concern here, is to examine the place of personal laws in the constitutional framework; i.e., to inspect the validity and

14 <http://thelawdictionary.org/personal-law/> accessed 1 November 2018.

15 <http://www.merriam-webster.com/dictionary/personal%20law> accessed 5 November 2018.

16 J M Masson et al., *Cretney's Principles of Family Law* (8th edn, Thomson Sweet & Maxwell 2008) 1.

17 M Freeman, *Understanding Family Law* (1st edn, Sweet & Maxwell 2007) 6.

legal standing of personal laws vis-à-vis the constitution. It has been observed that often the provisions of equality and non-discrimination contained in a modern constitution stand in direct opposition to the religious or customary, gender-discriminatory personal laws.[18] These various discriminatory and irrational[19] provisions have not only caught the attention of the judiciary, but have also come under the scrutiny and criticism of the same. This is significant and crucial because if the personal laws are kept out of the constitutional framework and are not bound by its limitations, the personal laws can openly flout the constitutional limitations and make a mockery of fundamental rights that are held to be inviolable and sacred by the Constitution.

Article 13(1) of the Constitution stipulates that all the customary and statutory laws, in pre-constitutional existence, must confirm to the constitutional mandate. This raises a moot question whether personal laws are 'laws in force' as mentioned under Article 13. This has been analysed by the courts as various cases and challenges were presented to it over time.

One of the earliest constitutional challenges to the existence of personal laws came up in the path-breaking case of *State of Bombay v Narasu Appa Mali,*[20] where the Bombay Prohibition of Bigamous Marriages Act, 1946 was challenged on the ground that it stipulated for monogamy in case of Hindus, and hence was violative of the provisions of equality under Article 14 and non-discrimination under Article 15 of the Constitution, because the Muslims were allowed to contract polygamous marriages. The court held that, personal laws are not the 'laws in force' as mentioned under Article 13 of the Indian Constitution as they are based on precepts and customs, and hence, the principles enshrined in Part III of the Constitution would not

18 Flavia Agnes, *Family Law: Family Laws & Constitutional Claims,* vol 1 (Oxford University Press 2011) 145.

19 Irrational provisions have been used to judge the personal laws from the perspective of equality and non-discrimination. It did not intend to hurt or devalue any personal beliefs of a particular religious sect or community. This aspect was also observed in *Ahemdabad Women Action Group v Union of India*, AIR 1997 SC 3614.

20 AIR 1952 Bom 84.

apply to the personal laws. Thus, the judiciary through this judgment excluded the personal laws from the ambit of Constitution.

In the subsequent case of *Srinivasa Aiyarv Saraswati Ammal,*[21] where it was argued that the right to practice polygamy was based on Hindu religious practices and the ban on it hinders their right to practice religion; the Madras High Court held that even if the term 'laws in force' includes personal laws, the Act does not offend Article 15 which stipulates non-discrimination on the basis of sex.

However, in the latter judgment of *C. Masilamani v Idol of Sri Swaminathaswami Thirukoli,*[22] the Supreme Court implicationally overruled *Narasu Appa Mali*[23] and *Srinivasa Aiyar*[24] and held that the personal laws come within the purview of Article 13 and hence are subject to the application of Fundamental Rights. The Court, clarifying its stand on personal laws, declared:

The personal laws conferring an inferior status on women is anathema to equality. Personal laws are derived not from the Constitution, but from the religious scriptures. The laws thus derived must be consistent with the constitution lest they became void under Article 13 if they violated fundamental rights.

The Court recognized the right of a woman to execute a will in respect of the property acquired or possessed by her, under Section 14 of the Hindu Succession Act, 1956. This right of a woman was held by the court to be an implicit right and was considered to be part of Articles 14, 15 and 21 of the Indian Constitution, which the judgment referred to as '*the trinity of justice- equality, liberty and dignity of person*'. Thus, through this judgment, it may be deduced that personal laws are 'laws in force' and hence, may be struck down, if they are found to be violative of fundamental rights.

Owing to the above decision, the Kerala High Court in the landmark judgment of *Ammini E. J.v Union of India,*[25] struck down Section 10 of

21 AIR 1952 Mad 193.

22 (1996) 8 SCC 525.

23 *Narasu Appa Mali* (n 20).

24 *Srinivasa* (n 21).

25 AIR 1995 Ker 252 (FB).

the Indian Divorce Act, which required women to prove adultery along with cruelty or desertion against their husbands to get a decree of divorce, as violative of Article 14, 15 & 21 of the Indian Constitution and introduced the notion of right to life with dignity, and implicitly rejected the decision of the Madras High Court in the case of *Dwarkabai v Prof. Mainam Mathews,*[26] which upheld the above provision. Similarly, in *Mary Roy v State of Kerala,*[27] the court declared two pre-independent statutes- the Travancore Christian Succession Act, 1910 & Cochin Christian Succession Act, 1922 which discriminated against daughter in relation to the share of property, though it was done based on technical grounds.

One of the landmark controversies, in the context of clash between the right to privacy and personal laws came up in 1983 in the case of *T. Sareetha v. T. Venkatasubbiah,*[28] where the Andhra Pradesh High Court struck down Section 9[29] of the Hindu Marriage Act, 1955 as unconstitutional, as it violated the right to privacy and human dignity guaranteed by Article 21 of the Constitution and causes the grossest form of violation of an individual's right to privacy. It denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being. However, the Delhi High Court in 1984, in the case of *Harvinder Kaur v. Harminder Singh,*[30] upheld Section 9 of the Hindu Marriage Act, 1955 and remarked:

Introduction of Constitutional Law in the home is most inappropriate; it is like putting a bull into a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life, neither Article 21 nor Article 14 have any place.

Later, in the same year, the Supreme Court affirmed the Delhi High Court decision in the case of *Saroj Rani v. Sudarshan Chhadha.*[31]

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26 AIR 1953 Mad 792.

27 AIR 1986 SC 1011.

28 AIR 1983 AP 356.

29 Hindu Marriage Act 1955, Section 9 deals with Restitution of Conjugal Rights.

30 AIR 1984 Del 166.

31 AIR 1984 SC 1562.

However, it does not mean that the right to privacy has been completely rejected by the court in adjudicating the matters pertaining to family law. In the path-breaking judgment of *Rayala M. Bhuvneswari v. Nagaphomender Rayala*,[32] the Apex Court, in a divorce petition, did not allow the telephone recordings of the wife to be presented as evidence as it considered to be a gross violation of a person's right to privacy. The Court held that the husband has actually violated his wife's fundamental right to privacy and he cannot compel her or ask the court to compel her to go under voice test and other such analysis as it would cause an infringement of her personal right to privacy.

Rather than advocating a universalized position regarding its authority, the courts have adopted a cautious 'case-to-case' basis to deal with the domain of the 'sacred and the personal'. A clear set of principles to deal with the relation of Article 14, 15 & 21 on one hand, and Article 25 on the other, is yet to emerge.[33]

IV. PRIVACY CONSIDERATIONS UNDER PERSONAL LAWS

There has been an equally contested debate between the scholars for the purpose of affording superior position to right to privacy or not. Whereas some scholars have strongly advocated for affording greatest possible protection to the right to privacy, there is another set of scholars strongly advocating against the same as this would jeopardize a lot many other aspects of justice. Brodie has remarked:

Privacy includes what the state has no right to know as well as what the state can know but should not disclose. The closed file should be equated with the closed door of the family home... When there is doubt it is better to be overcautious. It is easy to remedy too much privacy; it is impossible to remedy the effects of too little privacy.

Boyle, on the other hand, argues that the reason for the failure of the law in cases of domestic violence is that the family and its internal dynamics are perceived as private. In addition to that is a deeply entrenched view that, regardless of evidence to the contrary, the family is ex-hypothesis an innately good institution both from the point of view of its members and society as a whole. As an American

32 AIR 2008 AP 98.

33 Agnes (n 18) 148.

writer commenting on the nineteenth century has ironically stated, all husbands and wives lived together in perfect amity; all children loved the parents to whom they were indebted to the gift of life; and if these things were not true, they should be, and even if one knew that these things were not true he ought not to mention it.[34]

The above two arguments amply show the complexity in balancing and giving due consideration to a person's privacy and at the same time do justice to the society at large. Such tussle and struggles are reflected here under:

1. Balancing The Open Court Principle & Privacy:

The quote that most aptly summarise this aspect of the controversy has been given by Jeremy Bentham and has been often quoted in various works. The quote goes as follows:

In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place in any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice... Publicity is the very soul of justice. It is the keenest spur to exertion and thesurest of all guards against improbity. It keeps the judge himself while trying under trial.[35]

As the maxim goes, *'Quad non est in acti, non est in mundo'* which means *'That which is not in the record does not exist'*[36]amply reflects and throws adequate light on the importance of the cardinal rule of open-courts.The principle of open court is considered to be of cardinal importance due to its contribution to the information circulation relating to the judicial process and consequently educating the public and enhancing their confidence in the transparent and impartial judiciary.This is utterly crucial for the judiciary to subsist itself and to sustain the authority of rule of law.[37] Moreover, it greatly contributes

34 F. Bates, 'Privacy Considerations in Family Law' (1997) 45 Chitty's Law Journal & Family Law Review 12, 17.

35 J. Bowring, *The Works of Jeremy Bentham*, vol. 9 (Edinburgh Tait 1843) 493.

36 C. Vismann, '*Out of File Out of Mind*' in Wendy Hui-Kyong Chun &Thomas Keenan (eds), *New Media, Old Media: A history and theory reader*, (Routledge, Taylor and Francis 2006) 97.

37 B McLachlin, 'Courts, Transparency and Public Confidence - To the Better Administration of Justice' (2003) 1 Deakin Law Review6.

towards public awareness of law and judicial approach to various disputes. The persistent review by the public keeps every judge alert about his duties and ensures the proper administration of justice.

The advantages of the open court principle are not denied, but often the potential threats that are created by the same are often left unattended. The private details of the parties are exposed to the court and the public, leading to the potential threats of various consequences such as violation of informational privacy. The Canadian Judicial Council, back in 2003, has significantly highlighted the possibility of the misuse of personal information that is listed on public court documents and its possibility and potentiality for identity theft.[38]Apart from that, there is also the possibility that the public may discriminate against or have bias for the parties involved in cases pertaining to family laws. In the family law context, the open court principle often involves exposing the private details of family affairs. Allegations of abuse, adultery, and parental neglect can be raised in statements of claim, regardless of the truth.[39] Personal information, such as parties' names, dates of birth, account statements, and residential addresses are submitted to courts for cataloguing and evidentiary purposes.[40] No matter what the context, anonymity is essential to the protection of the individuals.[41]

Despite the open court principle having some serious costs and threatening the fundamental human right to privacy of the individuals, the principle cannot be ousted as it forms the very foundation stone on which the entire structure of public law and justice delivery system is built upon. Justice Fish has aptly statedin this regard in the case of *Toronto Star Newspapers Ltd vOntario,* 'In every constitutional climate, the administration of justice thrives on exposure to light-and withers under a cloud of secrecy'.[42]Thus, in a nutshell, the open court

38 <http://www.cjc-ccm.gc.ca> accessed 20 November 2018.

39 J C Mayoue, *Balancing Competing Interests in Family Law*(2nd edn, American Bar Association2003) 5.

40 F Jamal, 'Anonymity in Family Courts: Stop Naming and Shaming'[2011] Ontario Bar Association 1.

41 Mayoue (n 39).

42 [2005] 2 SCR 188.

principle ushers a strong wave of public confidence in the integrity of the judiciary on one hand, but at the same time puts the basic right to privacy of individuals in serious jeopardy. That is why, the Supreme Court reduces privacy to a quasi-constitutional status in *Southam,* where Dickson J. says the purpose of Article 8 of the Charter is 'to protect individuals from unjustified state intrusions upon their privacy."[43]

2. In-Camera Proceedings:

'The first cost of the open court principle is to privacy'.[44]

The above quote as per the former Canadian Chief Justice amply highlights the damages that the open court system causes. This is intrinsically connected to the right to privacy and reputation. Reputation is perceived as some respect that a man earns in the opinion of the public.[45] In matrimonial cases, particularly the disputes pertaining to judicial separation, restitution of conjugal rights and divorce-the common grounds that are often pleaded inter alia are adultery, cruelty, desertion, impotency, virulent and incurable form of leprosy, communicable form of venereal disease etc. Cruelty may be extended to include physical or even mental shock, excessive sexual intercourse or complete denial or refusal to sexual intercourse, and may be stretched to include physical assault, molestation, sodomy and bestiality within its ambit. These grounds in matrimonial disputes have been duly recognized across various personal laws under various legislations viz. the Hindu Marriage Act, 1955;[46] the Indian Divorce Act, 1869;[47] Special Marriage Act, 1954;[48] Dissolution of Muslim Marriages Act, 1939.[49] These grounds are directly linked with the reputation of the party in proceedings. In such cases, evidences adduced are often of revolting character having the potential to injure the finer instincts

43 *Hunter v Southam*[1984] 2 SCR 145, 161.

44 McLachlin (n 37).

45 Azizur Rahman 'Proceedings-In-Camera' [1995] JTRI Journal 1.

46 Hindu Marriage Act 1955, Sections 9, 10 and 13.

47 Indian Divorce Act 1869, Sections 10 and 18.

48 Special Marriages Act 1954, Sections 25 and 28.

49 Dissolution of Muslim Marriages Act 1939, Section 2.

of the party and drastically affecting their reputation directly in the eyes of the general public. This often acts as a severe deterrent to public to access justice.

This is why, despite being a cardinal principle of law, open court principle is criticised and demands are made to put certain limitations on the same. Such demands are often put forward by the feminist organizations in order to curb the deterrent impact of open court principle. This is because the open court principle exposes the secrets of marital life to the public which is way too personal for every human being. Not only that, it also discourages even the aggrieved to tell the truth due to the fear of being propagated and misunderstood in society.[50] These are the reasons why the legislature has recognized the concept of 'in-camera proceedings' under various statutes.

In *Janaki Ballav v Bennet Coleman and Co. Ltd.*,[51] the prominence of camera proceedings has been aptly explained precisely as follows:

In exercise of its discretion and if court thinks fit, the court may order that the trial of any suit may be held in camera and the public generally shall have no access or to remain in the court room or building used by the Court. The exception by its very nature requires exercise of due care and caution before the court directs trial of a suit out of the public gaze.… The allegations, the words and sentences are so filthy and obscene that generally a normal person much less children adolescents, young girls, ladies and men will hate to hear and read... In the background of the peculiar facts of the case and keeping the principles of law in the background, I am of the view that the administration of justice will not suffer if parts of the proceedings of the suit are tried in camera. The evidence recorded in camera shall not be printed and published in any newspaper, magazine, periodical, pamphlet, and book or otherwise.

The concept of in-camera proceeding is not an absolutely foreign one. The importance of the same has been duly recognized by the legislators and this is evidenced by the incorporation of the provisions providing for the same in the appropriate cases. The provisions for carrying on proceedings in-camera can be observed under the proviso appended to Section 153B of the Code of Civil Procedure, 1908 which was inserted by an amendment in the year 1976 which empowers

50 Rahman (n 45).

51 AIR 1989 Ori 225.

the judge to exclude the general public or particular person from the proceedings at any stage if he thinks it necessary. The above provision is not the lone ranger in the Indian legal framework. Section 327(2) of the Code of Criminal Procedure, 1973 is similarly worded providing for in-camera trial of certain offences.

Not only the procedural laws prescribe for such in-camera proceedings, the personal laws have even prescribed for the same in apt cases in order to strike a proper balance between the difficulties posed by the open court principle and the need to redress the personal law disputes. In this regard, Section 53 of the Indian Divorce Act, 1869; Section 22 of the Hindu Marriage Act, 1955; Section 33 of the Special Marriage Act, 1954; Section 11 of the Family Courts Act, 1984 can be specifically investigated. These provisions empowers the court to exclude the public at large from the proceedings when it deems necessary to do so and even enables the court to prohibit the publication of such proceedings. No written orders from the court are required where in-camera proceedings have been statutorily mandated as in such situations; the said provision shall have the force of an injunction in itself. Not only that, the law also deals and provides for consequences on such orders being flouted by the irresponsible persons and provides sanction to enforce its implementation. For instance, Section 22(2) of the Hindu Marriage Act, 1955 provides for a fine of up to one thousand rupees forprinting or publishing any matter in contravention of the court orders.In *V.C. Shukla v Tamil Nadu Olympic Association,*[52] the Full Bench in this regard observed:

'If violation of the court's order will be ignored, there will be nothing left save for each person to take the law into his own hands. Loss of respect for the courts will ultimately result in the destruction of the rule of law and ultimately the society'.

It must not be forgotten that allowing the in-camera proceedings in the appropriate cases requires due exercise of care, caution and diligence. In-camera proceedings cannot and should not be allowed on the mere demands of the party as it comes at the great cost of public awareness and judicial transparency. It is often essential to allow the public to

52 AIR 1991 Mad 323.

access such proceedings in order to show the ugly face of realities with the object to create fear and hatred in public mind against such offences.But, it must not be allowed to take a reverse effect altogether, which is happening in the present context.[53] Thus, the luxury and privilege of in-camera proceedings is to be used very cautiously so that the individual's right to privacy is duly respected in the appropriate cases and the public access to the court and the reliability and public confidence in the court system is not compromised by the inappropriately wide use of the in-camera proceedings.

3. Clash of the Right to Privacy & Freedom of Press:

When the court, in contravention to the open-court principle conducts the proceedings of disputes under a closed arena; i.e., in-camera, it restricts the public right to attend court proceedings of such cases. Moreover, the court may also reserve the right to publish any content relating to the dispute in consideration for the protection of the privacy of the parties to the dispute. Thus, there is a clash between the two fundamental rights of right to privacy and right to freedom of press.

One of the recent & landmark cases in this context came to the Supreme Court of Canada in the year 2012. The Supreme Court of Canada through its remarkable pronouncement in *AB v Bragg Communications Inc.*[54] has made it clear that anonymity must be and can be protected in regards to those cases which involve children. The above mentioned case was pertaining to the issue of cyber-bullying involving a child of less than 15 years of age and was actually a challenge against the publication sought by the child. Though it was argued to be against the freedom of press and a violation of the open court principle, the court did not allow the publication. Despite the importance of the matter that was gaining grip in the recent times and the imperative nature of incident to be known by the public, the court stayed with its ban as the subject matter involved the sensitive element in the form of children, which are in need of special protection. Preserving anonymity for children may be intrusive, but only to the minimum

53 Rahman (n 45) 4.

54 AIR 2012 SC 46.

extent, on freedom of expression which is legally justified and that is why, AB was entitled to proceed but only anonymously.[55]

The Indian Apex Court in *Naresh v State of Maharashtra,*[56]has opted for a different approach than that discusse above. The Indian Apex Court has declared that no prohibition on publication of such proceeding can last forever. It clearly and unambiguously states that any publication ban cannot be in perpetuity as it would be in contradiction to the freedom of press as read under Article 19(1)(a) of the Constitution of India. However, the Court added that a few comments about a case that has been heard and finally decided are protected under Section 5 of the Contempt of Courts Act.

The analysis and an in-depth look at the provisions signify that the court is completely justified in holding the trial behind closed doors or in forbidding the publication of the proceedings during the pendency of litigation. However, this power of the court appears to cease on the termination of the proceedings, which often defeats the entire purpose of the provision. Interestingly, Section 22 of the Hindu Marriage Act 1955 marks a deviance from the existing law in this regard by not only prohibiting the publication of such proceedings during the pendency of the proceedings but by prohibiting such publication in perpetuity. It needs to be emphasized that it only allows the publication of the Supreme Court or High Courts judicial pronouncements and that too only after attaining the prior permission for the same. Therefore, it certainly implies that the judicial pronouncements of the subordinate courts cannot be published even with the prior permission of the court, thereby permanently prohibiting publication even after the delivery of the judgment. The provision itself is violative of Fundamental Rights in view of the observation made in *Naresh v. State of Maharashtra* and how the said provision shall claim justification is yet to be explained.[57]

V. CONCLUSION

The importance of right to privacy for a dignified human life needs

55 [2012] 2 SCR 567.

56 AIR 1967 SC 1.

57 Rahman (n 45) 4.

no explanation or justification. It is an unopposed proposition that right to privacy has been rightly considered as 'the right most valued by civilized men'. The position accorded to this paramount right in the arena of personal laws is a bit confusing as it appears to be a combination of contradictions. On one hand, it appears that the right to privacy has been duly recognized, respected and limited the autonomy of the personal laws and have acted as severe limitations upon the latter. This is exhibited and demonstrated in the form of in-camera proceedings which has been given statutory basis under various legislative frameworks. On the other hand, these steps and acts of respecting the privacy of individuals has come under the severe criticisms of several scholars as it fails to answer the loss of faith of people in judiciary in such matters and the lack of awareness among the public by making the proceedings private. Moreover, the temporary ban on the publication of such cases violates the freedom of press. Anonymity is yet to be followed in reporting of such cases. The entire purpose of putting a temporary ban on publication is defeated, when the publication is later allowed with full details, because it leads to the public response and stigmatization of the parties involved in such proceedings, leading to the infringement of their right to privacy and right to dignified human life. As anonymity is followed in rape-cases, similarly the suits under the family law calls for the same, because often the contempt, hatred and opprobrium that the society imposes upon individual often goes beyond the extent of toleration, leading to suicides and other such acts, which acts to the greater detriment of the society. Privacy is a special kind of independence which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns.This is not a right against the state, but against the world. It may be said that public interest does not prevail over private interest absolutely and unless the individuals are valued in a society, development of society would be a far-fetched dream. To conclude, it may be said that personal laws has certainly covered miles to respect privacy of an individual, but there are still miles to be covered in this regard.

International Instruments on the Indigenous People and Response of India with Special Focus on Education: An Overview

Shristy Banerjee[1]

Abstract

It is believed that the strength of a society lies in the role of education as it fortifies training, development and allocation of its manpower resources. Education empowers disadvantaged groups with increased efficiency and ability to protect their interest, raise voice against oppression and make them politically conscious. All this leads to synergic relationship between human development and social development. With this perspective some major measures were taken at the international level and also on the national level. Considering that our country has a vast population and to capture the potential demographic participation and upgrading the overall quality of individual and society constitution drafters has given special place to education. Judiciary also in playing its role of safeguarding basic rights in Part III of the constitution has read education as a very much part of life and liberty in Article 21 which was also given eminence later by including a separate article i.e. Article 21A. Envisioning the special needs and desideratum of tribal population there are a range of provisions in the constitution and in policy frameworks providing for their special status and rights. But in spite of various efforts the status of the tribal education is not very good. This article explores the some major international and national measures for the upliftment of the tribal population.

Keywords: *Judiciary, Constitution, Education, Policy*

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Introduction

At the end of World War II there was no international mechanism dealing with indigenous people and their issues. To the extent, they were considered as an impediment in the development process in many countries. The initial measures adopted for these groups, from the early 1950s to the early 1970s, emulated the 'top-down' development approach in which international community was deciding what was best for indigenous peoples even without consulting those who were directly concerned. In early 1950s, the International Labour Organization (ILO), however, started working directly on their concerns. ILO adopted two Conventions that are recognized as the initial international measures working specifically for the rights of indigenous peoples with the close participation of the rest of the international community. The only international Conventions directly applicable to indigenous peoples are Conventions No. 107 of 1957 and No. 169 of 1989, adopted by the ILO.[2] The main focus of this paper in to analyse the three main international documents on indigenous peoples i.e. ILO Convention no. 107 & 169 and UNDRIP and the stance of India with special reference to education.

Key Words: *Tribal, Indigenous, Rights, Education, UNDRIP, ILO.*

ILO Background and Conventions on Indigenous Peoples

The International Labour Organization was the first intergovernmental organization which focused to address some specific indigenous people's issues and concerns. Its involvement in indigenous issues was in fact a natural upshot of its role on labour and social policy with the continued relevance even today. In the early 1920s the ILO began work on the situations of 'native workers' in the colonies of European powers and this motivated the adoption of the first ILO's human rights instruments, the Forced Labour Convention in 1930 which also marked the foundation of ILO's long-standing mission of adopting international law dealing with the situation of dependent

2 Lee Swepston, 'Indigenous Peoples in International Law and Organisations' in Joshua Castellino and NiamhWalsh (eds) *International Law and Indigenous Peoples* (Martinus Nijhoff Publishers, 2005).

peoples. The ILO functioned as a lead agency because of its vast experience in 'Andean Indian Programme' (1952- 1972) which came into existence as an integrated plan for regional development involving several countries and the indigenous peoples live there.[3] The major object of 'Andean Indian Programme' was to "modernize" the living conditions of indigenous communities in the Andean highlands and to integrate them into the other national societies.[4]

The "Andean Indian Programme" paved the way for ILO to consider the situations of indigenous peoples worldwide. ILO endeavours started with a detailed study on the living and working conditions of indigenous peoples which was published in 1953. It was at this stage that the ILO began using the terms 'indigenous and tribal peoples' or 'populations' – terms, which at that time were used interchangeably and had not yet acquired the major significance they would later have.[5] During the Andean Indian Programme, the other UN system organizations concurred that the ILO should develop an international convention on the subject on behalf of entire UN system and ILO came with the Indigenous and Tribal Populations Convention 1957 (No. 107) with the active involvement of the rest of the UN system.

- Convention of 1957- *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (No. 107)

The International Labour Organisation in its General Conference in its Fortieth Session on 5 June 1957 at Geneva decided to adopt certain proposals with the goal to protect and to integrate indigenous and other tribal and semi-tribal populations in independent countries. The focal point of the Convention was to improve the living and working conditions of these segments of the population, both for humanitarian causes and in the interest of the countries. The Convention consisted of 37 Articles divided in ten parts providing that governments should take the primary responsibility to assure the protection of these

3 ibid 57.

4 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/project/wcms_304059.pdf>accessed 08 October 2018.

5 Swepston (n 1) 57.

populations aiming their progressive integration into their respective national communities and to take efforts to improve their living and working conditions. The list of items included in the convention consolidate subjects like land, recruitment, conditions of employment, vocational training, handicrafts and rural industries, provisions for social security, health, education, means of communication and administration. Article 6 of the Convention specifically provides that in the plans for over-all economic development of areas, improvement of the conditions of life, work and level of education of these populations should be given a high priority.[6]

a) Flaws of Convention No. 107 that showed the way to Convention No. 169

Though a pioneer document on the topic, ILO Convention of 1957 invited some major condemnation that it took a condescending outlook towards indigenous and tribal peoples by referring to them as 'less advanced' and the idea that eventual integration is an answer to all the problems associated by some countries because of their continued existence was also criticised. The presumption that indigenous populations would in due course disappear as separate groups once they had the opportunity to participate fully in national society and to be benefitted from socio-economic development began to fade away as indigenous peoples manifested their intention to maintain their distinctive identity.[7]

The document though initiated the first ever recognition of the indigenous people's rights and concerns yet criticized that it largely spoke for assimilationist goals and was inscribed the idea that saw Indigenous society as lower on the evolutionary scale than those of European origin. The idea that the "process of losing their tribal characteristics" is inevitable as articulated in the convention was also criticized on the ground that such clauses make possible their oppression without consequence. John H. Bodley, a cultural anthropologist also pointed out "ironically, undisturbed tribal peoples

6 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107> accessed 03 October 2018.

7 Swepston (n 1) 56.

were doing just fine in all these areas before outside intrusions. 'Integration' created the very conditions of impoverishment that it intended to prevent."[8]Despite of its criticisms, Convention no. 107 is always valued of taking first immense step in the direction of promoting rights of indigenous people and securing equality by discouraging forced assimilation or displacement, acknowledging Indigenous rights to the land, and prioritizing education for Indigenous peoples in their own languages.

- Convention of 1989- *Convention concerning Indigenous and Tribal Peoples in Independent Countries (*No. 169)

The Governing Body of ILO responded to the growing criticisms against Convention No. 107 by convening a Meeting of Experts in Geneva in September 1986, with a view to seek advices on whether and how Convention No. 107 should be modified. All the experts unanimously that Convention No. 107 needed a revision and concurred that its integrationist approach should be removed and patronizing language should be replaced with an attitude of dignity and respect. In this meeting a significant agreement was also reached identifying some other elementary principles in many other respects.[9] All these solutions were deliberated in 1988 and 1989 conferences of ILO paved the way of the adoption of the Convention No. 169. The revised convention took a broad approach to the rights of indigenous and tribal peoples. It took a wide perspective in its outline referring to the need to respect indigenous people continued existence and their ways of life, and to involve them fully in decisions pertaining to them. It covered varied range of their rights and intended to assure greatest degree of autonomy. The Convention covered diversified matters related to indigenous people and is not confined to 'labour' only.[10] The Convention consisted of forty four articles expanded in ten parts.

The Convention casts the responsibility to the governments to develop a co-ordinated and systematic action to protect the rights of these

8 Alexandra Xanthaki, "Indigenous Rights in International Law Over the Last 10 Years and Future Developments", (2009) 20 MJIL36.

9 Swepston (n 1) 57.

10 Swepston (n 1) 58.

peoples and to guarantee respect for their dignity with the involvement of the peoples concerned. The Convention also declares that indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected. Part VI of the Convention which specifically deals with education insists in Article 26 thatspecial measures should be taken to guarantee the opportunity to obtain education at all levels on equal footing with the other communities of the nation. The Convention also advocates in Article 27 that to deal with their special needs education services and programmes shall be devised and put into operation with their co-operation and shall also incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations. Article 28 prescribes that indigenous children should be taught in their own language wherever possible and also to take adequate measures to give prospects to indigenous peoples to get fluency in the national language or in one of the official languages of the country. It also asserts to preserve and promote the development and practice of the indigenous languages of the peoples concerned.[11]

Since the convention adopted in 1989 the discourse on issues of indigenous peoples became more active. One gap that was identified in this document was that it is not explicit on the protection of intellectual property rights. One more criticism was the absence of explicit assertion of the right of self- determination.[12]

India's Stance on ILO Conventions 107 & 169

Although, the Government of India by and large always supportive of international law and organizations in the first decade of independence, but lately India has started adopting a determined stand against any international arrangement or forum that it perceives as flouting on its internal policies, principally relating to individual rights with

11 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 27, September 2018.

12 Swepston (n 1) 59.

a significant exception to this rule i.e., World Trade Organisation. India is one of the few countries in the world that has categorically rebuffed to sign the Rome Statute of International Criminal Court, also repudiated to sign the Optional Protocols to the International Convention on Civil and Political Rights (ICCPR), or the International Convention on Economic, Social and Cultural Rights (ICESCR) in continuation of the position with the Constitutional advertence, by which international agreements are applicable in India only after they are implemented through national legislation. Over the past few decades, this reluctant approach was extended to some international agreements concerning rights and one of them is ILO Convention no. 169. Since 1919, India has been the member of ILO with various conventions in force. Regarding ILO Conventions on Indigenous people, India has ratified only Convention no. 107 and did not ratify Convention no. 169. India has submitted reports albeit sporadically to the ILO on matters covered by Convention no. 107 and the Conference Committee alongwith The Committee of Experts have made stark observations on the reports.[13]The Convention no. 107 has been largely regarded as outdated because of its narrow approach, even though some of its provisions on land rights have been taken as relatively progressive and conducive towardsthe indigenous people's right and the individual or collective ownership over the lands they occupy by tradition. The Convention which covers a wide-ranging matters that includes employment, occupation, rights to land and education in indigenous languages, has been now closed for ratification but remains binding in 18 countries,[14] which have not yet renounced it or ratified its revised version i.e., Convention no. 169.[15] In these 18 countries, the Convention no. 107 can still be helpful as a mechanism to guarantee

13 C.R. Bijoy, Shankar Gopalkrishnan, (eds.)*India and the Rights of Indigenous Peoples*, (AIPP 2010).

14 Countries- India, Pakistan, Iraq, Angola, Portugal, Bangladesh, Cuba, Dominium Republic, Egypt, Ghana, EI Salvador, Guinea Bissau, Syria, Tunisia, Haiti, Malawi, Panama and Belgium.

15 BirgitteFeiring,*Indigenouspeoples'rightstolands,territories,andresources*, <http://www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf> accessed 12 October 2018.

definite minimum rights to indigenous and tribal people. On the other hand, the ILO Governing Body and the ILO Committee of Experts on Application of Conventions and Recommendations has called all the countries that have ratified Convention no. 107 to consider the ratification of Convention no. 169. India was among the first countries that had ratified Convention no. 107 but showed extreme reluctance to agree to or acknowledge the international framework demonstrated primarily in ILO Convention no. 169 by rejecting the very term 'indigenous people'.It was contended by India that all Indians are indigenous peoples and thatthe Convention is particularly impervious towards any orientation ofthe rights of indigenous people to self-determination, autonomy or self-governance.[16]

Indigenous People's Rights and Issues and the United Nations Human Rights Mechanism

Over the past four decades, uncovering of indigenous people issues and acknowledging their rights, have received a significant attention in the arena of international law and policy, as an upshot of the movements driven by civil societies, indigenous peoples, regional, domestic and international associations. There is no authoritative definition of indigenous people under international law, though ILO Convention on Indigenous and Tribal Peoples categorize them as tribal and indigenous people. Nonetheless, there are some accepted criterions that largely help to comprehend the concept of indigenous peoples. One of the main criteria is self-identification and those recommended by Jose Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minoritiesin his "Study of the problem of discrimination against indigenous populations" includes- "Historical continuity with pre-invasion and/or pre-colonial societies that developed on their territories; Distinctiveness; Non-dominance; and A determination to preserve, develop and transmit to future generations their ancestral territories and identity as peoples in accordance with their own cultural patterns, social institutions and legal system." The Study offered the corking definition of indigenous peoples- "Indigenous communities, peoples and nations

16 Swepston (n 1) 59.

are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."[17]Later the United Nations Permanent Forum on Indigenous Peoples laid emphasis on their distinct political, economic or social systems, distinctive culture, language, their string association to territories and surrounding natural resources in addition to the criterion as given in Jose Martinez Cobo study.

1. Working Group on Indigenous Populations (WGIP)

In early 80s the United Nations started becoming more concerned on indigenous issues and as a consequence in 1982, the Working Group on Indigenous Populations (WGIP) was established as a subsidiary organ to the Sub-Commission on the Promotion and Protection of Human Rights which thereinafter provided an opportunity for these people to raise their issues at the UN and to share their experiences. The WGIP was s subsidiary organ of the Sub-commission and was located at the lowest level of the hierarchy of UN Human Rights Mechanism and thereforeits recommendations took long to reach General Assembly. In order to reform this situation, the Human Rights Council adopted resolution with the objective to discuss the most apposite machinery to continue the work of WGIP as a result of which Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was established in 2007.[18]

2. Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was establishedby the Human Rights Council, the UN's main human

17 <https://www.un.org/development/desa/indigenouspeoples/publications/2014/09/martinez-cobo-study/> accessed 23, October 2018.

18 <https://www.un.org/development/desa/indigenouspeoples/about-us.html> accessed 26, September 2018.

rights body, in 2007 under resolution 6/36 as a subsidiary body of the Council. Its mandate was then amended in September 2016 by Human Rights Council resolution 33/25.The Expert Mechanism is composed of seven independent experts on the rights of indigenous peoples. The experts are appointed by the Human Rights Council which is to give due regard to recognized competence and experience in the rights of indigenous peoples, experts of indigenous origin, and gender balance. The Expert Mechanism provides the Human Rights Council with expertise and advice on the rights of indigenous peoples as set out in the United Nations Declaration on the Rights of Indigenous Peoples, and assists Member States, upon request, in achieving the ends of the Declaration through the promotion, protection and fulfilment of the rights of indigenous peoples.[19]

3. UN Permanent Forum on Indigenous Issues

In July 2000 the UN Permanent Forum on Indigenous Issues was established as an advisory body to the Economic and Social Council. The main precept was to discuss issues of indigenous people related to their social and economic development, the environment, culture, health, education and other human rights matters. The Forum consistsof 16 members who act in their individual capacity as specialists on indigenous issues. The Forum chief role is to give suggestions to ECOSOC on the programmes, agencies and funds with the objective to raise awareness and to bring coordination in the activities taken for indigenous peoples. It also prepares and publicizes the information in issues of indigenous peoples.The Permanent Forum was first met in May 2002. The Forum holds yearly two-week sessions that take place in New York. In its 17th session in 2018 the Forum adopted a draft of recommendations chiefly dealing with the central theme of the year 2018 i.e., indigenous peoples' collective right to land, territories and resources.In her closing remarks, Mariam Wallet Aboubakrine, Forum Member from Mali and its Chair, said "the session's discussions had spotlighted some progress, but also serious challenges still faced by indigenous peoples around the world. Speakers had cited higher

19 <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx>accessed 13, October 2018.

poverty rates, poorer access to education and major gaps in life expectancy between indigenous peoples and other groups. Meanwhile, continued allegations of violations of the rights of indigenous women and indigenous human rights defenders remained of great concern. Those challenges were rooted in — and often resulted directly from — centuries of assimilationist and discriminatory policies that disregarded indigenous peoples as distinct peoples with rights to their own identity, cultures, lands, territories and resources. While some States had taken important steps to reverse those policies, others must do the same."[20]

United Nations Declaration on the Rights of Indigenous Peoples, 2007

For a long time it was felt that the matters of indigenous peoples should solely be the concern of states and so long the governments comply with the principles and code of universal individual human rights, there was no separate role for the UN for indigenous peoples. But due to increasing occasions of violation of indigenous people's rights, the UN General Assembly by resolution 61/295 in September 2007 adopted the UN Declaration on the Rights of Indigenous Peoples, which is regarded on international fore as the most comprehensive and advanced international mechanism dealing with the rights of indigenous peoples. The UN Declaration on the Rights of Indigenous People (UNDRIP) is an exhaustive and far-reaching document which covers the entire range of social, economical, political, civil, environment and cultural rights.[21]In the words of the UN Secretary-General Ban Ki-moon, the UNDRIP "sets out a framework on which States can build or rebuild their relationships with indigenous peoples. The result of more than two decades of negotiations, it provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not

20 <https://www.un.org/press/en/2018/hr5392.doc.htm> accessed 19th September 2018

21 Claire Charters and Rodolfo Stavenhagen (eds.), *Making the Declaration Work,* 12 (IWGIA, Denmark 2009).

repeated."[22] The comprehensive document consists of 46 Articles which touches upon the major issues of indigenous peoples,proclaims in its Preamble that "the fundamental importance of the right of all persons to self-determination and considers that no provision of the present Declaration can be invoked to deny a people, whatever they may be, of their right to self-determination exercised in conformity with international law."[23]Adopted on 13 September 2007, the declaration got 144 votes in favour; there were 11 abstentions and four states against it (The United States of America, Australia, Canada, and New Zealand) but some States have changed their position since then, including the four States which voted against it. They have now endorsed the Declaration. Though ILO Convention 169 and UNDRIP are mutually complementary, India voted in favour of the Declaration but on the contrary has confined itself from ratifying ILO revised convention in 1989.

Prior to this universal document there were some other systems of protection like International Covenant on Civil and Political Rights (ICCPR) and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) not directly speaking on the indigenous issues in particular and despite some important contribution offered by the Human Rights Committee (HRC) and Committee on the Elimination of Racial Discrimination (CERD) to the expansion of international standards on issues and rights of indigenous peoples, they could address the issues only to a certain extent as these machineries were not formulated particularly for indigenous peoples. Against this limitation, the Declaration is expected to fill the crucial gap on the international platform and in addition to this, the declaration is also likely to assure coherence to a regime characterized by various approaches and different frameworks recognised previously.[24]

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22 <http://www.corteidh.or.cr/tablas/r26642.pdf> accessed 10 September, 2018.

23 <https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf> accessed 10 September, 2018.

24 Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples", (2009) 58 ICLQ 959.

The former UN High Commissioner for Human Rights, Louise Arbour, categorically welcomed the declaration as a "triumph for justice and human dignity", the document is braced by strong moral force. Its *raison d'être* can be recognized from one passage of the preamble affirming that 'indigenous peoples have suffered from historic injustices as a result of, *inter alia,* their colonization and dispossession of their lands, territories and resources. Recognizing that such historical injustices have affected their lives and conditions negatively the Declaration insists on the vital need to respect and protect the rights of indigenous people's world over. It is important to emphasise, therefore, that the rights established in the Declaration are not aimed at transforming indigenous peoples into a privileged category of international law, but, rather, at guaranteeing their very 'survival, dignity and well-being.'[25]

The Declaration pertinently lay emphasis in its preambular component that 'indigenous peoples are equal to other peoples' and that 'all peoples contribute to the diversity and richness of civilizations and cultures.' Article 8 has specifically adduced substance on their cultural integrity by providing that "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture and States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them."[26]

The absence of a definition of indigenous peoples in the Declaration is also in furtherance of the principle of equality because equality will mislay its very essence if someone other than indigenous peoples were to decide who is indigenous and who is not. In view of that, the

25 Mauro Barelli (n 23) at 961.

26 The United Nations Declaration on the Rights of Indigenous Peoples, 2007, art. 8.

Declaration follows the approach of self-identification in determining the indigenous status of a group. Articles 3 and 4 are particularly articulated with this aspiration. The Declaration also recognises less controversial, and yet essential, rights of indigenous peoples, such as the right to be free from any kind of discrimination (Article 2), the right to practice and revitalize their culture (Article 11), the right to manifest and practise their spiritual and religious traditions (Article 12), the right to participate in decision-making in matters which would affect them (Article 18), the right to their cultural and intellectual property (Article 31), and the right to determine their own identity or membership in accordance with their customs and traditions (Article 33). An important point should be stressed with regard to the nature of all the above mentioned rights, which are commonly referred to as 'special' or '*sui generis'* rights of indigenous peoples. The Declaration does not create special rights in the sense that they are 'separate[d] from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples."[27]

Constitutional and other Legal Provisions on Indigenous and Tribal Peoples and their Relation to International Law on Indigenous Peoples

India is the home for nearly a quarter of the world's indigenous population and after recognising this fact and the staunch reality of the continuous struggles of indigenous peoples, the Government of India has introduced an array of laws and policies in order to effectuate the protection of rights of such diverse groups. Yet there is one distinguishing factor in here, which is the reluctance of the government to acknowledge or accept the international framework embodied primarily in ILO Convention no. 169, 1989 and UNDRIP 2007. Despite the fact that India is a signatory to ILO Convention no. 107 (still in force in 18 countries including India) which was the precursor of Convention 169 and also voted in favour of UNDRIP, it has obstinately insisted that its own indigenous peoples cannot claim

27 Mauro Barelli (n 23) at 963.

status or protection under these laws. The government rejects the very term 'indigenous people', insisting that all Indians are indigenous, and is particularly hostile to any reference to the rights of indigenous people to autonomy, self-governance or self-determination. This is despite the fact that India's own laws provide for varying degrees of such protection - in some cases, far reaching- to certain communities. Since 1984, India's official stance with respect to WGIP has been that tribal people in India do not signify what is understood by the term indigenous people, seeing that India is an abode of complex assortment of peoples with variety of cultures, religions and languages and all communities contained in India are indigenous to the country. Therefore "the issue of indigenous peoples' rights pertained to peoples in independent countries who were regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region which the country belonged, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retained some or all of their socio-economic, cultural and political institutions... that the right to self-determination applied only to individualsunder foreign domination and that the concept did not apply to sovereign independent States or to a section of people or a nation, which was the essence of national integrity." However, India ratified ILO Convention no. 107 much before the emergence of this issue when the term 'indigenous people' itself became a controversial term within the WGIP.[28]

Concept of Indigenous people in International Law on Indigenous People and the Indian Concept

ILO in either of its Conventions on indigenous people i.e. 107 and its revised version Convention no. 169 do not interpret the concept of indigenous and tribal peoples that they seek to protect. Nevertheless, they prescribe some characteristics who they refer to in the documents likewise UNDRIP identifies 'indigenous peoples' as being the beneficiaries of the rights under the Declaration. Analogous to ILO Convention no. 169 UNDRIP recognizes the rights of indigenous peoples "to determine their own identity or membership according to

28 C R Bijoy (n 12) at 10.

their customs and traditions while simultaneously enjoying citizenship of the States where they live."[29]

In India these people for the purpose of recognition and to provide benefits under the law has been termed as 'Scheduled Tribes' which can be notified by President of India. As Article 342 of the Constitution of India says: "The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be".[30] However like the international law no definition is provided in the Constitution of India for Scheduled Tribes, but certain traits have been recognized for a group to be identified as Scheduled Tribe like: (i) geographical isolation; (ii) distinctive culture; (iii) primitive traits; (iv)shyness; and (v) backwardness.[31]In India the identification and recognition of tribal population is essentially area specific, that is Articles 342 and 366 (25) read with the special provisions for STs in Clauses 1 and 2 of Article 244 for Scheduled Areas and Tribal Areas and the Panchayat Raj (Extension to the Scheduled Areas) Act 1996, enablesextension of the Constitution, for Scheduled Area, which indicates that these categories are fundamentally administrative, area specific and are 'envisaged to reflect the level of socio-economic and development rather than ethnic status', even though ethnicity is a primary decisive factor to be used.Self-identification is a fundamental element recognised withinall international documents on indigenous people for their identification but lacks as a criterion for recognition of ST. Historically; the notifications have been initiated through political demands, which have also escorted to administrative decisions by the government to include communities under the ST list. But for all the practical purposes, STs, can be taken as international concept

29 C R Bijoy (n 12) at 58.

30 The Constitution of India, art. 342.

31 <https://tribal.nic.in/writereaddata/AnnualReport/LokurCommitteeReport.pdf>accessed 27, September 2018.

of indigenous people as signified by ILO Convention no. 169 and UNDRIP. Various components of international law on indigenous people, specifically dealing with protection of land and natural resources, collective attachment to geographically distinct habitats, social customs and traditions, and self-governance can be traced in Constitutional provisions and its approach. Whereas on the international platform the identification and recognition of indigenous peoples are community specific, that is based on ethnicity. In India the status of ST is not permanent. In general, the STs in India are indigenous peoples in context to international law, despite the absence of their existence under colonization or conquest. Despite of a range of constitutional and other legal provisions, there are occasions of failure on the part of the government to protect these marginalised groups against discrimination and exploitation. As a matter of fact, the tribal habitants have been experiencing similar conditions, which are largely, the result of colonization and conquest.[32]

Education in ILO Conventions and UNDRIP and Stance of India

Education is one of the vital issues for many indigenous peoples in the world over. International instruments, and particularly ILO Convention no. 107 and 169, as well as the UNDRIP pertaining to the topic, attempt to guarantee three types of rights in general: access to education for indigenous communities, appropriateness/sensitivity in education policies and programmes considering the special needs of indigenous peoples and control of the indigenous peoples over the nature, methods and institutions of education. The third type of rights was introduced on the international platform by Article 14 of UNDRIP which states that "Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning" distinct to convention 107 and 169.In concern with the motive for Education, the Declaration recognises in its preamble, particularly the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, which remains

32 C R Bijoy (n 12) at 62.

consistent with the rights of the child. Articles 14, 15, 17(2) and 21(1) specifically talks about education of indigenous peoples.Under Article 14, "Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning and that Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language."Under Article 15 "Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information and States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society."Taking into account the importance of child's education the Declaration in Article 17 (2) imposes an obligation on the States to "take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be perilous or interfering with the children's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment." Lastly, Article 21 (1) also states that "Indigenous peoples have the right, without discrimination, to the improvement of theireconomic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security."[33]

As per the latest annual report (2017-18) of Ministry of Tribal Affairs of government of India literacy rate for STs in the country has improved

33 Mauro Barelli (n 23) at 969.

from 47.1% in 2001 to 59% in 2011.[34]There is a gap of about 14 percentage points in literacy rate of STs as compared to the all India literacy rate. The reasons behind the low rate of literacy in tribal population in India are manifold but it should also be acknowledged that various measures have been taken by the government of India to improve the position of tribal people. Nearly all the educational schemes at the national level, including India's core programme for universalisation of education i.e., *Sarva Shiksha Abhiyan*, the Mid-Day Meal Program, and the District Primary Education Program which is a central scheme aiming the marginalised areas, contain specific components directed at ST population. On the state level, almost all the governments introduced special incentive schemes for ST students, including free uniforms and books that might be prove helpful to reduce the drop-out rates.Welfare schemes have also provided special funding and other policy arrangements with the aim to expand infrastructures in ST areas, something which was also given priority in National Policy on Education 1986.Owing to the constitutional mandate of substantive approach of equality, extensive schemes of affirmative action in favour of SCs and STs have been introduces since independence, in the form of admissions quotas in education, government employment, and local government bodies. Accordingly as per the designated policy, all centrally funded institutions are required to reserve 7.5% seats for STs, whereas State governments reserve seats as per the proportion to the share of STs in their population. Furthermore admissions requirements are also relaxed for these marginalised groups to allow easier access.To some extent, the National Policy on Education (NPE) of 1986 followed the principles enshrined in ILO Convention no. 107. NPE 1986 in paragraph 4 planned the preparation of educational material at the primary level in Advasi languages, with a 'switchover' to the regional language at higher levels, the aim which was demonstrated in Article 23 of the ILO Convention no. 107. Adding further, the policy also states "educated and promising ST youths will be encouraged and trained to

34 Government of India: *Annual Report 2017-18* (Ministry of Tribal Affairs, 2018).

take up teaching in tribal areas". Consequently, the programme of study would include "awareness of the rich cultural identity of the tribal people and the enormous creative talent". This approach has been taken rather more seriously in the later documents.[35]It is very significant to mention Article 350A of the Constitution of India, which says, that "It shall be the endeavor of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities."[36] But most of these principles have not been put into practice effectively.

Conclusion and Summations

There is no straight-forward definition of indigenous people at the international or national level but one thing on which all the legal mechanisms concerning indigenous people are based is that there is a larger need to recognise and protect their rights.This endeavour would require to understand their struggles and measures for their upliftment. Their issues may not be like the other segments of the society and therefore certain features have been accepted to recognise them so that they can be benefitted by the measures initiated by the government. The latest census reveals that there are 705 ethnic groups across states and union territories which are notified as Scheduled Tribes. Recognising pressing needs of the tribal people, special status has been given in the Constitution of India, but government does not recognise the word "indigenous" for the tribal community and not accede with the concept of "indigenous people" as introduced on the international platform and thus despite the fact that India had ratified the ILO Convention 107 on Indigenous and Tribal Population and voted in favour of UNDRIP, India did not signed ILO revised convention on "indigenous people". India though has incorporated principles of ILO Convention 107 and UNDRIP to some extent. To state a few examples; like the principle of non- discrimination, which has always been a part

35 Swepston (n 1) at 87.

36 The Constitution of India, art. 350(a).

of India's polity and is given a significant place within the Constitution of India in the form of equality under the Preamble and various other articles. Self-identification has been a major decisive factor in the majority of international documents on indigenous people, of which self-management is a necessary component. Various provisions of the Constitution of India present a high degree picture of autonomy at different level. Besides the rights over natural resources these three international instruments recognise cultural and language rights as among the key basic rights though there is no specific statutory protection or Constitutional provision which exists for the protection of tribal language apart from eighth schedule of the Constitution in which only two ST languages *Bodo* and *Santhali* are included. Nevertheless, many State governments with large ST population have allowed the use of ST languages for official purposes. Realizing the vital importance of language not only as a method of communication but as symbolic tool for education, development and social integration, the United Nations has announced 2019 as the International Year of Indigenous Languages, which is an attempt to draw the attention of the world to the critical loss of the indigenous languages. Education has also been the main agenda in all of the international documents. In India, though there is no specific exclusive system for tribal education but it has been a significant part of the Indian policies. The Constitution of India also provides for reservation policy for STs and Right to Education is even a part of the fundamental rights. But still there is a recognizable gap in the literacy rate of tribal population when compared with the other sections of citizens. Thus specific measures are required in order to provide faculties for tribal areas, designing of curriculum in their native language, socio- economic development to check the drop rates from the schools, vocational training of tribal youth for their upliftment and to spread awareness in tribal population.

NEED TO FOSTER THE FOSTER CARE- A CRITICAL ANALYSIS

Indira K[1*]

ABSTRACT

India is termed as 'young India', the reason being her youth population is more. And more specifically Children below the age of 18 years constitute 37% of the total population. As per 2016 data 50,000 adoptable orphans are available but in which only 1600 children are only up for adoption.Thus the author attempts to research for an alternativecare for the children who does not make up for adoption, in the light of the UN Guidelines on Alternative Care of Children, 2009. In this regard the author seeks our attention on foster care, which is one of thealternateunder non-institutional care. Further the author traces the history of foster care, evolution of foster care in India and the law relating to foster care both at the International and the national level. This paper also deals with foster care in the light of Juvenile Justice (Care and Protection of Children) Act, 2015. At the same time the paper focuses on the advantages and disadvantages of foster care, how it differs from the institutional care. The paper ultimately aims to critically evaluate whether foster care can be a better alternate to curb the menace of increasing child sexual abuses caused by institutional care.

Key Words: *Adoption, Foster Care, UN Guidelines on Alternative Care of Children,Institutional Care, Juvenile Justice (Care and Protection of Children) Act, 2015 etc.,*

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INTRODUCTION

India with a population of 1.21 billion people constitutes as the second most populous country in the world, while children represents 39% of total population of the country. Children between 0-5 years constitute 29% of the population. The Children's population between 0-18 years is 472 million[2].In this it is estimated as per 2007 data on the State of the World's Children, there are 25 million orphaned children in India, 2009, UNICEF, New York, USA. Another study points out that there are about 44 million destitute children and over 12 million orphan and abandoned children in India, but every year only 5000 adoptions takes place[3].The data presented here reveals that a minimal adoption takes place every year inspite of growing orphan and abandoned children in India.

The Supreme Court in *Exploitation of Children in Orphanages, Tamil Nadu V. Union of India & Ors.*[4], stated that as per the report of the Ministry of Family and Child welfare and UNICEF 53% of Children who are living in orphanages are exposed to sexual abuse. Thus the children face both institutional abuse and abuse by relatives as well. Therefore, to protect the orphan and abandoned children from sexual abuse, further to facilitate healthy growth of mind and body of children various mechanisms are practiced. There is no doubt adoption is one such method, but as per the data stated in the preceding paragraph it is seen due to its lengthy process and other social and economic reason the number of adoptions taking place is very minimal. Thus the author in this paper attempts to explore 'foster care' which is stated as an alternative in 2009 by the United Nations Guidelines on Alternative Care of Children, the same has been incorporated in India under the Juvenile Justice (Care and Protection of Children) Act, 2015. Before discussing foster care it would be appropriate to know the rights available to the children.

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2 http://www.censusindia.gov.in/2011census/population_enumeration.html

3 http://www.csa.org.in/pdf/White-paper-Adoption.pdf

4 AIR 2017 SC 2546

CHILD RIGHT LEGISLATION IN INDIA

In the year 1850, the first legislation for children was enacted called the Apprentice Act. This legislation, however, did not create a separate juvenile justice system but worked within the adult justice system. It was only under the Reformatories Schools Act, 1897 for the first time a separation was made between Child and Adult under the Criminal Justice System in India, the recommendations of Indian Jails Committee 1919-1920 paved way for the enactment of the Madras Children Act, 1920 which was the first Children's Act in India this was a provincial law which covered the then Madras Province. The Bengal Children's Act[5] and Bombay Children's Act[6] and other such legislations enacted. In 1960, the Government of India enacted the Children's Act, which was applicable in Union Territories. All these legislations were repealed with the enactment of the Juvenile Justice Act, 1986.

JUVENILE JUSTICE SYSTEM IN INDIA

In the year 1986 the Juvenile Justice Act was enacted this was the first centralised Juvenile legislation in India. In order to comply with the provisions of UN Convention on Rights of Children, the Juvenile Justice Act 1986 was amended and reenacted as the Juvenile Justice (Care and Protection of Children) Act in 2000. It was further amended in 2006 as Juvenile Justice (Care and Protection of children) Amendment Act, 2006 and further in 2011. After the notorious Delhi Gang rape a new legislation, the Juvenile Justice (Care and Protection of Children) Act, 2015.

HISTORY OF FOSTER CARE

Concept of foster care was prevalent even to Torah and Bible. It refers the caring of the dependent children as a duty under law. Even the Quran carried this tradition of caring for orphans and widows and the early Christian church deputed widows to take care of the orphaned children and for the same they were paid. In 1500s the English Poor Laws allowed for the placement of poor children into indentured

5 Bengal Act II of 1922

6 The Bombay Children Act, 1948 (Act 71 of 1948)

service until they become adults. Even the United States adopted this practice, and this is the beginning of the placement of children in foster homes. But the indentured services were exploitation and it only promoted almshouses, children did not learn any trade and were exposed to unsanitary conditions and abusive caretakers[7].

In 1800s the Foster homes in New York City were often abusive, for an instance in 1807, Mary Ellen Wilson, who is an 8-year-old orphan,was physically abused at her foster home. At that time there was no organisation to safeguard the interest of abused children, it was only who were members of the American Society for the Prevention of Cruelty to Animals pleaded for her case. They argued, the laws to protect children should be greater than the laws protecting animals. After this the court convicted the foster mom for assault and battery and awarded her one year sentence.

In due course, Charles Loring Brace, a minister, who saw the plight of immigrant children, their sufferings and inhumane conditions of life in the year 1853, founded the Children's Aid Society in New York City, as part of this he started the Orphan Train Movement[8]. Under this movement over 150,000 orphaned children in New York City were sent to farms all over the country. Among the Children who were sent, few children were treated with love and respect, while others were treated as slaves and they were abused. These Children were made to work for long hours. Though this system introduced by Mr. Brace had its pitfalls, the main purpose of this was to give family orientation to these abandoned and abused children. It is believed that the system introduced by Brace was the foundation for the introduction of the modern foster care in early 1900s.Social agencies started to pay and supervise foster parents and the government monitored and inspected the foster homes. Records were maintained to promote accountability, further catering to the needs of children they were placed under

7 http://family.findlaw.com/foster-care/foster-care-background-and-history.html

8 https://www.thevintagenews.com/2018/01/05/orphan-train-movement/

secure and safer hands. Along with services were provided to the birth families in a way to make the child reunite or return home. Foster parents were seen as an integral part for providing care and protection of dependent children.

EVOLUTION OF FOSTER CARE IN INDIA

In India foster care had a long history even in the epic Mahabarata the practice of foster care founds mentioned, while Lord Krishna's biological parents Devaki and Vasudeva who were imprisoned by King Kamsa, were not able to take care of their child. Thus Krishna was reared by Yashoda and Nandaraja. As the early Indian society had a Joint family structure there were facilities to maintain and care the abandoned and orphan children within the family ties in the form of adoption, kinship care etc., but due to urbanization and industrialization slowly joint family started to disintegrate, this had greater impact on the child care. So children lacked family care, only alternate available was the institutional care. But in the year 1972 the central government introduced the first non-institutional scheme in Maharashtra. In the late 1990s Karnataka implemented a foster care scheme focused on destitute children.

The non-institutional scheme introduced by the Central Government was revised in 2005 as'Bal Sangopal Scheme-Non Institutional Services'. However, the Juvenile Justice (Care and Protection of Children) Act, 2015 presently provides for foster care, still it is in verge of implementation. Thus in the year 2016 the Ministry of Women and child Development came up with the Model Guidelines on Foster Care[9].

FOSTER CARE UNDER JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

Foster care is a system of non-institutional family-based care under which a child lives with a family other than his/her biological family. This happens when a child is without biological family or with family which is incapable of providing care, or to whom the benefit of extended family or kinship care are not available. Foster families should preferably have cultural, tribal and/or community identities

9 http://cara.nic.in/PDF/foster%20care%202016.pdf

that are similar to that of the child. The system of foster care is meant for children in need of care and protection. Keeping this in view the needs of the child, foster care may be of short or long duration, short-term foster care is for a period not exceeding one year, long-term foster care exceeds one year and can be extended till the child attains 18 years of age.[10]

India's foster care system has two kinds one is the individual foster care and the other one is the group foster care. Individual foster care refers to the care of a child under a foster family. Group foster care, on the other hand, it is the family-like care in a fit facility for children in need of care and protection who are without parental care[11]. The system provides personalized parental care in a family-like environment to a group of unrelated children in a community setting. It is considered suitable for street children who pass through a weaning period[12] prior to their placement in individual foster care or any other form of family-based care. According to Juvenile Justice Rules 2016, the number of children in a group foster care unit should not exceed eight children, including biological children of the foster caregiver.

Foster care as defined under the Act it means,

"placement of a child, by the Committee for the purpose of alternate care in the domestic environment of a family, other than the child's biological family, that has been selected, qualified,approved and supervised for providing such care"[13]

"foster family means a family found suitable by the District Child Protection Unit to keep children in foster care under section 44"[14]

The act also explains about Group foster care which means,

"family like care facility for children in need of care and protection who

10 Juvenile Justice (Care and Protection of Children) Model Rules, 2016

11 Model Guidelines for Foster Care, 2016

12 Weaning period, in this context, refers to weaning of children from street life and high risk behavior

13 Section 2(29) Juvenile Justice (Care and Protection of Children) Act, 2015

14 Section 2(30) Juvenile Justice (Care and Protection of Children) Act, 2015

are without parental care, aiming on providing personalised care and fostering a sense of belonging and identity, through family like and community based solutions"[15]

Section 44 of Juvenile Justice (Care and Protection of Children) Act, 2015[16] states the procedure under which children needs to be placed under foster care.

"(1) The children in need of care and protection may be placed in foster care, including group foster care for their care and protection through orders of the Committee, after following the procedure as may be prescribed in this regard, in a family which does not include the child's biological or adoptive parents or in an unrelated family recognised as suitable for the purpose by the State Government, for a short or extended period of time.

(2) The selection of the foster family shall be based on family's ability, intent, capacity and prior experience of taking care of children.

(3) All efforts shall be made to keep siblings together in foster families, unless it is in their best interest not to be kept together.

(4) The State Government, after taking into account the number of children, shall provide monthly funding for such foster care through District Child Protection Unit after following the procedure, as may be prescribed, for inspection to ensure well being of the children.

(5) In cases where children have been placed in foster care for the reason that their parents have been found to be unfit or incapacitated by the Committee, the child's parents may visit the child in the foster family at regular intervals, unless the Committee feels that such visits are not in the best interest of the child, for reasons to be recorded therefor; and eventually, the child may return to the parent's homes once the parents are determined by the Committee to be fit to take care of the child.

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15 Section 2(32) Juvenile Justice (Care and Protection of Children) Act, 2015

16 The Juvenile Justice (Care and Protection of Children) Act, 2015 No. 2 Of 2016

(6) The foster family shall be responsible for providing education, health and nutrition to the child and shall ensure the overall well being of the child in such manner, as may be prescribed.

(7) The State Government may make rules for the purpose of defining the procedure, criteria and the manner in which foster care services shall be provided for children.

(8) The inspection of foster families shall be conducted every month by the Committee in the form as may be prescribed to check the well-being of the child and whenever a foster family is found lacking in taking care of the child, the child shall be removed from that foster family and shifted to another foster family as the Committee may deem fit.

(9) No child regarded as adoptable by the Committee shall be given for long-term foster care"[17]

Under Chapter VI of this act procedure in relation to Children in need of care and protection provides that after an enquiry the Committee of the opinion if the child has no family or ostensible support or is in continued need of care and protection, it may send the child to a Specialised Adoption Agency if the child is below six years of age, children's home or to a fit facility or person or foster family, till suitable means of rehabilitation are found for the child, as may be prescribed, or till the child attains the age of eighteen years. And such child placed in a children's home or with a fit facility or person or a foster family, shall be reviewed by the Committee, as may be prescribed"[18].

Similarly, the Act emphasises, the Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, can order the child under foster care under section 44[19].

17 Section 44 Juvenile Justice (Care and Protection of Children) Act, 2015

18 Section 36(3) Juvenile Justice (Care and Protection of Children) Act, 2015

19 Section 37 Juvenile Justice (Care and Protection of Children) Act, 2015

Similarly, under Section 39 and Section 40 of the Act discusses about rehabilitation and social re-integration and restoration and protection of a child. It confers powers on the Committee for restoring the child, restoring includes even restoring to foster parents. Further, any person aggrieved by an order made by the Committee relating to foster care can prefer an appeal to the District Magistrate[20].

Further the State Government is conferred with the power to make rules relating to foster care "manner in which a child may be sent to a Specialised Adoption Agency if the child is below six years of age, Children's Home or to a fit facility or person or foster family, till suitable means of rehabilitation are found for the child including manner in which situation of the child placed in a Children's Home or with a fit facility or person or foster family, may be reviewed by the Committee under sub-section (3) of section 36, procedure for placing children infoster care including group foster care under sub-section (1) of section 44, procedure for inspection of children in foster care under sub-section (4) of section 44, manner in which foster family shall provide education, health and nutrition to the child under sub-section (6) of section 44, procedure and criteria in which foster care services shall be provided to children under sub-section (7) of section 44, format for inspection of foster families by the Committee to check the wellbeing of children under sub-section (8) of section 44".[21]

FOSTER CARE UNDER THE INTERNATIONAL INSTRUMENTS

UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1986

This Declaration was enacted on the year 1986, Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.

20 Section 101 Juvenile Justice (Care and Protection of Children) Act, 2015

21 Section 110 Juvenile Justice (Care and Protection of Children) Act, 2015

Article 4

“When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute - foster or adoptive - family or, if necessary, by an appropriate institution should be considered”.

Article 5

“In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration”.

Article 6

“Persons responsible for foster placement or adoption procedures shouldhave professional or other appropriate training”.

Article 7

“Governments should determine the adequacy of their national child welfareservices and consider appropriate actions”.

Article 8

“The child should at all times have a name, a nationality and a legal representative. The child should not, as a result of foster placement,adoption or any alternative regime, be deprived of his or her name,nationality or legal representative unless the child thereby acquires a newname, nationality or legal representative”.

Article 9

“The need of a foster or an adopted child to know about his or her background should be recognized by persons responsible for the child's care,unless this is contrary to the child's best interests”.

Further this Declaration emphasis on foster placement. It emphasis that foster placement of children should be regulated by law[22].Foster family care, though temporary in nature, may continue, if necessary, until adulthood but should not preclude either prior return to thechild's

22 Convention on the Rights of the Child Art.10, *opened for signature on* Nov. 20, 1989

own parents or adoption[23]. In all matters of foster family care, the prospective foster parents and,as appropriate, the child and his or her own parents should be properlyinvolved. A competent authority or agency should be responsible forsupervision to ensure the welfare of the child[24].

Convention on the Rights of Child, 1989

India signed this Convention in the year 1992, the preamble of the Convention states, for recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the Declaration on the Protection of Women and Children in Emergency and Armed Conflict. Recognizing that in all the countries around the world, there are children living in exceptionally difficult conditions and such children need special consideration.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Further this Convention states that inter-country adoption may be

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23 Convention on the Rights of the Child Art.11, *opened for signature on* Nov. 20, 1989

24 Convention on the Rights of the Child Art.12, *opened for signature on* Nov. 20, 1989

considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin[25].

United Nations (UN) Guidelines for the Alternative Care of Children, 2009

Under this Convention, under Alternative Care Foster Care is also mentioned as one method of Alternative care. It states that the competent authority or agency should devise a system, and should train concerned staff accordingly, to assess and match the needs of the child with the abilities and resources of potential foster carers and to prepare all concerned for the placement.A pool of accredited foster carers should be identified in each locality who can provide children with care and protection while maintaining ties to family, community and cultural group. Special preparation, support and counselling services for foster carers should be developed and made available to carers at regular intervals, before, during and after the placement. Carers should have, within fostering agencies and other systems involved with children without parental care, the opportunity to make their voice heard and to influence policy. Encouragement should be given to the establishment of associations of foster carers that can provide important mutual support and contribute to practice and policy development[26].

NEED TO FOSTER THE FOSTER CARE- A CRITICAL ANALYSIS

In the year 1992 India signed the Convention on the Rights of Child, 1989. Even before that India enacted the Juvenile Justice Act, 1986 but under this legislation no specific mention was made with regards to foster care and even it did not explicitly mention about juvenile in need of care and protection. But after India became the Signatory to this Convention, in the year 2000 India enacted the Juvenile Justice (Care and Protection of Children) Act, 2000 under which Juvenile in need of care and protection founds mention. This Act though it

25 Convention on the Rights of the Child Art.21, *opened for signature on* Nov. 20, 1989

26 https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf

mentioned about foster care[27]but did not define foster care. But this provision authorised the State Government[28] to make rules for the purposes of carrying out foster care programme for children but even then no States framed guidelines on foster care. Meanwhile by 2014 only two states i.e. Delhi and Goa passed foster care rules.[29]In the year 2015 a new legislation called the Juvenile Justice (Care and Protection of Children) Act was enacted which defined foster care and group foster care, it extensively discussed on the provisions relating to foster care, along with it directed the State to frame guidelinesto implement foster care. The Ministry of Women and Child Development, in the year 2016 framed the model guidelines on foster care, yet most States has to frame guidelines for foster care.

At present in India there are few NGO's which has started propagating foster care and group foster care. Even though there are specific foster care units owned by few NGOs in India, the basic functioning of these organizations are similar to the traditional institutional care. Even the Act[30], while discussing individual foster care it also discusses about group foster care and we could find many of these NGO's mostly deal with group foster care. It is essential to analayse how this group foster care differs from traditional institutional care, the definition of group foster care[31] as laid down under the Act states it is a family like care which is provided with a community based solutions. Meanwhile,

27 Section 42 Juvenile Justice (Care and Protection of Children) Act,2000

28 Section 42(3) Juvenile Justice (Care and Protection of Children) Act, 2000

29 https://www.hindustantimes.com/india/foster-care-coming-to-india-law-in-the-works/story-ao7Yff6nRAqJ8X4FSyovyO.html

30 Section 44(1) Juvenile Justice (Care and Protection of Children) Act,2015; The children in need of care and protection may be placed in foster care, including group foster care for their care and protection through orders of the Committee, after following the procedure as may be prescribed in this regard, in a family which does not include the child's biological or adoptive parents or in an unrelated family recognised as suitable for the purpose by the State Government, for a short or extended period of time.

31 Section 2 (32) Juvenile Justice (Care and Protection of Children) Act,2015; "group foster care" means a family like care facility for children in need of care and protection who are without parental care, aiming on providing personalized care and fostering a sense of belonging and identity, through family like and community based solutions;

when we look into the definition of Children's home[32] and Child Care institution[33] the definition gives us clarity though care and attention are provided,but only by limited stakeholders and which gives enormous power only to the State and State sponsored agencies with a provision for Social Audit.

While looking into these definitions it is pertinent to look into the definition of foster care[34]. Ananalysis of these definitions makes one clear under an institutional care it is a limited participation, in a foster care the child is provided with an alternate family whereas under a group foster care the child is provided with the family like facility[35]. Therefore it is clear, institutional care and group foster care do not have a distinct conceptual difference.

As we are already well aware of the fact how institutional care has been a breeding place of sexual abuse and a money making business through the recent case study conducted by Tata Institute of Social Sciences under the Koshish Project[36], it would be important to strengthen the social audit system to eradicate these kinds of nefarious activities. Further under the Juvenile Justice Act, alternative care was incorporated under the head 'Social Rehabilitation and Social Re-integration'. But it was not titled as alternative care, few alternative

32 Section 2 (32) Juvenile Justice (Care and Protection of Children) Act,2015; "child care institution" means Children Home, open shelter, observation home, special home, place of safety, Specialised Adoption Agency and a fit facility recognised under this Act for providing care and protection to children, who are in need of such services;

33 Section 2 (32) Juvenile Justice (Care and Protection of Children) Act,2015; "child care institution" means Children Home, open shelter, observation home, special home, place of safety, Specialised Adoption Agency and a fit facility recognised under this Act for providing care and protection to children, who are in need of such services;

34 Section 2(29) Juvenile Justice (Care and Protection of Children) Act,2015; "foster care" means placement of a child, by the Committee for the purpose of alternate care in the domestic environment of a family, other than the child's biological family, that has been selected, qualified, approved and supervised for providing such care;

35 *See generally,* GAUTAM BANERJEE, CHILD AND THE LAW: AN INDIAN PERSPECTIVE IN PLAIN LANGAUGE (2017).

36 Prita Jha, *Redefining the purpose and rules of shelters,* LIII No.37 ECONOMIC AND POLITICAL WEEKLY Pg. No. 17 (2018)

cares viz., foster care[37], sponsorship[38], after-care[39] and adoption[40] finds mention. There is no doubt in comparison with institutional care, alternative care is the better option. And the present study restricts only to foster care. Under the foster care there are advantages like the child gets a steady and a relatively permanent place with one family rather than moving to several homes in several places, even if the child stays at one home there may be constant change of care takers

37 See *supra* 24

38 Section 45 Juvenile Justice (Care and Protection of Children) Act,2015
1. The State Government shall make rules for the purpose of undertaking various programmes of sponsorship of children, such as individual to individual sponsorship, group sponsorship or community sponsorship.
2. The criteria for sponsorship shall include,—
   i. where mother is a widow or divorced or abandoned by family;
   ii. where children are orphan and are living with the extended family;
   iii. where parents are victims of life threatening disease;
   iv. where parents are incapacitated due to accident and unable to take care of children both financially and physically.
3. The duration of sponsorship shall be such as may be prescribed.
4. The sponsorship programme may provide supplementary support to families, to Children's Homes and to special homes to meet medical, nutritional, educational and other needs of the children, with a view to improving their quality of life.

39 Section 45 Juvenile Justice (Care and Protection of Children) Act,2015 Any child leaving a child care institution on completion of eighteen years of age may be provided with financial support in order to facilitate child's re-integration into the mainstream of the society in the manner as may be prescribed.

40 Section 56 Juvenile Justice (Care and Protection of Children) Act,2015;
1. Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority.
2. Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority.
3. Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956.
4. All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.
5. Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the Court, shall be punishable as per the provisions of section 80.

and other employees. As in few cases contact with the birth parent/ parents, may give the Child self-confidence and security, further a good, supportive and encouraging home environment can provide the child with greater chances of balanced physical and psychological growth. Further the State or any other voluntary organisations can also financially assist the foster parents, which in return can be used for the wellbeing of the foster child.

Inspite of these benefits there are few disadvantages too, under the system of foster care, the children may be unhappy as it is away from their biological parents, despite the situation at home not being good. Further, there is a probability both from the foster parents and biological parents, if there is any disliking between them then the child may be moved on. This may psychologically disturb the child. Both in Group foster care and individual foster care, other children from the foster home may find it difficult with the new children and foster child coming into the home could influence a previously sheltered child.There may be deep attachment between the foster parent and foster children. However, children often choose to return to their blood parents, which could be hurtful to the foster parents.

Apart from these issues, Indian Society being a closed society, due to the caste rigidity, where, caste remains a determining factor in deciding many things. It becomes highly complicated for abandoned child to receive a foster family because caste remains as a determining factor to choose a child for fostering. This could be clearly made out from the instances that took place in few foreign countries, where discrimination is based on race. White children are preferred more than black children, where it is said that the black children has to wait 20 times more than the white children[41]. Even if the foster parents accepts a foster child, but the other members of the family if they do not accepts or ill treat the child then it again affects the growth of the child.

Apart from the above mentioned social and psychological issues, there are issues even under the Juvenile Justice legislations. The

41 https://www.theguardian.com/society/2010/nov/03/inter-racial-adoption

legislation provides for both individual foster care and group foster care. After looking into the definition of group foster care, the author feels that there is no difference between institutional care and group foster care. It would be appropriate if the State and the District Child Protection unit takes initiatives to promote individual foster care, this may facilitate the child in getting the family care. Further even in promoting individual foster care, the State should ensure that every child is assured with proper family care, safety, education and overall development above all acceptance of such Child within the family and among the members of the society.

CONCLUSIONS AND SUGGESTIONS

In view of the above mentioned facts, the State has to come up with the proper policy Guidelines to regulate foster care and even in case of group foster care clear policy framework has to be framed so that it can differ from institutional care, which will safeguard the child from the evils which it faced under the institutional care.

Though there is no denial that foster care is the best form of alternative care, the author feels that in our country, the rule of law at times becomes a serious threat and authorities who are mandated to safeguard the system, in few occasions derail from duty and make the system rotten. If this derailment of duty is shown in the care and protection of children, it is like piercing our eyes with our own fingers. So State should ensure vigilant action and stringent punishment on the wrong doers.

Even though many states have framed guidelines, foster care has not been implemented effectively.While framing the policies and guidelines, the state has to cater the needs of the well being of children and ensure the best interest of the Child.

Prevention is better than cure; it is better if all the stake holders become vigilant, then we can successfully and effectively promote foster care and thereby avoid incidences like sexual exploitation at the Muzaffarpur shelter home.

Further as directed by the Hon'ble Supreme Court of India in the matter of Exploitation of Children in Orphanages in *State of Tamil*

Nadu vs. UOI & Ors[42], social audit has to be conducted every year in child care institutions, to make the direction workable. The National Commission for Protection of Children Rights (NCPCR) has initiated to conduct social audit in child care institutions[43], which has to be effectively carried out in order to secure the wellbeing of children.

Further the State has to regulate the appointment of workers under the group foster care and scrutinize the appointment of workers even under the NGOs.As a suggestive measure, destitute women can be preferred for employment under group foster care. To conclude,in order to bring a change in the life of children who are in need of care and protection, foster care guidelines shall be framed according to the needs of Indian Society. Bearing in mind the 'best interest of children' and there by accomplishing the four core principles of the Convention on the Rights of Child.

42 *Supra* note at 4

43 http://pib.nic.in/newsite/PrintRelease.aspx?relid=177494

Notes/Comments

SABARIMALA : INEQUALITY IN DIVINITY

Vaibhav Suppal[1]

"I like the religion that teaches liberty, equality and fraternity"

– Dr Bhimrao Ambedkar

ABSTRACT

More than 25 million devotees visit Sabarimala Temple every year, yet there is no women to be found among the crowd. Lakhs of people join their hand in front of the Lord Ayyappa without any sign of female among them. Thousands of year old tradition continues to influence the mind of devotees towards gender inequality. A women in her menstruating age faces discrimination on the basis of gender and yet doesn't believe to raise her voice in order to preserve an old belief. Sabarimala Temple which is well known for Lord Manikanda was found to be in middle of debate inside the Courts of India over the issue of restriction imposed on the women of menstruating age to enter inside the temple. Each and every human is said to be equal before the eyes of god but beliefs like this puts a question mark on it. India which is also known as land of god saw many discrimination happening on the basis of gender inside the temples. Some temples altered their tradition with broad mind whereas there are still many where humans are discriminated on the basis of gender and Sabarimala Temple is one of them. Indian constitution which gives every citizen of India a right to profess any religion of their choice feels well short of power in front of such beliefs. Beliefs are not divine prophecies. All the customs and old traditions which violates human rights needs to get change with time and make this world more even for everybody to live for.

Keywords : Beliefs, Discrimination, Human Rights, Gender Inequality, Old Tradition.

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The divine land of India has given birth to numerous creeds such as Hinduism, Buddhism, Sikhism and Jainism, where each and every religion preach diverse ideologies. Religion sets a standard of life for each and every individual and plays an essential role in their existence. It is difficult to characterise a religion for everyone as each individual has their own way of portraying it in an explicit manner. For some of us it may be a lifestyle, which figures out what they auricle, who their companions are, and makes up what principles they pursue from every day. For other people, religion implies going to chapel or sanctuary and seeing religious celebrations.

India is the place that has always been known for its richness in culture and religion which laid down the foundation for its social structure. This land of divine has been battling for religion from decades, from the Mughal empire to British India and now to the present-day Pakistan. In past years, people have witnessed many fights between religion's customs and human rights. Sabarimala, a Hindu temple, situated in the Periyar Tiger reserve in Kerala is a modern day example of a fight between an old followed tradition and women rights.

A story of Lord Ayyappa laid foundation in the making of Sabarimala temple before 12th Century. Lord Ayyappa was born in human form "Manikanda" by the union of Lord Shiva and Lord Vishnu, when the latter was in Mohini form. Lord Vishnu appeared in Mohini form to destroy a deadly evil "Bhashmasur" and procure the remedy (amrut) for the divine beings amid the extraordinary whipping of oceans. Lord Shiva got influenced by the appeal of Mohini and Lord Ayyappa was conceived due to their union. During the childhood days of Manikanda, a lady evil had created chaos in the south. She had got a boon from divinities that she could only be conquered by the child born out of the amalgamation of Lord Shiva and Lord Vishnu. As it occurred, Lord Ayyappa crumpled her in fight. After destroying her, it was exposed that the evil spirit was really an admirable young lady who had been reviled to carry on with the life of an evil spirit. The annihilation set the lady free who, thusly, proposed to Lord Ayyappa. He declined the proposal saying that he had been chosen to go to woods and answer the prayers of his devotees. The young lady was relentless and wanted

to marry Lord Ayyappa anyhow. By seeing her determination, Lord Ayyappa assured to espouse her the day kanni-swamis (new devotees) quit visiting him with their prayers to him in Sabarimala. The young lady decided to wait for him till eternity in the neighbouring temple.

This was one of the reasons that the devotees of present day refuses women of the menstruating age i.e. between the age of 10 – 50 to enter the temple Sabrimala. They believe that by letting women of menstruating age inside the temple will be an abuse to Malikapurathamma's love and detriment.

Other than this, there is an another story which restricted the women entry into Sabarimala from decades. Lord Manikanda is a chronicled figure. He was born in "Panthalam", a little kingdom situated in Patthanamthitta region of Kerala. Sabarimala temple is situated in a similar area. He experienced childhood in the royal dwelling of Panthalam. The remnants of the palace still exist. Manikanda is said to have grown up into an lovable sovereign for his people as he thought about the prosperity of the general people living in his kingdom. A small continent of interlopers led by an Arab leader called Vavar confronted the realm during the time. Manikanda defeated Vavar which turned him into a fervent follower of him. As Lord Manikanda shelters at Sabarimala, Vavar subsists in spirit in a memorial at Erumeli, a place located on the 40 km hike to Sabarimala temple. Vavar is said to defend pilgrims going to visit Lord Manikanda. The presiding idol of Sabarimala Temple took a oath to answer prayers to every devotee hiking up to his shrine. Given the gruelling task that he accepted, Lord Ayyappa eschewed all worldly desires including contact with women. This is one of the other the reason why menstruating women are restricted from visiting Sabarimala Temple.

The present custom disallow the entry of women of the age 10-50 inside the Sabarimala temple. The purpose behind following this tradition is to avoid breaking the celibacy of Lord Ayyappa who is a Naishtika Brahmachari (Everlasting celibate). The above custom is a fallacy, an irrational belief, which needs to be removed. It has to be addressed in terms of divine terms, communal and lawful means. One of the other

issue which needs to be addressed is the misconception that people have between Manikanda and Lord Ayyappa. People believe them to be same which is wrong. Manikanda is the human form of Lord Ayyappa which is very similar to Lord Rama being an manifestation of Lord Vishnu. Manikanda had taken an oath of celibacy and decided to live his entire life as a Brahmachari where Lord Ayyappa was married with two wives "Pushakala" and "Poorna" and had a son named "Satyaka". A temple in Achankovil near to Sabarimala is known for worshiping Lord Ayyappa with his two wives. Manikanda, the son of Pandalam King took the oath to be brahmachari for life and he merged himself with Ayyappa of Sabarimala. The devotion towards the Lord Ayyappa in mountain peaks of Sabarimala preludes even before Lord Manikanda. Even nowadays, we show devotion towards Lord Ayyappa not Lord Manikanda, who took the vows of celibacy. It is beyond the bound of possibility to change gods from place to place. Lord Ayyappa is a married god and it is irrational to associate him with celibacy.Each and every persuasion is human made. None of the persuasion are made by any divinity. The idea of Spiritual responsibilities in itself is Abrahamic in nature. In Hindu ideas, there are no understanding of perfect proclamations. Each arrangement of conventions originates from an arrangement of persuasions. Also, every persuasion originate from the legends of a place. Indeed, Manikanda had chosen to lead his life as a brahmachari. But, there is no mention that presence of women near him will spoil his celibacy. It's not referenced in any sacred writings related with Ayyappa, rather just a custom pursued by people. One of the major difference which differentiate god from human is not having any worldly or humanly desire A divine being is over all enticements, all humanly wants, every single common material. In short a divine being is the one who is above "Maya". It's the humans who are a part of this. A human turns into a Divine being, the point at which he vanquishes all fantasies and wants. When he can accomplish the condition of perpetuity, i.e. a state over every common want, joys and allurements, he himself becomes a supreme power. Not at all like Abrahamic idea, Hindu ideas says, every animal himself is a divine being and most noteworthy objective of any creation is to recognize the

heavenly nature inside him.

Sabarimala temple has inscribed “Tat Tvam Asi”on its entrance. It prompts that every anthropoid is a Deity and pursues each human to discover the spirituality within him and become a deity like Ayyappa. By this, it implies that Lord Manikanda sitting in the Sabarimala has risen above from a humanoid to a divinity simply because he vanquished every single common enticement, wants and joys. He won't be enticed by sight of a woman or ladies who come before him, appealing him and looking for his endowments. He is a deity because he has given up all worldly or humanly desires that we all humans have. This makes him a supreme soul. A soul which is above all of us and cannot be tempted by any of the desire. This is the reason, he is known as a god and god never discriminate between humans.

It might be an incongruity, yet a hard truth, numerous ideas that we see today in Sabarimala are a piece of Buddhist conventions, not Hindu customs. In Buddhism, living a life as a brahmachari has a tremendous significance and generally recognized as a matter of veneration. To end up as a brahmachari is viewed as largest amount of heavenly nature, which isn't the situation of Hindu persuasion. The essential idea of Lord Ayyappa is bound to be impacted from Buddhist persuasions. Despite the fact that Manikanda is child of two Male energies (Vishnu Shiva), still Hindus accept there is a need of female energy to create a divine soul. This is the reason Lord Vishnu had to take Mohini form to bring Lord Manikanda to the earth. Hindu Mythologies has female gods like Parvathi who made an abstemious god Lord Shiva fall in love with her, as the latter will be incomplete without the female energy. Austerity or celibacy wasn’t a virtue in Vedic concepts unlike Buddhism. In Hindu concept, every divine power needs a female force to make him a godly. This is why Lord Shiva became an intense Viragi after demise of Sati. Thus, each and every god tried their best to work Lord Shiva out of the intense meditation by working hard to appear female energy in front of him and ultimately leading to their wedding. Thus, most of the major deities have female energy to make them divine. This is one of the reason Lord Ayyappa had two wives. There are also many people who believe Muruga/Kartikeya

as a Brahmachari, but many mythologies also says that he was too married. So basically the earliest of Hindu beliefs does not worship the concept of celibacy. However the rise of Buddhist beliefs lead to many elements being adopted into Hindu beliefs and made celibacy glorified. In Hinduism, majority of people wants to see Lord Shiva with his wife to become a complete divine power but then exchange dialogues among themselves about the importance of celibacy of Lord Ayyappa. While we can acknowledge a Buddhist concept in Hinduism, but it should not be taken in something of pure Hindu custom.

There are few social reasons for not having women entered to Sabarimala temple for years. Sabarimala's location was not easily accessible to all as it is today to most of the people. It used to took immense courage to climb through the woods and hiked up to the hill top. Unsurprisingly, it wasn't something advisable for females. There was also a fable that the woods of Sabarimala has some dacoits like Udayanan who used to kidnap women and beat them during their dacoity. Thus, this spread a sense of fear among the women and made them not to cross the idea of visiting Sabrimala in order to protect themselves from dacoits. But, the situation has changed now, Sabrimala is easily accessible to all people irrespective of their gender. Even though, one needs to put some considerable effort in trekking but still it does not make it hard enough to discriminate a gender.

Each custom is human made and unquestionably variable. Indeed, it's difficult to change a deep rooted convention as individuals are attached to it. Yet, probable. When a change comes, over some undefined time frame, the changed idea turns into a persuasion and individuals discover hard to acknowledge anything past that. It's fundamental human mind.

In the Mid-19th Century, there was a tradition in Kerala for not allowing women to enter the temple without being barechested. In 1937, people who belongs to lower caste were not allowed to enter. Only upper caste people had the right to enter the temples in Kerala. The custom of allowing only barechested women to enter the temple was very strict until a legislature was passed in 1940s. This legislature

allowed women to enter the temple with an upper cloth but still few women used to enter barechested. This old tradition faded with time and now we can't imagine a women entering the temple barechested. Thus, there are certain customs and old traditions which are bound to change with time.

There are many such traditions which are so difficult that it cannot be followed in the today's time such as the living a brahmachari life for 41 days before entering the Sabarimala Temple. This was one such custom which was mandatory to follow in older times. One could not enter the temple without following this custom.

There are plethora of such traditions and customs which changed over time. Some changed due to the incapability of people to follow it whereas the other violated human rights of the citizen of the country. One of such custom of not letting women enter the Sabarimala Temple which changed after the 4-1 verdict in the case of **"**Indian Young Lawyers Association & Others vs The State of Kerala & Others".The decision spread equality among people irrespective of their gender. It made women of all age enter the Sabarimala Temple. The custom of not letting women enter the temple was found to go against Article 14[2], Article 15[3], Article 19[4] and Article 25[5] of the Indian Constitution. All the females who were restricted to enter the religion have been violated of their right under Article 25 of the Indian Constitution. Confining the entry of females into the Sabarimala temple highlights the patriarchal structure of the Indian Society. It discriminates women on the basis of their gender. In a very similar case, the Shani Shingnapur temple allowed the entry of females in the temple who were restricted to do so before the court decision.

This recent matter of putting constraint on entry of females in places

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2 "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

3 "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth"

4 "Freedom of Speech and Expression"

5 "Every individual is equally entitled to freedom of conscience and has the right to profess, practice and propagate religion of one's choice".

of worship like Sabarimala, Shani Shingnapur, and Haji Ali have made the Indians debate on 'religious customs versus gender equality'. Restricting the women to enter the temples is a clear violation of fundamental rights under Article 14, Article 15 and Article 25Indian Constitution. The custom of restricting the women to enter the temples is not only discriminatory in nature but also very reverting and embryonic. People need to understand the logic behind following each and every custom. The traditions and customs which promotes inequality among humans must be abolished. It is very unfortunate that courts have become the mediator to spread the meaning of true religion and the situation is not looking to get change through judicial process. Society needs to get with changing times. As far as this does not happen, the divine power inhabited inside the accused temples will look the door of Courts of India.

THE ROLE OF PUBLIC INTEREST LITIGATION IN SHAPING UP THE PUBLIC POLICY REGIME IN INDIA: OVER-REACHING OR JUSTIFIED AND THE WAY AHEAD

Manvendra Singh Jadon[1]

Abstract

At the onset of Independence, India witnessed the growth and development of Individual liberty and governance (Samarsinghe, 1994) with courts playing a catalytic role in providing access to the masses in the judicial process through Public Interest Litigations (First recognized in Bandhua Mukti Morcha v. Union of India) in order to keep a check on other organs of the society (Sathe, 1998). Public Interest Litigation as a concept was a late bloomer in India after its humble origins in theUSA but it immediately garnered traction among India's legal stalwarts Justice Krishna and Justice Bhagwati in the late 1970's (Matthew, 2012). The power of Judicial Review stressed by the Indian courts in the first forty years of Independence to adjudicate public interest claims changed the paradigm of the Indian public law adjudication from a negative to positive function but the catapult effect of judicial intervention or adventurism on the four contours of the democracy was never calculated (Anand, 1999). Does the judicial capacity of the courts which reimagines policy, environment and social changes as a jural attribute instead of a socio-political attribute (Rajamani, 2007) overpowers the long-standing doctrine of Separation of Powers, is the question that needs to be answered. The answer to this scuffle lies in the evaluation of the role delineated to the three pillars of the democracy. Till date, most of the research in Public Interest Litigation has largely been unilateral focusing on the merits of the judgments laid down by the courts and there is no assessment of the patterned effect of these decisions on a large social scale. This research work is an effort to provide an insight into the accountability and transparency of the Indian democratic through discussion on the far-reaching effects of the court's decisions on the public sentiment. The research work also ponders over the question as to whether the policy intervention by the courts is a way to supervise and monitor issues affecting the consensus or is a way to establish hegemony over the emerging and developing system. In a special reference, the research work also touches the causal effects of the judicial intervention on the newer avenues of infrastructure, smart governance, urban development and foreign policy.

Keywords: *Policy, Democracy, Judicial, India, Public Interest.*

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Introduction To Public Interest Litigation

« Injustice Anywhere Is Threat To Justice. »

– Martin Luther King Jr.

Principally, the Rule of law is an integral piece of any democratic social structure wherein the privileges of the resident are taken into consideration by an autonomous, free and fair judicial forums. In this manner, within any majoritarian society, access of citizens to justice and equity is the insurance against any infringement of the true pith and substance of any democratic system. As of late, the adjudicatory framework has fallen prey to a tardy and extensive procedure which has taken an overwhelming toll on the underprivileged section and marginalized communities of the society, explicitly when it comes to access of justice. After the 'coming of age' of the Indian economy and the subsequent institution of the goals of "Liberalization, Privatization and Globalization" by the legislature, there has been a graphical increase in the administrative power and obligation as the possibility of the welfare state is turning out to be conspicuous. This involves a large interference of the Executive in different facets of human life and leaves no side of individual life truly free. Consequently, because of this phenomenal and overwhelming change in the political and socio-economic purview of the Indian governing structures, the judicial bodies have also taken up new roles and responsibilities.

One of the main aims of 'law' is to attain equity and justice in the society and Public Interest Litigation is one such tool developed by the judiciary in India to achieve this objective. For example, a litigation which focuses not on the vindicating private rights but on the matters of general public interest extends the reach of the judicial system to the disadvantageous section of the society. The term "Public Interest" signifies a larger interest of the masses and prosperity of the citizens[2] alongwith the word 'litigation' which denotes a formal court procedure to seek remedial measures and pursuance of rights.

2 Public Interest, 12 OXFORD ENGLISH DICTIONARY (2 ed.).

Until the emergence of the PIL, justice was a remote reality for the underprivileged section of the society. This was largely due to three major problems; first being, lack of awareness among the people; secondly, lack of assertiveness due to their socio-economic status and thirdly, lack of an effective machinery to give them legal aid. Further, the reinterpretation of the concept of *locus standi* by the Apex court has removed the major obstacles faced by the poor and paved the way for easy access to justice. If one looks at the traditional interpretation of the *locus standi,* it can be interpreted in the manner that only an individual against whom a legal wrong has been committed can withstand the test of jurisdiction before the court. The new approach adopted by the court has relaxed this strict interpretation of *locus standi*. According to this approach, if any legal wrong is done to a person or a class of persons who by reason of poverty or any other disability cannot approach the court of law for justice, it is open to any public-spirited individual or organization to approach the court on their behalf. This approach has been majorly taken up by the courts in order to fulfil the constitutional objective of socio-economic justicefor all.[3]

The concept of PIL[4] was initially brought in India by Justice Krishna Iyer in 1976 through the case of Mumbai Kamgar Sabha v. Abdul Thai[5] and was further elaborated in Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India[6], where even an unlisted association of workers was given the permission to institute a writ petition under Article 32 of the Constitution which states the remedies for enforcement of rights conferred by Part III of the constitution to redress the grievances suffered by them. Krishna Iyer J. enunciated the reasons for liberalization of the rule of *locus standi* in Fertilizer

3 KG Balakrishnan, Judicial Activism under the Indian Constitution, Trinity College (2009).

4 S Bohra, Public Interest Litigation: Access to Justice, Manupatra Articles, http://www.manupatra.com/roundup/379/Articles/Public%20Interest%20Litigation.pdf (last visited Mar 5, 2018).

5 Mumbai Kamgar Sabha v. Abdul Thai, AIR 1976 SC 1455 (India).

6 Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India, AIR 1981 SC 298 (India).

Corporation Kamgar Union v. Union of India[7]and the idea of 'Public Interest Litigation' was brought in S.P. Gupta and others v. Union of India[8]. In cases prior to S.P. Gupta, the Apex Court did not use the term 'Public Interest Litigation' expressly but just had the rule of *locus standi* relaxed, it was only after the judgment of the S.P. Gupta case that the term was expressly used by the court.

Therefore, the development of PIL in India is a progeny of the activism, albeit judicial activismeffectuated by the courts in India during the period of emergency. Such a shift was starkly visible because the courts started interpreting the constitutional provisions more liberally to secure the objective of socio-economic justice for the poorer sections of the society. The paper in excess of providing positive aspects of the PIL simultaneously focusses on the darker side of PIL as well, especially when the judiciary uses it as a tool for judicial populism and not activism at times.

Evolution of Public Interest Litigation

The development of Public Interest Litigation[9] spurred the bodies of judicial significance to extend their security towards new avenues of social and public interest. The term 'PIL' was first coined in the United States during the mid-1980s. The expression 'Public Law Litigation' was conspicuously utilized by the American academician, Abram Chayes to portray the act of advocates or other such spirited people working for public interest, who try to bring social changes through a decree in order to reform the legitimate principles of law, uphold existing standards and create lucidity in existing public norms.[10] In line with this, the first legal aid office was set up in New York in 1876. Later on, this movement of PIL caught a spark after it was linked with the Economic Opportunity office and started to spread like wildfire. This attachment with an office of financial value fuelled a new

7 Fertilizer Corporation Kamgar Union v. Union of India, AIR 1981 SC 344 (India).

8 S.P. Gupta and others v. Union of India, AIR 1982 SC 149 (India).

9 Hereinafter referred to as "PIL".

10 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARVARD LAW REVIEW 1281 (1976).

emergence of public interest lawyering for the underprivileged sections of the society, for protection of the environment and to achieve optimal public health for citizens etc. The PIL movement first started to gain momentum in England during the 1970's

The inception of PIL in the Indian setting is fundamentally and largely a constructed wonder and is firmly identified with the dynamic affirmation of judicial power. In spite of the fact that there has been a touchy attestation of judicial power following the revelation of the political crisis of the 1970s in India, such power had been articulated in the past as well. The constitutional tension over land reforms had been pronounced before the court and parliament.[11]

The triumph of Mrs Gandhi's Congress in the Lok Sabha elections of 1971 on a declaration of a flurry of monetary and social changes gave off an impression that there will be a mainstream negation of the court's methodology soon. Following the long stretch of this electoral triumph was the more or less established emergency crisis which kept going on from 1975 to 1977. As a consequence of this, there was judge's transfers; and overlapping of the status of authority, which led to a major imbalanceand erosion of the autonomy of the judicial bodies.[12] Such middling crises of power and balance was followed by the removal of right to property from the fundamental rights chapter under the Constitution. This manifested failure to protect the sanctity and integrity of fundamental rights during the times of crises[13] led to a common belief that the supreme judicial organ of the country has become ineffective. Finally as a result of this discontent, an amendment to the Constitution (42nd) was made to remove judicial power of review.

An uprising of the Judicial Activism was seen in the era of 1970's.

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11 JAGAT NARAIN, "JUDGES AND DISTRIBUTIVE JUSTICE," in V.R. KRISHNA IYER ET AL., JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOUR OF JUSTICE V.R. KRISHNA IYER (1985); S.P. SATHE & U. BAXI, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2nd ed. 2006).

12 J. Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 THE AMERICAN JOURNAL OF COMPARATIVE LAW 495 (1989).

13 A.D.M. Jabalpur v. Shiv Kant Shukla, AIR 1976 SC 1207 (India); *supra* note 11.

In the case of Kesavananda Bharati, one of the judges said, "The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people." And further, "The court is not chosen by the people and is not responsible to them in the sense in which the House of the People is. However, it will…augment its moral authority if it can shift the focus of judicial review…to the humanitarian concept of the protection of the weaker section of the people."[14]

After this long period of emergency, a completely false narrative of judicial interpretation and construction of Article 14[15] and Article 21[16]began to take place in form of decision like *Gopalan*[17] wherein the supreme judicial body were being contradictory to its decision in Kesavananda Bharati[18] and Minerva Mills.[19] To counter this distortion and contradictions in the philosophy of the courts, there was a significant rise of the PIL in India to provide a voice to the marginalized sections of the society and liberalize the interpretation of courts towards the rights of the citizens of the country. This rise also saw the flexibility in the courts approach towards the principle of locus standi so that maximum benefit can be ensured for the maximum people, a utilitarian phenomenon. As a result of this rising popularity of PIL, novel avenues within the culture of PIL were being discovered by the likes of Justice V.R. Krishna Iyer and Justice P.N. Bhagwati in the 70's and 80's.[20]

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14 *Id.*

15 Article 14 of the Constitution of India, 1949 (talks about 'Equality before Law').

16 Article 21 of the Constitution of India, 1949 (deals with 'Protection of life and Personal Liberty').

17 A.K. Gopalan v. State of Madras, 1950 SCR 88 (India).

18 *Supra* note 18.

19 Minerva Mills Ltd. & Ors. v. Union of India & Ors, 1981 SCR (1) 206 (India).

20 Kuldeep Chand, *Judicial Activism and the Problem of Governance in India 2011*, 2015, http://shodhganga.inflibnet.ac.in/handle/10603/128562 (last visited Mar 5, 2018);T.R. Andhyarujina, *Going Beyond The Ambit*, INDIAN EXPRESS, June 1, 2016, http://indianexpress.com/article/opinion/columns/arun-jaitley-judicial-activism-supreme-court-2828018/ (last visited Mar 5, 2018).

Is The Power Of The Judiciary Overreaching In Public Interest Litigations?

Public Interest Litigation for more than three decades has served as a viable tool for the Indian Judiciary to advance the concept of social and economic justice to the marginalized and underprivileged sections of the society. However, everything that shines is not gold and the same holds true in the case of PIL. In the recent past, certain limitations and criticisms have emerged in the sphere of Judicial Activism concerning the 'Separation of Powers', 'Capacity of Judicial Powers' and 'Inequality'.[21] It is quite clear that matters in PIL primarily constitute social and economic rights which generally requires a positive action and does not identify a duty holder. The jurisprudential analysis of the concept reveals that it is a right without a corresponding duty, the reason being that public constitute masses at large and no single individual can be attributed to the duty. Furthermore, the rights are claimed against the state and hence, it should be *'sine qua non'* when it comes to enforcement, protection and remedies against the guaranteed rights and not the judicial arm of the constitutional machinery.[22] Other aspects which have been starkly highlighted, revolves around the illegitimacy of the judicial power in exercising social justice. The time traversed by the PIL in Indian context says much about the transformation of the judiciary from an interpretative jurisdiction forum to supervisory jurisdiction forum wherein it started correcting actions, legislation and policies of the public authorities, government and other bodies working for the public good. Justice P.N Bhagwati strongly noted in 1982 that PIL is an '*a strategic arm of the legal aid movement which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area*

21 S. Sorabjee, *Soli Sorabjee on PILs: Every matter of public interest cannot be a matter of public interest litigation*, FIRSTPOST, January 21, 2016, http://www.firstpost.com/india/soli-sorabjee-on-pils-every-matter-of-public-interest-cannot-be-a-matter-of-public-interest-litigation-2592886.html (last visited Mar 5, 2018).

22 R. Rekha Kumari Singh, *An analytical and critical study on judicial activism vis-a-vis judicial overreach with respect to legislative function of the Indian parliament*, 2015, http://shodhganga.inflibnet.ac.in/handle/10603/32340 (last visited Mar 5, 2018).

of humanity, is a totally different kind of litigation from the ordinary traditional litigation." This definition captures the true essence of the Public Interest Litigation but the modern interpretation developed by the judiciary to the 'Public Interest' is leaning more towards the 'Public Cause'. This, in turn, is creating a plethora of problems towards the implementation of a rights-based social structure as the judicial arm is working more towards correcting the decisions of the legislature rather than to protect the existential rights.[23]

It is duly highlighted in the evolution of PIL in the earlier chapter that unlike the United States regime, where the concept was rooted in the 'participation of civic masses in the government decision making', the concept of PIL in India was mooted as one which talks about the repressive character of the state and takes stringent measures against Government-influenced lawlessness through the whip of the Judicial arm.[24] This characteristic feature is reminiscent of the fact that the Indian tinge on PIL has a concentrated effect on its institutional framework leading many scholars to believe that it has become more of 'populism' than 'activism' on the part of the courts in India. Of a multitude of factors behind this play, few have gained larger notoriety including the excessive workload on the courts, lack of judicial infrastructure, procedural abuse of power and the rift that it has created with the other organs of the government. All such factors give rise to the 'judicial adventurism' on the part of the courts which are meant to be interpretative in nature and not decision makers on public policy matters.

PIL Is A Boon Or Bane?

Going through a history of writ petitions involving issues of public interest ranging from public mal administration, environmental degradation, pollution, access to basic amenities, regulations of public

23 Varun Gauri, *Public Interest Litigation In India: Overreaching Or Underachieving*, POLICY RESEARCH WORKING PAPERS WPS 5109(2009).

24 T.R. Andhyarujina, *Disturbing trends in judicial activism*, THE HINDU, August 6, 2012, http://www.thehindu.com/opinion/lead/Disturbing-trends-in-judicial-activism/article12680891.ece (last visited Mar 5, 2018).

institutions, prohibition, and sexual harassment in the workplace to violations of rights by public bodies, gives a very confusing picture of the Public Interest Litigations. All issues similar to the ones stated above, pertains to the development and upliftment of the society but among these, some frivolous and unwanted issues were also barged over the Court including PIL against a Super Specialty Hospital,[25] PIL as a revision petition for the so-called "public interest" during Bofors Scam,[26]PIL against pollution by an industrial company on private accord and rift[27] and even PILs for regulating practice of private schools in conducting interviews of adolescent pupils.

All such instances lead the intelligentsia to believe that PIL is no more a tool for social reform but rather a failed gimmick to claim judicial intervention for personal motive and vendetta, an opportunity to build a private practice, an easy way to claim fame and a mechanism to over-exert an already overburdened judiciary.[28]The question which has haunted the Courts the most is the point of diversion when it comes to *Locus standi.*[29]In few cases, the Courts have considered petitions from third parties which have no relatable association or connection with the issue or the cause of action of the affected parties.[30] On the other hand, in a few situations, Courts have also rejected petitions for lack of public interest being affected or for petitioners having no identifiable measures to take up public interest in the particular circumstances[31].

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25 J. Venkatesan, *Supreme Court slaps Rs 5 lakh costs on petitioner for frivolous PIL*, Deccan Chronicle, March 11, 2017, http://www.deccanchronicle.com/nation/current-affairs/110317/supreme-court-slaps-rs-5-lakh-costs-on-petitioner-for-frivolous-pil.html (last visited Mar 5, 2018).

26 Janata Dal v. H.S. Chowdhary and Ors., AIR 1993 SC 892 (India).

27 Subash Kumar v. State of Bihar, 1991 AIR 420 (India).

28 M.S Ahuja, *Public interest litigation in India: A Socio-Legal Study*, Etheses, 1996, http://etheses.lse.ac.uk/1417/ (last visited Mar 5, 2018).

29 Mahesh R Halde, *Locus Standi Has Widening the Scope of Public Interest Litigation*, SSRN Electronic Journal (2011).

30 Ashok Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, 1 *in* Supreme but not Infallible Essays in Honour Of the Supreme Court Of India, International Environment Law Research Centre (2000).

31 *Id.*

This commotion at the judicial level is not only limited to the issue of *locus standi* but several other issues are also at the helm of the Courts when it comes to PIL and judicial activism, which are discussed in the following passages.

Ignorance of Separation of Powers

One of the most keenly contested spaces in India is the supremacy of the various organs and especially that of the Legislature and Judiciary. The concept of 'Judicial Overreach'[32]lies in the hallways of judicial intervention in the forsaken territory, ruled by the Legislative arm of the Government. It is no secret that it is upto the legislature to formulate laws, policies and rules regulating the public discourse but there were many times when such power was usurped by the judiciary to come up with guidelines while dictating terms in a plethora of case laws.

A fine example of such a collision can be seen in the case of Vishaka v. State of Rajasthan[33]where the Supreme Court forgot that it is infallible and went on to detail out a comprehensive set of guidelines to avert sexual harassment of women at the workplace which was not provided in any other civil or criminal law. This clearly lends credence to the fact that the judiciary was trying to encroach upon the exclusive domain of legislature.

In a similar fashion, in the case of Prakash Singh v. Union of India[34]the judiciary laid down directives to the State to incorporate amechanism that lead to a series of reforms in the police-system in 2006. In this case, the court unbendingly laid down seven points of action which must be adopted at the earliest in the wake of loopholes in the disciplinary administration on the part of the Police Authorities. Such an action by the Court was totally violative of the Separation of Powers enshrined in the Constitution of India as Police Administration is a state subject and hence, out of the purview of the Judiciary to legislate

32 Swati Sharma, Rahul Rishi & M.S. Ananth, *Judicial Activism in India: Whether More Populist or Less Legal*, 1 INDIAN JOURNAL OF CONSTITUTIONAL & ADMINISTRATIVE LAW (2017).

33 Vishaka & Ors v. State of Rajasthan & Ors., AIR 1997 (7) SC 384 (India).

34 Prakash Singh v. Union of India, AIR 2006 8 SCC 1 (India).

such norms.[35]

Without an iota of doubt, it must be quite clear that the Judiciary should not take policymaking in their hands and must steer away from engulfing the authority of the decision-makers of the state. On a parallel note, it was rightly pointed out by the Court in the case of Satya Narain Shukla v. State Of U.P. Chief Secy.[36] that "The justification given for judicial activism is because of the executive and legislature[37]failure in performing their functions. Even if this allegation is true, does it justify the judiciary in taking over the functions of the legislature or executive? In our opinion, it does not, firstly because that would be in violation of the high constitutional principle of separation of powers between the three organs of the State, and secondly because the judiciary has neither the expertise nor the resources for this."[38]

Hence, in order to maintain the order and principles of Constitutional Supremacy, the Courts must ensure that they do not row their boats in far-off waters and thus, does not double up as a legislative arm of the Government.

Aspersions over the Nature of PIL: Public or Private

It has always been an accepted truth, that at times judicial bodies have traversed the farthest of territories, some of which have been established as circumscription of the delimited boundaries of power. This includes but not limited to entertainment of the matters beyond the scope and judicial adventurism on the basis of populist beliefs; thus, breaking the barriers set by the Constitution. Conversely, it can also be said that the Courts are the only accessible forum for the common citizens to address their grave issues in a timely, impartial and

35 Raj Kumar, *First information report and role of police A study of legislative and judicial trends*, 2010, http://shodhganga.inflibnet.ac.in/handle/10603/132545.

36 Satya Narain Shukla v. State Of U.P. Chief Secy., 2015(4) ALJ 578 (India).

37 N. Santosh Hegde, *Public Interest Litigation and Control of Government*, 4 NLS Student Bar Review.

38 Union of India v. R. Gandhi, 2010 (11) SCC 1 (India) ([T]hat the Indian Constitution recognizes separation of power in a broad sense without however their being any rigid separation of power as under the American Constitution or under the Australian Constitution.)

justifiable manner. In light of such contrasting perspectives, it would be best for the Courts to exercise judicial discretion in churning out a definite mechanism for implementation of 'judicial restraint'. Such exercise of judicial discretion would not only ensure a level playing field for the various stakeholders of the Government but would also mean that some measures would exist to counter the ill-effects of PIL usage by parties inclined towards private interest and for whom the public benefit is inconsequential to their own self-motives. It was well noted by the then-Chief Justice of India, Mr A.S.Anand[39] that "*Care has to be taken to see that PIL essentially remains Public Interest Litigation and does not become either Political Interest Litigation or Personal Interest Litigation or Publicity Interest Litigation or used for persecution.*"

As the name suggests, the whole circle that encapsulates PIL speaks of 'public good' and 'public betterment' and in no manner, such interests be hampered by individually motivated goals. To provide impetus to this argument, it was held by the Apex Court in the celebrated case of Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors.,[40] that,

"When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that party which has brought the litigation is litigating bona fide for thepublic good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition.Hence, before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests."

This decision truly enlist the reasons behind the adoption of Public Interest Litigation in India by the courts of law which was to seek out larger good of the society keeping in mind the constitutional limits and giving a pedestal to the weaker sections of the society in order to safeguard them against the burgeoning interest of private hounds whose only goal is to fulfill their commercial interests.

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39 Faqir Hussain, PUBLIC INTEREST LITIGATION (1993). <https://www.sdpi.org/publications/files/W5-Public%20Interest%20Litigation.pdf> accessed February 4, 2018; *supra* note 11.

40 Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors , (1999) 1 SCC 492 (India).

Limited Resources and Populism Exercised by the Judiciary

PIL serves as the most effective and speedy way to justice as it is considered by the courts of law around the country on priority-basis for the purpose of hearings. Additionally, it is quite clear that the Courts in India are backlogged[41] to a far larger extent than they should have been actually and all this is because of the fact that the Courts are still lingering over the formulation of rules that can guarantee strict action against PILs which are frivolous, individualistic and unwanted in nature. This is the reason why speedy justice still hasn't reached the common people and indirectly, their rights have been violated because of the limited access to justice.[42] In a few cases, the Courts have also shown a lethargic attitude in disposing of PILs which are quintessential as to the time and the need for the parties. This attitude of the judiciary has further widened the gap between effective justice and the public's access to it.

In PIL, the judiciary did away with the procedural nuances and adopted adversarial litigation. Hence, it can be rightly pointed out that such procedural dilution could give rise to abuse of power and such abuse could also lead to the violations of the epitome of law, i.e. the "Principles of Natural Justice":[43]

(i) nemo judex in re sua, i.e. the authority deciding the matter should be free from bias*; and*

(ii) audi alteram partem, i.e. a person affected by a decision has a right to be heard.

The first principle herein not only means that a person should not be a judge in his own case but also that the authority deciding the matter including judges, chairman's and other administrative judgment-givers must be impartial and unbiased. Such an authority should not have any presumptions or preconceived notions as to the parties and

41 Law Commission of India. April 1992. Report No. 245 on Arrears and Backlog: Creating Additional Judicial (wo) manpower, 2014.

42 B.S. Chauhan, The Legislative Aspect of the Judiciary: Judicial Activism and Judicial Restraint TNSJA, http://www.tnsja.tn.nic.in/Article/BS%20Chauhan%20Speech-%20Lucknow.pdf (last visited Mar 6, 2018).

43 S. Deva, *Public Interest Litigation in India: A Critical Review*, 28 Civil Justice Quarterly (2009).

subject matter of the litigations.[44]

One of the foremost scholars on Indian PIL regime, Prof. Upendra Baxi reaffirms that "*Social Action Litigation marked the advent of judicial populism that is, the Supreme Court (in the memorable phrase of Justice Goswami) began to imagine itself as the —last resort of the bewildered and oppressed Indians.*"[45] This statement is viable in the present context as the judiciary has already soaked its hand in the blood of populism, adventurism and excessivism. Judges who are the primary deliberators, interpreters and protectors of the courts of law are far from being unbiased. The reason often being cited revolves around the proposition that how PIL is an impediment in judicial-efficiency mainly because of its gate-keeping role.[46] Sathe argues that Courts are primarily staffed by Judges who are human beings with a repository of judicial knowledge but the psychological setup of just another similar human being. Thus, he is susceptible to error which means that to uphold the principle of democratization of judicial powers, a simplistic tradition of juristic and populistic criticism of such decision must develop.

All judges are humans and they are no short of their individual convictions based on their political outlook,[47] social inclinations and religious ideologies.[48] This approach was vociferously reflected in the judgment of Justice Dwivedi in the landmark case of Kesavananda Bharati v. Union of India[49]where it was stated that"*the court is not chosen by the people and is not responsible to them in the sense in*

44 Shobha Agarwal, THE PUBLIC INTEREST LITIGATION HOAX IN INDIA: ITS ADVERSE ...SACW (2015), http://www.sacw.net/article11105.html (last visited Mar 5, 2018).

45 Satinder Kumar, *Abuse of public interest litigation in India need of legal safeguards*, 2015, http://shodhganga.inflibnet.ac.in/handle/10603/39837 (last visited Mar 6, 2018).

46 KG Balakrishnan, GROWTH OF PUBLIC INTEREST LITIGATION SINGAPORE ACADEMY OF LAW (2008).

47 R. Shunmugasundaram, *Judicial Activism and Overreach in India*, 2007 AMICUS CURIAE22–28 (2011).

48 P.N. Bhagwati, *Judicial Activism and Public Interest Litigation,* 23 COLUM. J. TRANSNAT'L L.561–578 (1985).

49 *Supra*note 18.

which the House of People is. However, it will win for itself a permanent place in the hearts of the people and augment its moral authority if it can shift the focus of judicial review[50] *from the numerical concept of minority protection to the humanitarian concept of the protection of the weaker section of the people.*" The essence of this observation lies in the core of 'judicial populism' and how it should be avoided at all costs. To sum up this dark nature of the Public Interest Litigation, the celebrated case of S.P Gupta v. Union of India[51] must be discussed wherein the Court laid down that "Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach…. What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry million people of India who are continually denied their basic human rights".[52] This approach adopted by the Court clearly means that judges should abstain from using Public Interest as a tool for popularity but rather work as social engineers who are aware of the socio-economic realities of the social structure existing in the society and uses thelaw as a tool for achieving the underlying Constitutional objectives.

Falling standards of Implementation and Ill-fated Recognition of Rights

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50 Delhi Development Authority, N.D. and Anr. v. Joint Action Committee, Allottee of SFS Flats and Ors., AIR 2008 SC 672 (India) (Broadly, a policy decision is subject to judicial review on the following grounds:
"(a) if it is unconstitutional;
(b) if it is dehors the provisions of the Act and the Regulations;
(c) If the delegate has acted beyond its power of delegation;
(d) If the executive policy is contrary to the statutory or a larger policy.")

51 *Supra* note7;*See* Justice Krishna Iyer observed, "Every judge is an activist either on the forward gear or the reverse."

52 *Supra* note 53.

Even though it has been repeatedly mooted that "the judges could enforce a law but should not create a law and seek to enforce it"[53], they actually do enact laws in innumerable instances probably in a manner suited to the whims and fancies of the judiciary. A two-fold approach to the justice rendered under PIL bluntly shows that PILs do come up with fancy symbolic decisions but fail big time in the implementation of those directives, principles and rules. On a secondary note, it has been seen that nothing could be achieved in recognizing such rights under PILs which cannot be exercised and thus, will eventually become worthless. The reason behind lack of implementation is not concerned with the standing of the court of law in the eyes of people but it highly depends on the public officials, departments and officers who are appointed or called in case of issues arising in the Courts. These officials are the impediments in the implementation of qualitative decisions because of uncooperativeness and non-compliance of these officials in lieu of the excuse that such decisions are non-implementable or are overly ambitious.[54] A sequence of chain events which is clear in these sort of circumstances is that if Judiciary steps into the shoes of Executive and Legislature, it is exposed to the issues faced by these organs on the front of implementation, transparency and accountability. "More often than not, the alacrity of the judiciary in delivering path-breaking judgments in public interest may not match by the foot soldiers in the executive, who ultimately shoulder the burden of implementing the given directions." Without such support from the Executive, even the most welfare-centric directions, rules and guidelines would not be able to make any positive impact on the society. The Courts themselves have accepted the notion that majority of the decisions in the PILs have been unfruitful even after creating a mass hysteria among common people. Katju pointed out in the case of Common Cause (A Regd.

53 University of Kerala v. Council of Principals of Colleges, Kerala, (2011) 14 SCC 357 (India).

54 Prashant Narang, JUDICIAL ACTIVISM OR OVERREACH? iJustice, http://ijustice.in/sites/default/files/resources/judicial_activism_or_judicial_overeach.pdf (last visited Mar 6, 2018).;Umama Moin, *Parliament and Supreme Court : The Indian experience*, 2011, http://shodhganga.inflibnet.ac.in/handle/10603/11379 (last visited Mar 5, 2018).

Society) v. Union of India & Ors.[55]that "We would be very happy to issue such directives if they could really be implementable. However, the truth is that they are not implementable (for various reasons, particularly lack of financial and other resources and expertise in the matter). For instance, the directives issued by this Court regarding road safety in M.C. Mehta's case hardly seem to have had any effect because every day we read in the newspapers or see the news on TV about Blue-line buses killing or injuring people. In the Hawala case (Vineet Narain v. Union of India, AIR 1998 SC 889) a valiant effort was made by this Court to check corruption, but has it made even a dent on the rampant corruption prevailing in the country? It is well settled that futile writs should not be issued by the Court." The analogy drawn by former Justice Katju, in this case, is pertinent to the crux of a lot of guidelines and directives issued by the courts of law which are not more than a sword made out of paper. Some of these guidelines include the ones in the *Police* Directives case,[56] Vishaka case,[57] D.K Basu case[58] (Procedure of Arrest), Depletion of Forest Cover case,[59] Madhu Kishwar case[60] and other similar cases where the judiciary positively legislated on the intrinsic issues involved in the heart of the matter but were overshadowed due to the procedural blunders committed by the authorities in their implementation.[61]In such cases, even though the courts of law have the power to impose penalties on the concerned official through 'contempt of court' mechanism if the official absents himself from the appraisal of the Court of the progress made under its order, they usually hinder themselves from using such extreme measures because they might lack in implementation and

55 Common Cause (A Regd. Society) v. Union of India & Ors., U.P. 2014(2) SCC 1 (India).

56 *Supra* note 40.

57 *Supra* note 44.

58 D.K.Basu v. State of West Bengal, (1997) 1 SCC 416 (India).

59 T.N. Godavarman Thirumulpad v. Union of India & Ors., (1997) 2 SCC 267 (India).

60 Madhu Kishwar & Ors. v. State Of Bihar & Ors., 1996 AIR 1864 (India).

61 Lakshmi v. Union of India, (2014) 4 SCC 427 (India).

can get useless by overuse.[62]

Till the time the Courts does not come up with a strategic plan for implementation of such orders, the whole purpose of PILs would keep going on the downside. Alternative measures can be taken by designating private authorities in keeping a check and balance on the government's progress on the implementation of the orders by providing such parties certain incentives so they can carry out such review work diligently and efficiently. Yet another alternative could be a monitoring authority where individuals are appointed by the legislature but are under the supervision and control of the judiciary. This would ensure that neither the principle of separation of powers nor that of realization of justice is violated.

In the long run of events, the best would be to take remedial measures against misuse of such powers usurped by the Courts which leads to unfruitful results. More importantly as pointed out by Singh that "*a judge may talk about right to life as including right to food, education, health, shelter and a horde of social rights without exactly determining who has the duty and how such duty to provide positive social benefits could be enforced*",[63] it must be kept in mind that rights are recognized in light of a corresponding duty. If anywhere in the conundrum of rights and duties, a point of contention arises, it will negate the whole concept of justiciability as rights cannot exist in abeyance of an existing duty.

Justification to the Powers Available To the Courts under the Public Interest Litigation System

With reference to the works of Rousseau, Austin and many other great minds, there was one contention that was found to be common among them and that was their conviction of the fact that the human nature is not a completely virtuous element. Paying heed to this statement,

62 Somnath Chatterjee, SEPARATION OF POWERS AND JUDICIAL ACTIVISM HIGH COURT SESQUICENTENARY BUILDING (2013).

63 Anuj Bhuwania, *Competing Populisms: Public Interest Litigation and Political Society in Post-Emergency India,* 2013, https://academiccommons.columbia.edu/.../Bhuwania_columbia_0054D_11468.pdf (last visited Mar 5, 2018).

it has been observed since times immemorial that society has always been exploitative. Going further down the line on a microscopic level, it is weak whether socially, politically or economically who face the brunt of these exploitative measures.

It is fortunate to find that many remedies against such exploitative measures are enshrined in the Constitution of India, a document which is upheld to its highest reverence by any citizen of the Republic of India, like Article 16(4)[64] of the Constitution which helps the depressed classes of the society by encouraging affirmative action to increase their participation and representation and *etc*. But sadly, in reality, many of the rules enshrined in the Constitution are not enacted upon (forget the enforceability) and thus, again the weaker sections are up against the predicaments caused by this abstinence of the executive and the legislature which is ironically the representative of the population of the nation.

In order to save the day for the people who belong to the weaker sections of the society, to instil upon them the fruits of justice; the Supreme Court took up the cause of dispensing justice by responding to a Public Interest Litigation suit through its judicial activism. Justice Krishna Iyer himself said that "Every judge is an activist either on the forward gear or reverse."[65]

A PIL can be introduced in a court of law *suo motu*. It is not necessary for the aggrieved party to personally seek remedies from the court.[66] When an individual or group of people feel that their interest is not taken care by the government, a PIL can be filed in a court of law by approaching the Supreme Court under Article 32[67] of the Constitution or any of the High Courts who have the requisite jurisdiction,

64 Article 16(4) of the Constitution of India, 1949 (states that 'Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State').

65 M. Kothawade, 1 Need for Judicial Activism (1 ed. 2015).

66 *Supra* note 11.

67 *Supra* note 6.

under Article 226[68] of the Constitution. Thereafter, the court of law can proceed and enforce the necessary measures which serve and safeguards the welfare of the public. Therefore, it can be witnessed that the lacunas of the policies, made and adopted by the legislature and executive, which affects the unprivileged sections of the society in a detrimental fashion, have been effectively handled by the tool of PIL to secure social justice for everybody.

One must not forget that there were times when the legislature wanted to curb the fundamental rights of the citizens during the pre-emergency days but it was the historic decision of the Supreme Court in the Kesavananda Bharti case which gave its due to the fundamentals of a citizen in the form of the unamendable 'basic structure' of the constitution. In this case, it was held that the Parliament could amend any part of the Constitution including the Fundamental Rights; but there were certain 'basic doctrines' of the Constitution of India, if amended, could irreparably alter the whole spirit of the Constitution. With this judgement, the doctrine of 'basic structure' of the Constitution came into existence. Further, in the Minerva Mills case, Justice P.N. Bhagwati also concluded that Judicial Review as laid down in Article 13[69] of the Constitution of India, is also a part of the 'basic structure' of the Constitution as,without Judicial Review, the effectiveness of the Constitution would be rendered as futile. Therefore, it is because of this doctrine of'basic structure' that the Republic of India has not seen the lights of a tyrannical rule that has been faced by its neighbours.

Article 21of the Constitution of India guarantees the Right to Life and Personal Liberty. This article, which talks about the concept of 'life' and 'personal liberty', has been interpreted liberally in many decisions ever since the judgement in the Maneka Gandhi case[70] was decided. Consequently, the Supreme Court has carried on to expand the scope of Article 21 through Public Interest Litigation, which started

68 Article 226 of the Constitution of India, 1949 (states the power of High Courts to issue certain writs).

69 Article 13 of the Constitution of India, 1949 (talks about 'Laws inconsistent with or in derogation of the fundamental rights').

70 Maneka Gandhi v. Union of India, 1978 SCR (2) 621 (India).

guaranteeing certain socio-economic rights which had not been expressly mentioned in the Constitution.

With the S.P. Gupta case[71], we saw the explicit-introduction of Public Interest Litigation in the country for the first time. In this case, the counsel appearing on behalf of the Law Minister argued that the petitioners had not faced any grievances or any legal injury by the issue of a circular of the Law Minister nor by the short-term appointments of the judges by the Central Government; hence, the petitioners had no *locus standi* for the maintenance of the writ petition. In opposition to this argument, it was made clear by the esteemed judges of the bench that in a country like India where access to justice is already curtailed by many social and economic stymies, judicial remedies can be democratized by promoting "Public Interest Litigation" which is an accessory to provide access to justice to large masses of people who are denied basic human rights and to whom words like 'freedom' and 'liberty' have no meaning. For that reason, PIL is a way to guarantee justice to those socially cornered people to whom the actions of the legislature are inaccessible as it is also in consonance with Article 32 of the constitution and Article 226 of the Constitution.

The scope of Public Interest Litigation also comes in agreement with Article 39A[72] of the Constitution which is a directive principle of the state policy that is laid down to protect and deliver prompt social justice with the help of law. Furthermore, the Supreme Court's rulings become obligatory precedents for all courts of law and tribunals in the legal system of the country which points to the fact that the decisions and the judgements of the Supreme Court also becomes the 'law of the land' as it has been empowered to do the same by Article 141[73] of the Constitution. Thus, with respect to the interpretation of above facts, it can be seen that even the founding fathers of the nation, who have meticulously drafted the Constitution of India after referring to

71 *Supra* note 7.

72 Article 39A of the Constitution of India, 1949 (talks about 'Equal justice and free legal aid').

73 Article 141 of the Constitution of India, 1949 (states that 'Law declared by Supreme Court to be binding on all courts').

the Constitutions of various other civilized nations, were of the view that judicial activism was the solution to the problems of the country where the hands of legislature could not reach.

Ever since the rape of Bhanwari Devi in the late 1996, the nation finally took cognizance of the major threat of sexual harassment that the women faced in their workplace but sadly, the legislature had not brought in the necessary statute to have this grave and abhorrent act curbed, despite being a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1980 itself. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 came in sixteen years after the *Vishaka case*[74] was heard in 1997 but it was due to the activism of the Supreme Court that women could go freely to work, being finally empowered with their rights. It is often seen that a particular petition might not be able to secure relief in a wholesome fashion or be sluggish in its implementation but nonetheless, litigation does play a very important role in bringing constructive and significant reforms by at least introducing an ignition for change.[75] For those sixteen years, it was the *Vishakha guidelines* of the Supreme Court that safeguarded the honour of hard-working women from sexual harassment; thus, upholding gender justice in the society. It is very interesting to also see that these guidelines were framed by the Supreme Court with the consent of the Solicitor General, who is a premier law officer of the executive government. This shows that judicial activism doesn't encroach upon the doctrine of 'Separation of Power' which talks about the division of responsibilities among the three organs of government in a manner that the powers of one organ do not come in conflict with powers associated with the other organs, but it only fills up an existing legislative void by providing effective redressal.

Public Interest Litigation has also been the sword or rather the pen of the environmental crusade or also known as the 'green litigation' that was valiantly and tirelessly pursued by M.C. Mehta. He brought in several progressive changes in the protection of the environment by not

74 *Supra* note 44.

75 *Supra*note 33.

being a policy- maker elected by the people but by being a conscious citizen of the nation who filed petitions in the interest of the public which have resulted in orders deciding absolute liability for the leak of Oleum gas from a factory in New Delhi,[76] bringing in directions to the authorities to have pollution in and around the Ganges river checked,[77] having hazardous industries relocated from the domestic boundaries of Delhi,[78] bringing in directions to state agencies to check the pollution in the propinquity of the Taj Mahal[79] and also having government-run buses shifted to the use of environment-friendly fuel like Compressed Natural Gas (CNG).[80] In the beginning, some of these decisions were criticized for making 'unwarranted intrusion' into the functions of the pollution-regulation boards but slowly with the passage of time, it is now widely acknowledged that pollution in Delhi has been checked to a considerable extent due to such judicial activism. It can also be observed that Public Interest Litigation has consequentially played a big role in the setting up of the special 'Green Bench' which has been constituted by the Supreme Court to give directions to the apropos governmental agencies in keeping a check on the forest conservation measures.[81] With the Shriram Food & Fertilizer case, a whole new doctrine of law was introduced in the legal system of India earmarked by concepts like 'absolute liability', which brought in a clinical change in the jurisprudence of law of torts in India, a common-law country. Prior to this judgment, the jurisprudence involved in the law of torts in India was heavily dependent on the practice followed in England, another common-law country. This makes it clearly visible that with the inception of Public Interest Litigation in the country, a wide- array of doors have been opened for innovative judicial interpretations

76 M.C. Mehta v. Union of India, (1987) 1 SCC 395 (India).

77 M.C. Mehta v. Union of India (1988) 1 SCC 471 (India).

78 M.C. Mehta v. Union of India, (1996) 4 SCC 750 (India).

79 M.C. Mehta v. Union of India, (1996) 4 SCC 351 (India); Emily R. Atwood, *Preserving The Taj Mahal: India's Struggle to Salvage cultural icons in the Wake of Industrialisation*, 11 Penn State Environmental Law Review (2002).

80 M.C. Mehta v. Union of India, (1998) 8 SCC 648 (India).

81 Raghav Sharma, *Green Courts In India: Strengthening Environmental Governance?* , 4 Law Environment and Development Journal52–71 (2008).

which have subsequently helped in 'justice' being achieved in a unique manner with respect to time and place.

The thing that makes the aura of Public Interest Litigation even-more charming is its simplicity and its 'public-friendly' procedure. While giving out the judgement in the *S.P. Gupta case*,[82] Justice P.N. Bhagwati had noted that access to justice could be made easier by removing the technicalities which often acts as a barrier rather than a bridge while dispensing justice. From this statement, it can be understood that the ones who are direly in need of justice, in accordance with the rule of law, are often ruled out from seeking it as the technicalities associated with the courts of law in providing justice such as time, money and other inconveniences involved in a litigation, are too much for the common man to digest which concurrently deters their recourse to take legal action. With Public Interest Litigation, there came a pivotal change in the form of the dilution of '*locus standi*' concept, which is quintessential for initiating proceedings in a court. In contrast to this, the Court's culture of taking *suo motu* cognizance of matters which have exploited and deprived the sections of humanity of their socio-economic rights, through letters addressed to sitting judges of courts of law has been extended. This exercise of initiating proceedings on the basis of letters has become a common practice and has come to be described as 'epistolary jurisdiction'.[83] Due to such people-friendly policies and measures, the Supreme Court's attention was drawn to labour and employment-related issues like the employment of underage labourers and the payment of wages below the prescribed statutory levels of minimum-wages to those involved in the construction of the facilities of the then- Asian Games of 1982.Here the Supreme Court took serious exceptions to these practices as the employment of children in construction-related jobs clearly violated the constitutional prohibition on child labour and the non-payment of minimum wages was considered to be nothing less than theextraction of forced- labour.[84]

82 *Supra* note 8.

83 *Supra* note 7.

84 People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473 (India).

Public Interest Litigation also provides sufficient assistance in keeping a check on persisting social evils like the age-old convention of bonded labour despite the Constitution outlawing such abhorrent practices.[85] It is also through the channel of PIL, that courts of law in India have embraced the strategy of providing hefty monetary compensation by way of awarding exemplary damages for constitutional injuries such as illegal detention,[86] torture of detainees held in custody[87] and extra-judicial killings by state agencies.[88] One can never forget that India's struggle for freedom was a movement to regain the right to life with dignity and the right to equality which were purged by the atrocities and the exploitative measures carried on by the imperialist approach of the then colonial rulers of India. Thus, people who pursue litigation in the interest of the public, are only pursuing their fundamental duty of cherishing and following the noble ideas such as achieving social, economic and political justice, equality of status and of opportunity for all, which inspired India's national struggle for freedom, as laid down in Article 51A[89] of the Constitution.

Individuals who are of the view that judicial activism through Public Interest Litigation is encroaching upon the sovereignty of the parliament must be advised to stop looking at this as a battle between the executive and judiciary, something that the country had already witnessed in the starting decades of its independence.[90] The Constitution of India has elucidated the fact that the ultimate aim of the judiciary is to dispense justice in accordance with the rule of law, to each and every person of the state who seeks access to it. In the *BALCO case*,[91] when the disinvestment season was initiated by the NDA-1 government of the then Prime Minister of India, Mr Atal Behari Vajpayee to sell 51% of stakes in BALCO, the BALCO

85 Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (India).

86 Bhim Singh v. State of Jammu and Kashmir, (1985) 4 SCC 677 (India).

88 *Supra*note 69.

89 Article 51A of the Constitution of India, 1949 (states the 'Fundamental Duties' of a citizen).

90 *Supra*note 15.

91 Balco Employees Union (Regd.) v. Union of India & Ors., 2002(2) SCC 333 (India).

Employees' Union filed a petition arguing that the workers would be severely affected by this disinvestment decision of the government as they would lose their rights and protection under Article 14[92] and Article 16[93] of the Constitution which they were entitled to, for being employees of a governmental authority as defined in Article 12[94] of the Constitution. The Supreme Court responded to this by making it clear in its decision that "Public Interest Litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in the exercise of their administrative power." This prudent decision highlights that the Apex court of the land also acknowledges the administrative independence of the executive and in no manner, is interested in encroaching upon its jurisdiction as long as such policies are in consonance with the existing statutory provisions and the spirit of the Constitution. It has also been laid down in the National Litigation Policy of 2009 that Public Interest Litigation should not be taken as matters of convenience to let the courts do those things which the government finds inconvenient.

As it had been stated in the beginning of this chapter, the human nature is not a completely virtuous element. In furtherance of this statement, it is not surprising to see the misuse of Public Interest Litigation by people who frivolously file a petition in pursuance of their self-motivated interest which is sugar-coated by them as "in the interest of the public". Although it has been held in the S.P. Gupta case[95] that the phrase "in the interest of the public" is subjective and depends from one case to another, the judgement of this very case also puts down that litigants filing petitions in the interest of the public must act in a bona fide manner and must not petition for personal gain or

92 *Supra* note 24.

93 Article 16 of the Constitution of India,1949 (provides "Equality of opportunity in matters of public employment")

94 Article 12 of the Constitution of India, 1949 (states that 'In Part III, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.')

95 *Supra* note 8.

political motivation or any other circumlocutory considerations. The judgement of the BALCO case[96] also actively discourages Public Interest Litigations filed for the sake of publicity. Frivolously filing petitions in the interest of the public, impedes the justice delivery mechanism as the whole process eats up the valuable judicial time of the court while engrossing in the nitty-gritty of such cases which ultimately turn out to be futile. Such incidents at the cost of 60,751 pending cases in the Supreme Court looks highly cataclysmic for the future. In order to efficiently restrict this negative practice, the Supreme Court has launched an unprecedented confrontation on the piling up of frivolous petitions by imposing heavy costs like imposing a cost of Rs. Ten lakhs on a Bihar MLA who filed a petition questioning the "authenticity of a 23- year old newspaper article", Rs. One lakh on a professor from Maharashtra who filed a petition challenging "a circular issued by the Gujarat government" and admonishing of costs from a Madurai-based car mechanic who filed a petition challenging "illegal additional floors" in a hospital in Thanjavur, Tamil Nadu.[97] It has also been recognized by the highest court of the land that law is in a process of development that makes it exigent to develop separate public law procedures as well as public law principles whose applicability depends on the situation identified by the court. Thus, the courts are required to function in a firm manner by holding to their ground but with adequate caution and abstention or else proceedings under Article 32[98] or Article 226[99] of the Constitution shall be misused as a covert alternative for civil action in private law. In order to restrict such misuse, the decisions of the Supreme Court have set precedents for the grounds on which a PIL can be rejected such as non-impleading of the necessary parties,[100]

96 *Supra* note 110.

97 Krishnadas Rajgopal, *A stern message from SC against frivolous PILs*, The Hindu, May 1, 2017, http://www.thehindu.com/news/national/a-stern-message-from-sc-against-frivolous-pils/article18347907.ece (last visited Mar 5, 2018).

98 *Supra* note 6.

99 *Supra* note 79.

100 Krishna Swamy v. Union of India, AIR 1993 SC 1407 (India).

misrepresentation or suppression of facts,[101] Res Judicata,[102] laxity of the petitioner in filing the petition[103] and maliciousness of the petition filed before the court.[104]

Therefore, after analysing the course of judicial activism in India that has been moulded by Public Interest Litigation, it is strongly believed that the role of PIL in shaping up the public policy regime in India has been justified as judicial activism through such Social Action Litigations- as Prof. Upendra Baxi prefers to call it, has taken on numerous pressing issues that have plagued the society. The legislature has always been acknowledged for its primary role played in the shaping of a nation's public policy by coming out with new legislation and statutes but it should also be undeniably considered that the procedure in making and passing such laws can be a prolonged and a time-taking one as has been witnessed with the enactment of "The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013". Therefore, in the presence of such legislative vacuum, it is highly necessary for the judiciary of the land to play a critical role in redressing the problems of the masses in order to achieve the constitutional goals of equality and social, economic and political justice which have been mentioned through the Preamble of the Constitution until concrete policies are undertaken by the legislature and the executive to fill up such a vacuum.

Conclusion

With the arrival of 2019, the world would be witnessing nearly 40 years of Public Interest Litigation in India since its introduction into its legal system in the 1970s but the pertinent question that still lingers around after all this time is whether the role of Public Interest Litigation in shaping up the public policy regime India has been overreaching or justified? In this paper, we have approached and elaborately dealt with both the faces of Public Interest Litigation, which makes it even

101 Welcome Hotel v. State of Andhra Pradesh AIR 1983 SC 1015 (India).

102 Forward Construction Co. v. Prabhat Mandal (Regd.), AIR 1986 SC 391 (India).

103 Tilokchand Motichand v. H.B. Munshi, AIR 1970 SC 898 (India).

104 Kini v. Union of India, AIR 1985 SC 8915 (India).

more difficult in reaching a conclusion in general due to the variations in tendencies witnessed among the decisions passed by the courts of law over the time.

Upon this exercise, it is being said without any doubt that PIL has a very critical role to play in the justice redressal mechanism which provides a metaphorical elevator to the path of justice to the marginalised classes of the society which also includes a section of people who are not even aware of the rights provided to them by the Constitution. In this manner, Public Interest Litigation has provided a platform for the dissemination of such rights among the aggrieved individuals of the public who do not even have the opportunity to get access to courts; for such people 'getting justice' is already considered out of question. The other positive outcomes which have come with the introduction of PIL are the direct involvement of the civil society by engaging in widespread awareness about human rights and providing a voice to the unprivileged communities in the courts of law and in public policy-making too. This shows that PIL has significantly contributed to good and smart governance by legitimising the accountability of the government. This highlights a massive mark in improving the principles of democracy and strengthening the rule of law which have contributed to a great extent in achieving many important policy goals that have been envisioned by the founders of this 67-year-old republic through the Constitution of India.

At the same time, the Indian experience of Public Interest Litigation also forecasts the importance to ensure that PIL does not become the alternate entry to the sanctuary of justice to have private interest fulfilled, political motives entertained or to have publicity gained as all these motives go antithetical to the principle with which PIL was conceived. It is often argued that PIL leads to the overreaching power of the judiciary in the separation of power. However, many a time it is ignored that balance of power among the organs of the government which is maintained by this separation of power does not suggest a rigid interpretation of this doctrine but connotes a passive *interpenetration* among these autonomous organs by which a check is maintained on the domination of any such organs over the others. Thus, courts should refrain from using PIL as a weapon to run the

country by illegitimately entering into the domain of the executive and legislature. Hence, judicial populism has to be circumvented with extreme rationality by restricting the ambit of PIL. It will also be foolish to disregard the fact that with the inception of PIL, there has been an unprecedented increase in the number of pending cases in the judiciary due to the frivolous filing of such petitions which is highly detrimental in the process of delivering justice to the ones who require it the most.

Therefore, the sanctity of Public Interest Litigation can only be maintained by discouraging the practices which stand as hindrances to the objectives that have been set by such mechanisms. This can be achieved by promoting economic incentives and disincentives on such litigations. Incentives such as protected cost order, provision of legal aid, encouragement of filing suits *pro bono*, fundraising for the civil society engaged in petitioning in the interest of public and *amicus curiae* briefs, will not only encourage legitimate PIL cases but will also remain concurrent with view of the original and essential rationale for PIL of acknowledging potential plaintiffs who are not always found to be resourceful. Contrarily, disincentives could keep the people filing PIL for an ulterior purpose which could be harmful in promoting smart governance, urban development and peaceful and strategic foreign policy, although indirectly, away from the bays of its aims and objectives.

On a concluding remark, it can be highlighted that judicial review through PIL has been quite fundamental in churning out an 'equity-based society' with the protection of rights of the individual coming in its periphery. What lacks is that access to justice under PILs has not been heard in every corner of the country and hence, many sections of the society still remain weaker and continue to suffer as they are not aware of their rights. Thus, in order to provide a real purpose to the concept of PIL, the courts of law must ensure its implementation and keep in mind that it respects the principle of Constitutionalism and Separation of Powers enshrined in the spirit of the Indian Constitution.

LEGAL FRAMEWORK CONCERNING CHILD LABOUR IN INDIA: A CRITICAL ASSESSMENT

Toshali Pattnaik[1]

Abstract

Child Labour is a socio-economic problem plaguing the society since time immemorial. In 1986, social compulsions, existing constitutional provisions and legal obligations of the State, prepared the hotbed for the enactment of Child Labour (Prohibition and Regulation) Act, 1986. However,the Act failed to attain its objective by prohibiting employment of children only in hazardous occupations and regulating working in the other processes. To overcome the deficiencies in the 1986 Act, the Government made amendments to the principal Act, in 2016. The Child Labour (Prohibition and Regulation) Amendment Act, 2016, instead of revising the previous legislation, created exceptions in the prohibitive enactment. The provisions of this Act were vehemently criticized to be unconstitutional and inconsistent with the provisions of extant legislations. To silence these criticisms, the Government of India introduced the Child Labour (Prohibition and Regulation) Amendment Rules, 2017. Though these rules filled up the interstitial spaces in the 2016 Act and provided more teeth to the legislation, certain changes can yet be made to these Rules to make child labour laws in India invincible. The paper critically analyses the provisions of the 2016 Act, in the light of existing legal provisions and international conventions, pointing out the defects and loopholes in the law. It showcases the paradigm shift in the child labour laws in India, in the last two years, and discusses the stipulations made in the Child Labour (Prohibition and Regulation) Amendment Rules, 2017. Finally, the paper endeavours to make suggestions with regard to changes that can be made in the 2017 Rules to avoid chances of law evasion.

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1. Introduction:

The Child Labour (Prohibition and Regulation) Act, 1986 was vehemently criticized for latently promoting child labour in India. Though the Act prohibited employment of children in certain occupations and processes as specified in Part A and Part B of the Schedule to the Act,[2] it created loopholes by incorporating exceptions[3] and regulatory provisions governing conditions of work of children engaged in 'occupations or processes' not 'referred to in Section 3' of the Act[4]. Moreover, the Act did not extend protection to children above 14 years of age who worked as labourers.[5] In order to surmount these condemnations, the Child Labour (Prohibition and Regulation) Amendment Act, 2016[6] was promulgated. This Act was introduced to act as a harbinger of protection from abuse and exploitation of children and adolescent. However, on intense scrutiny, the Amended Act was also criticized for being impervious to the grim realities of rampant child labour. According to Census 2011, there are 35.3 million child labourers in the total population (within completion of 18 years of age). The data states that 8.2 million are children in the age group of 5-14 years and 27.1 million are children in the age group of 15-19 years.[7] Though the Government of India has demonstrated its incessant commitment towards bulwarking the rights of the child by ratifying various international conventions like ILO's Minimum Age Convention, Convention on the Worst Forms of Child Labour, Declaration of the Rights of the Child, UDHR and its covenants, Convention on the Rights of the Child and its two optional protocols etc[8], the ramifications of

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2 The Child Labour (Prohibition and Regulation) Act1986, S 3.

3 Ibid proviso to S 3.

4 The Child Labour (Prohibition and Regulation) Act 1986, Part III.

5 Court on its own motion v. Govt. of NCT of Delhi,(2009) 6 ILR Del 663.

6 The Child Labour (Prohibition and Regulation) Amendment Act, 2016 [hereinafter *The Amended Act*]

7 Dr.Sophy K.J., '*The Child Labour Amendment Bill: Legal Dilution of Efforts at Elimination of Child Labour?*',1Journal on Rights of the Child 65, 66 (2016).

8 *The National Policy For Children*(2013), https://www.childlineindia.org.in/pdf/The-National-Policy-for-Children-2013.pdf.

these actions had not found place in the Amended Act, 2016. The Amended Act, instead of absolutely eliminating child labour, provided exemptions within the prohibitive legislation.

The argument that child labour is predominantly an economic problem that cannot be resolved by merely enacting legislations[9] is no longer valid. Child Labour is a socio-economic problem plaguing the society and reifying antiquated notions of traditional caste based occupations for generations by pushing children in harsh labour traps of intergenerational debts. As the nexus between law and society is well established, widely recognized and pervasively accepted, it is the obligation of the State to make special provisions for children[10] and fend the children against exploitation and moral as well as material abandonment.[11]Legalization of children working in family enterprises and entertainment industry made the situation rather murky in India[12]. Couching the definitions of family and family enterprise in exorbitantly wide ambits left room for the possibility of forced child labour, owing to the socio-economic reality of our country. The contention that eliminating child labour is unrealistic as children contribute to the meagre income of the family, helping it to survive, does not take into consideration the physical deterioration and moral degradation that a child is subjected to, on account of being forced to work in appalling conditions without consent. Eventually, the whole scenario trickles down to the vicious cycle of poverty, unemployment, marginalization, and lack of social security programmes, which are notable causes of child labour in India[13].

The white paper was sanguine that the Amended Act[14] would facilitate eradication of child labour. But it offered no respite due to the broad, loosely worded and ambiguous provisions. To address the technical

9 Labourers, Salal Hydro Project v. State of Jammu and Kashmir AIR 1984 SC 177.

10 Constitution of India 1950, art.15, cl. 3.

11 ibid art. 23, cl. 1 r/w art.39 cl. e and f.

12 The Child Labour (Prohibition and Regulation) Amendment Act (2016), § 3(2).

13 Sophy (n 6) 67.

14 The Amended Act, (n 5).

challenges faced by the Amended Act, the Government of India, after exhaustive deliberation with the stakeholders, introduced the Child Labour (Prohibition and Regulation) Amendment Rules[15], 2017. These Rules fill up the gaps left in the Amended Act and narrows down the extant legal provisions to specific and unambiguous interpretations. It is indeed a progressive step towards abolition of commercial exploitation of children in India.

This paper shall critically analyse the provisions of Child Labour (Prohibition and Regulation)Amendment Act, 2016 in relation with the existing constitutional provisions as well as other extant legal provisions. The paper shall also trace the progressive steps taken by the Government by introducing the Child Labour (Prohibition and Regulation) Amendment Rules, 2017. The discourse on whether the exemptions to child labour enumerated in the provisions of the Amended Act lead to legal dilution of efforts at eliminating child labour and how these criticisms have beenovercome in the Amended Rules, 2017,would form a major part of the discussion in the paper. The perpetual discourse on the age of the child relating to labour law and the introduction of the category of adolescent in the Amended Act, shall also find place in the academic debate. Apart from these, the penalty provisions, enforcement mechanisms and rehabilitation scheme provided under the Amended Act and the Rules shall also be scrutinized considering the debates around these provisions.

2. Exemptions within Prohibition: Legal Attenuation of Efforts at Eliminating Child Labour?

2.1 An insight into the problems in 2016 Act:

Section 3 of the Amended Act allows employment of children below 14 years of age in family or family enterprises, other than hazardous occupations, after school hours or during vacations[16]. It also permits engagement of children below 14 years of age in audio-visual

15 The Child Labour (Prohibition and Regulation) Amendment Rules, 2017 [hereinafter *The Amended Rules*].

16 The Child Labour (Prohibition and Regulation) Amendment Act 2016, §3(2)(a).

entertainment industry except circus[17]. Further, the Act puts up with employment of adolescents in occupations other than hazardous occupations and processes[18]. These provisions were emphatically criticized for creating exceptions in the interdictory legislation. Instead of completely banning child labour, the Act permitted working in family enterprise and entertainment industry. Though the intention of the legislature was to primarily prohibit commercial exploitation of children,[19] it failed to deduce that these enterprises would also entail involvement in physically and mentally taxing travails. Even though it permitted work only after school hours, it did not take into consideration the right to rest, recreation, extra-curricular activities, etc. that a child is entitled to for his all-round personality development.[20]Moreover, the Act also failed to provide for definite working hours in family enterprises and entertainment industry.

The progressive step taken by the legislature in eliminating child labour suffered a huge setback as the legislature categorically permitted employment of children in family enterprise and entertainment industry. The founding argument supporting such provision is that children tend to help and support their families, given the social fabric of our nation. However, legalization of this practice opened the flood gates to forced child labour in India. This is because of the discernible reason that labour of children was insidiously outsourced to family based enterprises.[21] This could destroy the ambitions and aspirations of children and also trample their enthusiasm and curiosity.

Childhood is an important and impressionable stage of human

17 Ibid S. 3 (2) (6).

18 Ibid S. 3A.

19 *40th Report onthe Child Labour (Prohibition and Regulation)Amendment Bill, 2012, Standing Committee on Labour,* 15th Lok Sabha (2013-14), 2014 http://www.prsindia.org/uploads/media/Child%20Labour/SCR-child%20labour%20bill.pdf.

20 Sophy (n 6) 68.

21 AratrikaChoudhuri, '*Child Labour (Prohibition and Regulation) Amendment Act, 2016: Key Concerns and Issues,*SCCONLINE BLOG (10th February, 2018), http://blog.scconline.com/post/2016/09/30/child-labour-prohibition-and-regulation-amendment-act-2016-key-concerns-and-issues/

development. Therefore, it is imperative to ensure that the environment in which the child grows is conducive to his intellectual, social and physical health so as to enable him to become responsible and productive citizen of our nation. However, early exposure to patterns of employment, oppressive conditions of work and unsparing realities of economic responsibilities not just scrape away their talents and aspirations, but also subjects them to relentless mental and physical agony. Therefore, it is highly unreasonable to burden children with economic needs of the family.

The ambiguous and wide ambit of the definitions of 'family' and 'family enterprise' further convoluted the situation. 'Family' of a child not just included his immediate family (parents and siblings) but also the siblings of his parents.[22] Further, family enterprise is any work, profession, manufacture, or business which is performed by family members with engagement with other persons.[23] This permitted children to work where their family was employed to earn a living, for instance agricultural work, domestic chores, etc. The Act did not specify that the enterprise should be owned or controlled by the family itself. This raised a possibility of existence of latent employer-employee relationship. If a family had to meet a deadline of a contract but had limited workforce, it could require the children to work ceaselessly to produce the necessary output, owing to the pressure imposed by the contractors. In such a scenario, even if a child worked after school hours, there would be no time left for him to do his homework or to take rest. This may potentially increase the number of dropouts from schools and colleges, defeating the constitutional purpose behind right to education. Thus, the scene faded to oblivion at key moments, selectively revealing the melancholy of the future citizens of the nation.

Moreover, employment in family enterprises could trap children in paying back intergenerational debts, leading to a pattern of bonded labour. This evinced the ample scope for pervasive exploitation even within family-based enterprises as it confined children to traditional

22 The Child Labour (Prohibition and Regulation) Amendment Act 2016, explanation (a) appended to S. 3.

23 Ibidexplanation (b) appended to S. 3.

caste based occupations for generations leading to socio-economic segregation and exclusion of future generation from productive human capital. In addition to this, children working in audio-visual entertainment industries were also subject to exploitation at the hands of parents as well as industry. There have been cases where the children have not been able to bear the physical and mental trauma associated with the rigorous routine[24]. However, the legislation did not provide any prohibition or regulatory provisions for employment of children or adolescents in the entertainment industry.

The Amended Act had been so enacted to be read harmoniously with the Factories Act, 1948. In the Factories Act, 1948, 'factory' is defined as 'any premise where manufacturing process is being carried on with the aid of power or is ordinarily so carried on'[25]. Reading the definition of 'family enterprise' under the Amended Act and 'factory' under the Factories Act, 1948 together, it could be deduced that the term 'family enterprise' includes factory. This had raised a question on the constitutionality of the Amended Act as Art. 24 of the Constitution of India explicitly prohibits employment of children below 14 years of age in any factory or mine or any other hazardous employment. Thus, Section 3 of the Child Labour (Prohibition and Regulation) Amendment Act, 2016 could be challenged forits unconstitutionality as it is in contravention with Part III of the Indian Constitution[26]and stealthily promotes child labour in factories, frustrating the legislative intent of prohibiting commercial exploitation of children as child labour.

2.2 The Child Labour (Prohibition and Regulation) Amendment Rules, 2017: A monumental leap in the right direction

The legislative sanction given to employment of children in family enterprise and entertainment industry spurred fervid criticisms around these provisions. The possibility of commercial exploitation of a child working in family enterprise was absolutely ignored in the Amended Act, 2016. However, the Government of India took a monumental

24 40th Report on the Child Labour(n 18).

25 The Factories Act 1948, § 2(m).

26 Sophy(n6) 70.

leap in the chronicle of India's socio-economic realities by bringing about the 'Child Labour (Prohibition and Regulation) Amendment Rules, 2017'. 'The Rules' imposed conditions on the employment of children in family enterprises. It restricted the working hours to not more than 3 hours excluding the period of rest in a day[27]. Further, it categorically emphasized that children shall not be made to work from 7 p.m. to 8 a.m.[28] and shall not be engaged in an occupation or process that is remunerative for the child or his family or family enterprise[29] One of the greatest concerns that have been addressed in these 'Rules' is that a child shall only be allowed to help in his family or family enterprise, where his family is the occupier.[30]This rules out the chance of existence of latent employer-employee relationship that could outsource child labour in family enterprises. 'The Rules' further secure a child's right to education, rest and extra-curricular activities by preventing his engagement in tasks hindering the same[31]. Thus, 'the Rules' clearly outlawed employment of children for commercial purposes[32].

'The Rules' also lays down regulatory provisions for employment of children in entertainment industry. Keeping in view the mental trauma and physical pressure on the child due to the rigorous routine, 'the Rules' limited the period of work to 5 hours a day and not more than 3 hours without rest[33]. In addition to this, 'the Rules' also imposed legal responsibility on the producer of any audio-visual media production or commercial event to employ children only after obtaining permission of the District Magistrate and specifying the name of the individual, from the production, who would be responsible for the safety and security of the child[34].

27 The Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2B (1)(a)(vi).

28 Ibid Rule 2B (1)(a)(iv).

29 Ibid Rule 2B (1)(a)(ii).

30 Ibid Rule 2B (1)(a)(iii).

31 Ibid Rule 2B (1)(a)(v) & (vi).

32 Ibid Rule 2B (1)(b).

33 Ibid Rule 2C (1)(a).

34 Ibid Rule 2C (1)(b).

To maintain the sanctity of right to education movement, 'the Rules' made it mandatory to ensure that there is no discontinuity from school while the child is engaged in entertainment industry. It also prohibited employment of children for more than 27 days in a row[35]. The Rules even uphold the importance of will and consent of the child with regard to employment in the entertainment industry. Thus, there has been a paradigm shift with regard to the position of child labour laws in India over the last 2 years. After years of struggle and exploitation, the rights of the future assets of the nation, finally stand preserved and protected.

3. Perpetual Discourse on Age of the Child in relation to labour laws in India

There is no uniformity in the existing laws in India with regard to definition of a 'child'. On one hand, the Factories Act[36], 1948 and the Motor Transport Workers Act[37], 1961 define 'child' as a 'person who has not completed 15 years of age'. On the other hand, the Plantations Labour Act[38], 1951; the Beedi and Cigar Workers (Conditions of Employment) Act[39], 1966 and the Minimum Wages Act[40], 1948 define child as 'a person who has not completed 14 years of age. These discordant provisions lead to ambiguous conclusions while courts adjudicate cases before them. When the Ministry of Labour was questioned on the rationale behind continuing with such concomitant variations, it replied with specific reference to the Child Labour Amendment Act, 2016 and Right of Children to Free and Compulsory Education Act, 2009 only and did not answer the question in generality[41].

The Child Labour (Prohibition and Regulation) Amendment Act,

35 Ibid Rule 2C (1)(d).

36 The Factories Act 1948, S. 2(c).

37 The Motor Transport Workers Act 1961, S. 2(c).

38 The Plantations Labour Act 1951, S. 2(c).

39 The Beedi and Cigar Workers (Conditions of Employment) Act 1966, S.2(b).

40 The Minimum Wages Act 1948, S. 2(bb).

41 40th Report on the Child Labour (n 18)

2016 defines a child as 'a person who has not completed 14 years of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act[42], 2009, whichever is more'.[43] This demonstrates the intention of the legislature to align the provisions of the Amended Act with the RTE Act. Under RTE Act, a child is defined as 'a male or female child of the age of 6 to 14 years'[44]. Thus, in future, if the age of the child, as defined under RTE, increases, the age of entry to employment would automatically increase.[45]Therefore,criticisms surrounding the existing provisions of the Child Labour Amendment Act could also be silenced by amending the RTE Act, 2009 and increasing the age of compulsory education to 18 years[46]. This would have outlawedchild labour, and the objective of right to education movement could have been achieved in true sense of the term.

It is indeed ironical that the Amended Act endeavoured to secure the right to education of a child by permitting him to work in family or family enterprise or audio-visual entertainment industry after school hours[47]. The proviso appended to Section 3 clause 2 sub-clause (b) did encounter implementation challenges, given the fact that a single loophole made in the legislation provides whacking number of opportunities to people to evade the intent of the statute. The Amended Act was distressfully oblivious to the fact that in absence of prescribed working hours, children might feel tired after working incessantly in family enterprises and might not be able to enjoy their right to rest, extra-curricular activities and wholesome development. Instead of adhering to a rights perspective and forbidding employment of children below 18 years of age, the Amended Act affirmed to the

42 The Right of Children to Free and Compulsory Education Act, 2009 [hereinafter *RTE Act*].

43 The Child Labour (Prohibition and Regulation) Amendment Act 2016, §2(ii).

44 The Right of Children to Free and Compulsory Education Act 2009, §2(c).

45 40th Report on the Child Labour (n 18).

46 This would require an amendment of Art. 21A of the Constitution of India, 1950 as well.

47 The Child Labour (Prohibition and Regulation) Amendment Act 2016, § 3(2).

provisions of the 1986 Act and further categorized children below 18 years of age into two groups: child and adolescent[48]. This classification actually denotes two different stages of growth requiring different levels of care and protection for fuller personality development. But instead of enacting mandatory prohibitions against employment of children and adolescent, the Amended Act creates exceptions where their engagement wouldn't amount to child labour.

The adroitness with which the Government handled the above problems is indeed commendable. Eliminating the inconsistencies between securing education and permitting employment of children in family enterprises after school hours, is one of the many progressive efforts made by the Government to cure the radically faulty approach of the Amendment Act, 2016. Though the Amendment Rules, 2017 did not ban child labour per se, but it did provide stringent mechanisms to prevent commercial exploitation of children.

The National Policy for Children, 1974 had addressed the children of India as the nation's 'supremely important asset'[49]. Displaying its tenacious efforts at securing the rights of children, the Government of India has ratified several international conventions on rights of the child. One of the most recent achievements of the Government in this regard is ratification of the Minimum Age Convention, 1973. According to the Convention, "each member would undertake to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment consistent with the fullest physical and mental development of young persons."[50]The Convention further specifies that 'the minimum age of employment shall not be less than the age of completion of compulsory schooling and shall not be less than 15 years, except in countries where the economy and educational facilities are insufficiently developed'[51]. However, even in underdeveloped or developing countries, the minimum age of employment cannot be less

48 Sophy (n 6) 71.

49 The National Policy For Children(n 7).

50 The Minimum Age Convention, art. 1, 138, 1973.

51 Ibid *Art.2.*

than 14 years. India, being a signatory to the Convention, though has been successful in prescribing 14 years as the minimum age of employment; it has failed to effectively eradicate child labour, given the radically faulty approach of the Child Labour (Prohibition and Regulation) Amendment Act, 2016. Nevertheless, the Amendment Rules, 2017 has brought in a ray of hope by giving more teeth to the 2016 Act and ensuring prevention of its misuse.

In addition to the above mentioned flaws in the Amended Act, the Act prohibits employment of adolescents in just three occupations or processes as specified in the Schedule i.e. in "Mines, Inflammable substances or explosives and hazardous process as defined in Factories Act".[52]This would expose the adolescents to a whole array of exploitative workplaces,not incorporated in the Schedule, and would interfere with their fundamental rights under Article 21 and Article 23(1) of the Constitution of India, 1950. The National Policy for Children 2013 lays emphasis on equal opportunities for the development of all children during their period of growth.[53]However, compartmentalizing stages of growth for providing lesser protection to one stage over the other defeats the objective of the Policy. Therefore, it is imperative for the Government to take affirmative action in the best interest of the child for enacting a sustainable and harmonious legislation towards absolutely banning child labour in India.

4. Enforcement Mechanism and Penalty Provisions

4.1 Scenario under the Amendment Act, 2016

Though the inconsistent provisions and vacuum in the Amended Act appears to be the most visibly egregious part of the problem faced by the child rights movement, it is just the tip of an iceberg of the insurmountable challenges encountered by the legislation. One of the most daunting problems in abolition of child labour is the loopholes in the implementation mechanism. The Amendment Act, 2016 vested only two responsibilities on the Inspector: *firstly*, verification of age

52 The Child Labour (Prohibition and Regulation) Amendment Act 2016, The Schedule.

53 The National Policy For Children(n 7).

of the adolescent[54] and *secondly,* inspecting the register maintained by the occupier in respect of adolescents employed by him[55]. These enforcement techniques appeared to lack spirit as the inspector was not given the power to investigate conditions of work at regulated occupations[56]. In addition to this, the employer has an obligation to maintain a register on the details of the employed adolescent[57]. However, no such responsibility was vested on the occupier to keep a record on children helping/assisting their employed family in his establishment. This hidden employer-employee relationship exposed children to commercial exploitation, insidiously outsourcing their labour to family based enterprises, until the Amendment Rules, 2017 came into being.

Under Section 12 of the Amended Act, it is obligatory to display notices containing an abstract of Section 3A and 14 of the Act in every railway station, port authority and place of work. This provision was introduced to sensitize people on 'ban on child labour' and 'penalty in case of contravention'. But the Act did not ensure compliance of this provision by prescribing punishment for its non-compliance.

The Amendment Act has however, created sufficient deterrence by prescribing stringent punishments for persons contravening Section 3 of the Act[58].Under Section 14B clause 1B, it excuses the parents or guardians of any child or adolescent, for contravention of Section 3, in case of first offence. However, if they commit a like offence afterwards, they shall be punishable with fine which may extend to ten thousand rupees[59]. Further, the Amendment Act has been given more teeth by making offences under Section 3 and 3A, cognizable[60].

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54 The Child Labour (Prohibition and Regulation) Amendment Act 2016, S. 10.

55 Ibid S. 11.

56 Sophy (n 6) 71.

57 The Child Labour (Prohibition and Regulation) Amendment Act 2016, S. 11.

58 The Child Labour (Prohibition and Regulation) Amendment Act 2016, S. 14.

59 Ibid S.14 (2A).

60 Ibid S. 14A.

The Amendment Act further imposes a duty on "the District Magistrate to ensure that the provisions of the Act are properly carried out"[61]. But the manner in which such compliance has to be ensured has been intrinsically provided for in the Amendment Rules, 2017.

4.2 Changes brought about in the Amendment Rules, 2017 and the existing loopholes:

Under the Amendment Rules, 2017, the powers vested in the Inspector have been fairly increased to include the following:

- Supervise the opening of account in the name of a child or adolescent in a nationalized bank where the rehabilitation fund can be deposited.[62]
- Prepare a report on the amount transferred to the bank account of the child or adolescent along with particulars to identify the child or adolescent and send the report annually to the Central Government.[63]
- Verification of age of the adolescent by certificate of age[64] and by reference to prescribed medical authority.[65]
- Conduct raid in accordance with law, as a member of the Task Force.[66]
- Comply with norms of inspection issued by Central Government for securing compliance of the Act.[67]

However, the Amendment Rules, 2017 failed to vest on the Inspector the power of inspection and monitoring of regulated workplaces. Though the Rules have laid down conditions for employment in family-based enterprises and entertainment industry, a periodic

61 Ibid S. 17A.

62 The Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 16A(1)(i).

63 Ibid Rule 16A(1)(iv).

64 Ibid Rule 17.

65 Anant Construction Company v. Govt. Labour Officer and Inspector,(2006) 9 SCC 225; See also M.A. Nagarajan v. State, 1 MWN 200 (Cri) (2001).

66 The Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 17C (2).

67 Ibid Rule 17D.

check on whether these conditions are being complied with would have further strengthened the provisions. Also, the Amendment Rules, 2017 did not prescribe penalty for non-compliance of Section 12 of the Amended Act, 2016.

Giving force to Section 17A of the Child Labour (Prohibition and Regulation) Amendment Act, 2016, the Amendment Rules, 2017 imposed the following duties on the District Magistrate:

- Specify nodal officers, who would exercise powers and perform duties conferred on the District Magistrate by the Central Government.[68]
- Preside over as the Chairperson of the Task Force.[69]
- Ensure, through nodal officers, that children or adolescents, who are employed in contravention to the provisions of the Act, are rescued and rehabilitated.[70]

Lastly, though the Amended Act and Rules provide for inspection and monitoring of occupations and processes where employment of children and adolescents is prohibited, it does not provide for periodic investigation of regulated workplaces including family enterprise and entertainment industries. There should be a mechanism set up to ensure that the conditions imposed for employment of a child in family enterprise and entertainment industry is being complied with. Otherwise, the noble intent behind notifying the Amendment Rules, 2017 would get defeated.

5. Rehabilitation Scheme

The Amendment Act, 2016 empowered the appropriate Government to constitute a Child and Adolescent Labour Rehabilitation Fund to which the amount of the fine realised from the employer of the child/adolescent shall be credited to[71]. Though the Act specified the amount which is to be credited to the Fund, it left an open end to the

68 The Child Labour (Prohibition and Regulation) Amendment Rules2017, Rule 17C(1)(i).

69 Ibid Rule 17C(1)(iii).

70 Ibid Rule 17C(3).

71 The Child Labour (Prohibition and Regulation) Amendment Act 2016, S. 14B.

question of how the amount will be paid to the child or adolescent. In the absence of a definite procedure, the amount collected for the welfare of the child/adolescent could have been misused. But the enactment of the Amendment Rules, 2017 warranted proper procedure according to which the amount credited and the interest accrued on it could safely be paid to the child/adolescent. The Rules directed the Inspector to supervise the opening of bank account of the child/ adolescent in a nationalized bank[72]. It also made it mandatory for the banking authorities to keep the Inspector updated about the transfer of the interest accrued to the account of the child. The inspector is authorized, by the Rules, to prepare a report on the above transactions and submit it annually to the Central Government for information[73]. These watertight provisions would make it difficult for law evaders or exploiters to misuse the money deposited for the welfare of the child. However, the extant legal provisions do not protect the money accumulated in the Fund from exploitation by the parents/guardians of the child/adolescent.

6. Suggestions and Conclusion

Though the Amendment Rules, 2017 have put things in perspective, there are certain changes that can be made by the legislature to make child labour laws in India invincible. *Firstly,* there should be inspection and monitoring of regulated workplaces. The Amendment Rules, 2017 has incorporated conditions for employment of children in family enterprises and entertainment industry. However, in absence of sudden checks, it would be difficult to ensure compliance with these provisions. *Secondly,* constitution of a Child Labour Redressal Forum would assure that there is no flaw in the enforcement of the Act. The 2016 Act and 2017 Rules impose many responsibilities on the District Magistrate. This might create implementation problems as there are limitations to the work that can be done by a particular individual. Moreover, the large number of pending cases in courts is one of the greatest challenges that the judiciary is struggling with. In this scenario, instead of overburdening the District Magistrate, constituting a Child

72 The Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 16A(1)(i).

73 Ibid Rule 16A(1)(iv).

Labour Redressal Forum to ensure implementation of provisions of the Act and deal with cases of non-compliance, would be better. *Thirdly,* a public-spirited person should also be allowed to file a complaint under Rule 17A of the Amendment Rules, 2017 and *lastly,* the legislature should specify the purpose for which the Child Rehabilitation Fund shall be utilized and in order to secure proper utilization of the Child Rehabilitation Fund, the amount should be paid, via bank transfers, to the educational institution, where the child is admitted; health care centre, where the child is under care and treatment etc. These bank transfers would ensure that the amount credited to the Fund is only being used for the purpose for which the Fund has been collected. Such a provision would kill the chances of misuse of the Fund by the parents or guardian of the child/adolescent and would secure the intent of the legislature in true sense of the term.

Child Labour laws in India have undoubtedly undergone a paradigm shift in the last few years. The interstices left in the Child Labour (Prohibition and Regulation) Amendment Act, 2016 incited careful academic discourse and fervid criticisms surrounding the provisions elaborately discussed above. However, the legislature ingeniously did away with the earlier anomalies, addressed all concerns and made the legislation a progressive law by enacting the Child Labour (Prohibition and Regulation) Amendment Rules, 2017. These Rules systematically amended the principal Child Labour Rules of 1988 and resolved the irregularities of the extant legal provisions.

Though it would have been a historic decision to absolutely eradicate child labour, the sheer determination of the Government to precisely regulate child labour in family enterprise and entertainment industry, demonstrates its willingness in abolishing the menace. But, given the socio-economic fabric of our nation, a legislation explicitly banning child labour may not be well received by the population below poverty line. However, the efforts of the Government in balancing societal needs, constitutional obligations and political pressure cannot be disregarded. The stringent provisions of the Amendment Rules will definitely prevent misuse and evasion of the law. Yet the Government should leave no stone unturned to make child labour laws in India, impregnable.

LEGALITY OF ARMED DRONES UNDER INTERNATIONAL LAW

Aditi Singh Kavia[1]

Abstract

The proliferation of unmanned armed drones in military combat operations is one of the most contentious legal issues confronting International Humanitarian Law. The legality of such armed drones is highly questionable as whether they will be able to fulfill the conditions of legality under different international conventions and international customary law is unsettled. Due to this uncertainty, the powerful nations are developing and using high-end technology, according to their own whims and fancies, without the fear of being held accountable for the international wrongs. There is lack of accountability and transparency in the use of such armed drones. In this article, it is argued that despite the wide variety of benefits of armed drones there still exist glaring challenges which loom large, such as faulty functioning, technical destruction, use for unlawful purposes, use as a weapon for retribution, and unparalleled power in the hands of authorities. Henceforth, there is a dire need to address such issues. Due to the absence of a proper regulatory regime, there has been an exponential growth in the use of armed drones. This can be potentially destructive in the near future. It is time for the international community to come up with a robust regulatory mechanism for the regulation of armed drones in military operations before it becomes catastrophic. This article also tries to explain the Indian position with regards to armed drones. Many private players are pouring investment in research and development of armed drones which is making this sector highly commercial. Proper standardization and quality control of such armed drones has taken a backseat due to high commercialization and privatization, which has increased the chances of calamities during times of warfare. Dearth of proper regulatory regime has given unparalleled power in the hands of such private players. There is a pressing need to address such issues and draft laws in sync with technological advancements and to increase government intervention in privatization of armed drones.

Keywords: International Humanitarian Law, Armed Drones, Proportionality principle, Martens Clause, Distinctiveness principle, Precautionary principle

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1 NALSAR, Hyderabad

1.INTRODUCTION

The rapid proliferation of technology across the globe has led to major transformation in the nature of war. In the recent years, the advent of high-end technology has led to introduction of unmanned aerial vehicles to the battlefield. Such drastically changing nature of warfare has raised serious concerns across the international community. Due to the exponential growth of the technology, law finds it difficult to matchthe pace of such rapid growth. Such unregulated and unrestricted growth of technology can be disastrous in the coming future and is quite capable to replace humankind with technology-driven machines.[2]

The hugely common practice of the states, mainly the developed ones, to employ armed drones has come under scrutiny and has become the most contentious issue due to the covert acts of the state as the states lack transparency and accountability in the usage of armed drones. Moreover, the principles laid down by the international law are not being compiled fully by the parties in conflict and there is lack of clarity on many issues. Too much ambiguity in international law and lack of proper domestic regulatory regimes give leeway to the parties to manipulate laws to suit their own personal interests.

2. HISTORICAL OVERVIEW OF THE USE OF DRONES

The use of unmanned aerial vehicle is not a new discovery. There are various instances in the past where the drones were used in the warfare. The use of drones can be traced back to the world war.. The United States made use of drone in the US – Vietnam war in 1960s and Israel in Lebanon in 1980s.[3] In 1996, India operated its first drone when the Indian Army acquired its first searcher mark 1 from Israel. Less than 2 years following that, air space and navy came up with multiple drones.[4]The usage of drones can be seen in

2 Ken Bernauw, 'Drones the Emerging era of Unmanned Civil Aviation'(2016), 66 (2-3) PFZ226

3 Peter L. Bergen and Daniel Rothenberg, *Drone Wars: Transforming Conflict, Law, and Policy*(4thedn, 2015)

4 Bill Boothby,*The Law Relating To Unmanned Aerial Vehicles, Unmanned*

different fields ranging from intelligence-gathering, reconnaissance, military-targeting,remote-sensing, environmental conservation and surveillance[5].Unmanned Aerial Vehicle[6] or Remotely Piloted Vehicles commonly called as drones can be defined, as any vehicle which can be operated autonomously or remotely piloted through an individual or in a networked manner.[7] Its unprecedented rise is a clear indicator of its success across the globe. As it is a cost effective vehicle, high precision attacks, unmanned and autonomous and fast decision making.[8]But it has its own downsides and has become a contentious issue in the realm of international humanitarian law. Its unprecedented rise as a weapon of war has facilitated more precision-based attacks with less number of casualties[9]. It is a highly technology-driven vehicle which can contain highly advanced surveillance systems, livefeed video cameras, infrared cameras, thermal sensors and radar, and various types of other equipment including global positioning systems (GPS), and precision munitions.[10]

2.1 Types of Drones

Armed drones can be divided into personality strikes and signature strikes. Personality strikes take place when an identified or presumed terrorist is targeted, while on the other hand, signature strikes take place when an unknown one person or a group of unknown persons

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Combat Airvehicles And Intelligence Gathering From The Air (2011)

5 Lawrence Newcome, 'Unmanned Aviation: A Brief History of Unmanned Aerial Vehicles'(2008)164 VJLT 41-61, M. E. O'Connell, 'The resort to drones under international law', 2010-2011 DJ Int. L&T 585

6 Benjamin Medea, *Drone Warfare: Killing By Remote Control* (HarperCollins, 2013), Kelsey D. Atherton, *Flying Robots 101:Everything You Need to Know About Drones*, POPULAR SCI. (Mar. 7, 2013), http://www.popsci.com/technology/article/2013-03/drone-any-other-name. (last visited on 20 march, 2018)

7 R. Swaminathan, 'Drones & India, Exploring Policy and Regulatory Challenges Posed by Civilian Unmanned Aerial Vehicles'Occasional Paper, Feb. 15,(2015) http://www.orfonline.org/wp-content/uploads/2015/02/OccasionalPaper_58.pdfaccessed 20 March 2018

8 Supra note 10

9 Nathalie Weizmann, *Remotely Piloted Aircraft and International Law*, The International Committee of the Red Cross, (2013)

10 Supra note 6

are targeted.. Personality strikes can be subdivided into targeted killings and extra judicial killings.Quoting Nigel S. Rodley: extrajudicial killings are "killings committed outside the judicial process by, or with the consent of, public officials whereas targeted killings as defined in US joint publication 3-60 are when the target is known through the collected information and drone strike is directed to the said target and the information is assessed to see the incidental effects of the drone strike. Also, there should be proportionality assessment with regard to potential civilian causalities. The targeting is further divided into deliberate or dynamic. Deliberate targeting is conducted in future time,such aswithin 24-72 hrs, whereas dynamic targeting is more immediate, and is carried out within 24 hrs. Such target can further be divided as a target of opportunity or a target of planning.

3. COMPLIANCE WITH IHL AND LOAC PRINCIPLES

As it is quite evident that use of unmanned aerial vehicles has accelerated since last decade, it is pertinent to see if the law of armed conflict is capable of providing regulatory mechanismswith regard tothe functioning of drones in armed conflicts. Under international law, the law of armed conflicts governs the choice of weapons and imposes restrictions on the use of certain indiscriminate and lethal weapons as stated under rule 71 of IHL[11], as applicable in both international and non-international armed conflicts.[12]Law of armed conflict is based on humanitarian concerns and promoted international peace and cooperation and set rules to avoid unnecessary conflicts[13]. It regulates the conduct of consenting states in situations of armed hostilities. It is based on four cardinal principles - *distinction, proportionality, unnecessary suffering, and military necessity*[14]. In order to ascertain the lawfulness of the weapons used under international norms, it has

11 Supra note 12

12 Fleck Dieter (Eds), *The Handbook of International Humanitarian Law* (OUP, 2008)

13 Id

14 Boyle Michael J., *The legal and ethical implications of drone warfare, 105* IJHR *(*2015), at 9,12

to be evaluated under the law relating to weapons and lawful use of drones.[15] Such weapons should be capable of distinguishing between the targets and should prevent unnecessary suffering. Unmanned aerial vehicles can be tested on four cardinal principles of LOAC to see whether they can be used in warfare.[16]

3.1 Principle of Distinctiveness:

The principle of distinctiveness was first discussed in 1898 in the *St. Petersburg declaration*[17] which says that, "*That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy"*[18].The importance of this principle has been verified by the International Court of Justice in its Nuclear Weapon Advisory Opinion.[19]*Fenrick* had once stated: *"Military commanders are obligated to distinguish between civilian objects and military objectives and to direct their operations against military objectives"*[20].Further, Additional Protocol 1, Article 51,[21] gives immunity to the civilians from being a target of a drone attack and are treated as protected persons in armed conflict.[22]

At the times of armed conflict, it is pertinent for the parties to distinguish between the military targets and protected persons[23], in accordance with the Additional Protocol I, Geneva Protocol Article 48,

15 Supra note 15

16 NILS MELZER. TARGETED KILLINGS IN INTERNATIONAL LAW , OXFORD UNIVERSITY PRESS, 4thed (2008)

17 Brooks Rosa, 'Drones and the International Rule of Law', (2014) 28 Journal of Ethics and International Affairs 83

18 Id

19 Supra note 21

20 William J. Fenrick,'The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside',(2003) Yearbook of International Humanitarian Law, 53

21 supra note 19

22 Article 51 paragraph 1: "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations"

23 In'tl Committee of the Red Cross, Customary IHL Rule 1: The Principle of Distinction between Civilians and Combatants (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 [hereinafter IHL Rule 1].

which strictly prohibits the use of indiscriminate weapons which are incapable of distinguishing between military and civilian targets.[24]

3.2 Principle of Proportionality:

LOAC principle of proportionality means that the civilian casualties, loss to the property, and other damages caused by drone strikes should not be excessive to the military advantage anticipated from striking the target.[25] This basic principle has been codified in the Hague Convention, 1907[26]. The focus is on minimizing incidental[27] causalities during war and adopting a more cautious approach in targeted drone strikes. Proper precaution should be undertaken even when the target is purely military. Various factors such as verification of the target, timing of the attack, chosen weapon, warnings and proper eviction of the population should be considered in this regard. According to this principle, carrying out an attack which may be expected to cause *"incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"* is prohibited.[28] With regard to drone attacks, the principle of distinctive has to be respected. Such attacks should focus on the military objectives.[29] The Proportionality Principle aims to strike a balance between the anticipated military benefits and collateral damage. The use of indiscriminate weapons is strictly prohibited by Article 52 of Additional Protocol I which provides a definition of military objective being those "*which by their nature, location, purpose or use make*

24 Int'l Committee of the Red Cross, Customary IHL Rule 3: Definition of Combatants (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3 [hereinafter IHL Rule 3].

25 Knoops Geert-Jan Alexander, 'Legal, Political and Ethical Dimensions of Drone Warfare under International Law: A preliminary survey'(2012) 12 International Criminal Law Review 697

26 Megret Frederic, 'The Humanitarian Problem with Drones'(2013) 5 Utah Law Review 1284

27 Id

28 Article 52(5)(b), 57(2)(a)(iii) and 57(2)(b) Additional Protocol I

29 Amichai Cohen, Yuval Shany. *The Application of the Principle of Proportionality in the Targeted Killings Case* ,Journal of International Criminal Justice, Oxford University Press, (2007)

an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[30]

3.3 Prohibition of Unnecessary Suffering:

TheAdditional Protocol 1, Article 35(2)prohibits deployment of such weapons which may cause unnecessary suffering to civilian population and aims for humanity and minimum damage to the civilian population, property and minimum suffering in the armedconflict. International compliance of this principle is concerned with a consideration of the kind of weapon used and the kind of suffering caused.[31]Generally, such weapons and ammunitions are examined on three different counts to decide whether they are indiscriminate and should be prohibited :first, the intensity of the pain;second, the degree of permanent disability; and third, the likelihood of death that it produces.[32] It was concluded by various studies that drones hovering over the target area for longer periods of time cause negative psychological suffering such as stress to the civilian population.[33]

3.4 Military Suffering

In such cases combatants can employ force only against the military personnel. It makes sure that the combatants engage in only those acts which are necessary to achieve the required military objective.[34] It can also cause some property damage if that is necessary to achieve the military objective.It majorly relies on controlled violence which is

30 Id

31 Pejic Jelena, 'Extraterritorial targeting by means of armed drones: Some legal implications' (2015) 96 International Review of the Red Cross 1, available online at: https://www.icrc.org/en/document/jelena-pejic-extraterritorial-targeting-means-armeddrones-some-legal-implications, (last visited on 24thMarch, 2018)

32 Geneva Academy of International Humanitarian Law and Human Rights, "Superfluous injury or unnecessary suffering", (Weapons Law Encyclopedia), http://www.weaponslaw.org/glossary/superfluous-injury-or-unnecessary suffering (last visited on 23rd march, 2018)

33 Id

34 Jasmine Henriques. *Unmanned Aerial Vehicles (UAV): Drones for Military and Civilian Use,*Centre for Research and Globalisation, March 2014 http://www.globalresearch.ca/unmanned-aerial-vehicles-uav-drones-for-military-and-civilianuse/5374666(last visited on 26th march, 2018)

essential in wartime.[35] There has to be reasonable nexus between the destruction of property and other damages and military necessity. In such scenarios, the drones are effective weapons as they promote controlled violence. The drones engage in high precision strikes which lead to less civilian deaths or property damage.

The principle of Military Necessity determines the force which is to be deployed and the type of force and the amount of force which can be deployed. There is restriction on the amount of force applied and such force should not be excessive. It must also be in line with the principle of humanity. Such attacks should be conducted only when, based on all the necessary information available, it can be reasonably believed that the target is a military objective and not a civilian objective.[36]

3.5 Principle of Precaution

The Principle of Precaution focuses on reasonable precaution which should be taken to protect the civilian population from being targeted and to avoid collateral damage. The principle allows the parties to the armed conflict to do everything feasible and to make use of all available information to protect the civilians, while also assessing whether the person is a civilian or a military objective. It generally takes note of the use of weapons, target selection and verification, assessment of the attack, warnings in advance and suspension of the operation in situations where there is change of circumstances. [37]

It can be explained as under Article 27, 1899 and it emphasize on precautionary principle and aims to remove the civilian population from the vicinity of the war zone, avoid locating the targets near densely populated areas and take other necessary precautions in order to save

35 Michael N. Schmitt, 'Autonomous Weapon Systems and InternationalHumanitarian Law: A Reply to the Critics'10 (2013) HSJ111 Ryan J. Vogel, 'Drone Warfare and the Law of Armed Conflict', (2010-2011) 39 DENV. J. INT'L L. & POL'Y 115

36 Petra Ochmannová. 'Unmanned Aerial Vehicles and Law of Armed Conflict Implications' (2011) 2 Czech Yearbook of Public & Private International Law

37 Knoops Geert-Jan Alexander, 'Legal, Political and Ethical Dimensions of Drone Warfare under International Law', (2012)12 International riminal Law Review 697

the civilian population. In case of drones, it gives considerable time for evacuation and other precautionary measures. Proper surveillance is carried out before the drone attack, it does not mean there are no casualties but the number is far less than the combatant attacks with no precautionary measure. In cases where better alternative is existing, the use of drones for targeted killings is avoided.[38]

4. ACCOUNTABILITY UNDER INTERNATIONAL HUMANITARIAN LAW

Ben Emmerson, the UN Special Rapporteur for Counter Terrorism and Human Rights has examined the issues with regard to the states and the non-compliance of the relevant principles.He says that the states engage in the drone attacks without the consent of the other party, without the prerequisite authorization of UNSC, and without complying with the rules of self-defense. Hence, there is a lack of transparency and accountability[39] and the same is a violation of international laws[40].

Such drone strikes often come under the scanner for the potential risks that the civilians are exposed to, raising concerns for legal liability. In such cases, liability is majorly divided into two forms legal liability and state liability which are explained below.

4.1 State Responsibility

State responsibility is broadly discussed in four Geneva conventions and the state is held accountable for such civilian causalities along with the combatants involved in the act, in cases of drone attacks. It is also mentioned in the Hague Convention,under Article 3,that the"belligerent party shall be responsible for all acts committed by armed forces"[41]. State legal liability for violations of international humanitarian law is evidently a customary rule and is applicable in international armed conflict and non-international armed conflict.[42]

38 Schmitt Michael N., 'Precision Attack and International Humanitarian'(2005) 87 International Law Review of the Red Cross 445

39 Id

40 Supra note 40

41 Id

42 Henckaerts Jean-Marie and Dosward-Beck Louise, *Customary*

4.2 Command Responsibility

In such form of responsibility, the commander takes responsibility on behalf of his troop for the breach of IHL norms. As generally such attacks are operated by the low ranked officials which discharge the superior from any responsibility,it is pertinent to attribute responsibility on such officials.The pilot who is handling the attack remotely cannot be absolved of the responsibility and is liable not only for illegal drone strike but also for facilitating, aiding, abetting, planning and investigating the commission of the drone strike.[43]

5. ASSESSMENT OF THE LEGALITY OF DRONE STRIKES UNDER INTERNATIONAL LAW

It is pertinent to take into consideration holistic approach to assess the legality of the drone attacks. Legality of any drone attack can be legal only when it is lawful under every international convention. It should be able to satisfy the requirements of jus ad bellum, jus ad bello, along with the various normsunder the IHL and the IHRL. If it is unable to satisfy the applicability of any international law, it entail the responsibility of the state to fulfill such requirements.[44]

5.1 Just War Theory

Just war theory discusses the moral justification of the war. It majorly relies on two set of principles on whose basis the morality of the war is tested.

5.2 Jus Ad Bellum

It discusses the legality of drone strikes by the consenting parties, and it conducts inquiry on the legality of drone strikes as consented by the territorial state. The interstate use of force focuses on state sovereignty and protection of citizens. The use of drones has to first comply with the jus ad bellum principle and interstate use of force can be conducted only with the consent of the state as stated under article

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International Humanitarian Law, Vol.1: Rules, (Cambridge University Press, 2005)

43 Fleck Dieter (eds), The Handbook of International Humanitarian Law (OUP, 2008)

44 Id

2(4)[45], which prohibits the use of force interstate, except however, in cases where consent is given, or in cases of self-defense.[46]

5.2.1Consent Theory

When proper consent is given by the territorial state for the use of drones as against the non-state actors on the former territory, no issue of non-compliance arises, as under the principle of jus ad bellum. Consent has been given by Yemen, Somalia and Pakistan for the use of drones to the United States which makes such drone attacks legal and in compliance with international law. Such consent is generally given by the highest authority of the state.

5.2.2 Self Defence Theory

In cases where consent is not given, the state can engage in interstate use of force by invoking the exception of self-defense theory. Self-defense theory explained as under Article 51 of international law and some stringent conditions has to be fulfilled before invoking self defense exception. The principles of proportionality and necessity should be followed and the act should not be punitive or in retaliation.[47]The US invoked the self-defense exception when the lethal drone attack was conducted against one US citizen.[48]. Also, it cannot be exercised unless the act reaches a certain level of threshold, which is kept relatively high, as applied in the ***Nicaragua v. United States***[49] case and the

45 Judith Gardam, *Necessity and Proportionality in Jus ad bellum and jus in bello*, in Laurence Boisson de Chazournes and Philippe Sands (eds), (CUP 1999), at 283

46 Schmitt Michael N., 'Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law" (2010) 13 Yearbook of International Humanitarian Law 311

47 Ruys Tom, 'The meaning of "force" and the boundaries of the jus ad bellum'(2014) 108 The American Journal of International Law 159

48 The U.S. and UK, for example, rely on self-defence: US Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force' (made public 5 February 2013); E MacAskill, Drone Killing of British Citizens In Syria Marks Major Departure for UK, The Guardian, 7 September 2015.

49 [1986] ICJ Rep 14, para 191

Iran v. United States[50] case[51].

Drone attacks can be justified on the basis of self-defense theory when one state engages in drone attacks over another state in a preemptive manner in order to defend its state from future armed conflict. The US has successfully indulged in such pre-emptive self-defense operations post 9/11. One such case is the US drone attack on Pakistan to take control over al Qaeda and Taliban forces.In this instance, the US engaged in a self-defense drone attack against Pakistan without taking the consent of Pakistan.

5.3 Jus In Bello

It defines legal target under an armed conflict. Combatants can be treated as legal target whereas non-combatants cannot be treated the same way. It provides legal basis to the territorial state in determining the military target.. There is nothing illegal about using drones if the use is not indiscriminate and it follows principles of distinction, proportionality and necessity[52].

It is hard to say that such armed conflicts fulfill such requirements as discussed in the jus in bello principle. In reality, it is very hard to prohibit the use of force against the civilian population, assuch wars are fought with non-state actors with loose organizational structure and they use civilian population as human shields[53] and generally hidebehind them, which makes it difficult for the drones to strike without causing civilian causalities.[54]Moreover, some concepts like

50 [2003] ICJ Rep 161, paras 51

51 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) ; Case Concerning Oil Platforms (Iran v United States)

52 Michael N. Schmitt. 'Drone Attacks under the Jus ad Bellum And Jus in Bello: Clearing the 'Fog of Law"(2011) 13 Yearbook of International Humanitarian Law 311, 9

53 Int'l Committee of the Red Cross, Customary IHL Rule 97: Human Shields (2017) https://ihldatabases.icrc.org/customary-ihl/eng/docs/v1_rul_rule97. (Last visited on 26th march, 2018)

54 Michael Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5(2) Chicago Journal of International Law 512

military advantage feasible measure and distinction of civilian with military is blurring and lacks clarity.[55]

6. BENEFITS OF USE OF DRONES

UAV has facilitated the operation of war by relying more on high-end technology which allows the military personnel to engage in the warzone without being physically present there, by controlling the UAV remotely. Due to the absence of military personnel on the battlefield there is less bloodshed and there are less potential losses of family, friends and wealth of the public.[56]

As it is robot-based weaponry and has an added advantage as the robots doesn't eat, sleep, doesn't get distracted or bored, do not panic and are unsusceptible to the biological or chemical weapons.Such drones are also provided with a 'strike window' as they hover over the target for some time to assess the situation before striking the target.Moreover, one primary advantage of unmanned aircraft over the manned aircraft is that they are cheaper and can be produced at a low cost.[57]

7. CHALLENGES OF USE OF DRONES

British Lord Bingham severely criticized drone attacks and said:

"From time to time in the history of international law, various weapons have been thought to be so cruel as to be beyond the pale of human tolerance. I think, cluster bombs and land mines are the most recent examples. It may be - it may be, I am not expressing a view, that unmanned drones that fall on a house full of civilians is a weapon the international community should decide should not be used."

As drones have the potential to function autonomously and independently, there is no risk relating to theloss of combatant lives. But on the other hand, it can encourage states to start a war as there would be no loss of lives.

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55 Supra note 55

56 Supra note 48

57 Supra note 49

7.1 Issues with Data Collection

The data collected for drone operations generallystay for a longer time which makes it difficult to adapt to change and is unable to give an updated status of the battlefield.[58] As a massive amount of data is collected,assessment and classification of such data into relevant and non-relevant data requires skilled analysts. Such assessment takes time and thus causes further delays.[59] Moreover, due to lack of skilled persons in such field it becomes all the more difficult to function effectively. As patterns are drawn from such collected data, improper assessment of data can lead to killing of the civiliansas drones are incapable of distinguishing between civilian and non-civilian targets.[60]

7.2 Faulty Functioning

Drone systems are not as proper as the manned aircrafts and they are unable to escape and drone operator generally find it hard to adapt to situational awareness. Such unmanned systems are highly vulnerable to jamming and hacking.[61] As the drones are remotely directed by the officials and the precision and accuracy of the drone attack heavily relies on the intelligence of the person, such intelligence can be improper or faulty. Moreover, as we know drones are technology- driven, they are not efficient in adapting to change and indefending themselves in the battlefield, which creates problems. In cases like sudden attacks, bad weather conditions, and other unprecedented situations, there arises a communication problem which lead to delays. Moreover, the option of surrender before using lethal weapons is unavailable with regard todrones as drone systems are incapable of surrendering before using lethal force. So such drones cannot be employed when the conflicts

58 U. E. Finn, L.Rachel and D.Wright, 'Unmanned Aircraft Systems: Surveillance, Ethics and Privacy in Civil Applications'(2012) 28(2) Computer Law & Security Review 184-194

59 Id

60 International Humanitarian Law and the challenges of contemporary armed conflicts, Report prepared in the 31st International Conference Of The Red Cross And Red Crescent, Geneva, ICRC, 2011

61 Gogarty & Meredith Hagger, 'The Laws of Man over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air', (2011) 19 J.L. INF. & SCI. 73, 138

are governed under the laws of IHRL[62].

7.3Technological Destruction

The unprecedented growth of technology has given very less time-frame for the present generation to adapt to the drastic technological changes. Such rapid proliferation of technology in every fieldcan be detrimental tohumanity as that time is not far awaywhen robots would replace humanity. High-end technology such as artificial intelligence, highly computerized military weapons, and high processing speed would be capable of unleashing large scale destruction due to unmatched power and technology.[63]

7.4 Used As a Weapon For Retribution

Targeted killings raise several issues with regard to them being killings in the warzone, or for giving effect to counter terrorism operations. Michael Gross states that employing targeted killing in the struggle against terrorism "complicates the conceptual framework that justifies killing during war and distinguishes it from murder" as such targeted activities are used as retribution or punishment to the terrorist by targeting them rather than prevention of armed conflict or in self-defense.[64]

7.5 Less Public Participation

Immanuel Kant's 1795 essay,'Perpetual Peace' states that democracies are inherently peaceful because the people ultimately have a say in decisions, and their collective decisions are wiser than a single dictator's.[65]As the cost of technology is less and there is a huge decline in human resources expenditure in the wartime which makes the public more disconnected in the public discussion which has provided immense power to the high end technology. Also, it is highly unlikely that public would oppose a costless war which may lead to unchecked

62 Heller Kevin Jon, "'One Hell of a Killing Machine": Signature Strikes under International law' (2013) 11 Journal of International Criminal Justice 89

63 Id

64 Megret Frederic, 'The Humanitarian Problem with Drones' (2013) 5 Utah Law Review 1284

65 Id

power in the hand of the state to go for war which may result in unnecessary warfare and killings.[66]

As there is less participation in the warzone and UAV can be controlled remotely which reflects emotional detachment with the war and less empathy for the civilian deaths and which leads to more civilian casualties.

7.6 Unparalleled Powerto the Authorities

The authorities in leadership in a state can become overly confident of the high-end weaponry they possess which can cause misconceptions about the military advancements they possess over the other countries. Such misconceptions about military advantage give unparalleled power to the military planners which may affect decision making.[67]

7.7 Use for Unlawful Purposes

Moreover, such non-peace loving and rogue countries can use such high-end technology for fighting against political opponents and for other unlawful purposes. Terrorist organizations, due to their funding by various developed countries, can take control over such technology and can cause mayhem and destruction.[68] With the easy availability and rapid proliferation of drones there are instances of seizing of such drones by the terrorist organization and using it for nefarious activities. For instance, ISIS has started using drones in their operations against the Kurdish forces. The terrorists generally use such drones for different purposes such as surveying security arrangements, jamming networks, and executing bombings as seen in Iraq.[69]

8. INDIAN REGULATORY REGIME ON DRONES

In 2014, DIPP and the Ministry of Commerce and Industry, in a press note 3 issues a list of defense equipment and electronic aerospace. This list mainly consists of autonomous vehicles, unmanned aerial vehicle, remotely piloted vehicles, drones, balloonsand other lighter aerial

66 Sparrow Robert, '*Killer Robots'* 24 Journal of Applied Philosophy 62(2007)

67 Boothby William, '*Some legal challenges posed by remote attack* 94 International Review of the Red Cross 579(2012)

68 supra note 69

69 Supra note 70

vehicles. All the vehicles mentioned under this list has to mandatorily obtain an industrial license for manufacturing/ production of the equipment, which includes vehicles for military as well as civil purposes.[70] This seems that there is no prohibitionwith regard to manufacturing and production of drones for military purposes by the private players and it can be registered by the provision of unique identification numbers. However, such privatization of military drones has its own limitations.[71] India, till now, does not have a robust legal regime for military drones, although DGCA has come up with draft guidelines on the use of drones for civil purposes.[72]

As there is no comprehensive safety regulatory regime for the working of drones,there is no overarching international law for functioning of law. So, the International Civil Aviation Organization in 2011 came up as a safety regulator to regulate drones. The need for a safety regulator was discussed in the Riga Declaration[73]. The ICAO plans to come up with safety guidelines to regulate drones and would also assist countries to come up with domestic legislation[74].

The use of unmanned aerial vehicles can be for surveillance, intelligence and security purposes. There is a lack of proper legal regime for such usage of drones and there is an absence of regulations on the part of the government agencies who are involved in surveillance with the help of drones.[75]

8.1 Policy Gaps

The main policy gaps are the lack of standardization and quality control in the indigenously manufactured ones and imported ones. Legal liability is hard to ascertain as there is always a doubt

70 Nishith Desai, *Unravelling the Future Game of Drones, can they be legitimized*165 JILT 36 (2017)

71 Ridha Aditya Nugraha, *Urgency For Legal Framework On Drones: Lessons For Indonesia, India, And Thailand* 2 ILR 137-157(2016)

72 Id

73 Supra note 73

74 Katya Neal, "*Disruptive Technologies and the Law."* Thee Georgetown Law Journal 102, issue 6 (2014): 1685-168

75 Id

with regard to whether the device hasmal-functioned or has been improperly handled.[76]. It can cause major national security concerns as the humongous data of the citizens is collected for surveillance and intelligence purposes which can be misused. Drones are technology-driven vehicles and, hence, are more prone to hacking and other cyber malware. It is important for the DGCA authorities to plug in these gaps in order to avoid any such mis-happenings and come up with a strong regulatory regime on armed drones.[77]

9. CONCLUSION

After coming across a catena of articles it can be concluded that there is excessive cloudiness surrounding the international regulatory framework for the regulations of the armed forces which makes it impossible to hold anyone accountable for the international wrongs, as the states can be held liable under one convention but not the other, which makes it hard to give decision on such international violation. Moreover, the states tries to keep it secretive by hiding it under the garb of 'security reasons' and prevent public participation. Such decisions lack fairness and transparency.

It is pertinent to note that the drones have immense potential to be beneficial but they also pose challenges which can have far-reaching detrimental effects to the society, while having the capability to destroy the country and replace the human race with technology- driven robots. Thereforeit is pivotal to strike a balance between the benefits and challenges. Drones should be used with due care and responsibility, and stringent measures should be laid down for liability in cases of violation. The international regulatory regime should adapt to the new technological advancement in the methods of warfare and use of weapons and amend laws accordingly and make parties absolutely liable for acting inappropriately and for the indiscriminately use of

76 Rajeswari Pillai Rajagopalanrahul Krishna, Drones: Guidelines, regulations, and policy gaps in Indiahttp://www.orfonline.org/research/drones-guidelines-regulations-and-policy-gaps-in-india/ (last visited on march 26th, 2018)

77 Id

armed drones.

In India, in order to promote transparency and accountability on the part of the states it is pivotal to come up with necessary guidelines to deal with armed drones. As increasing number of private players are involved in the manufacturing of armed drones. Government intervention is necessary to promote technology and also to curb concentration of immense powers in the hands of private players.

INDIA'S LIAISON WITH THE INTERNATIONAL CRIMINAL COURT

Devapreeti Sharma[1*]

Abstract

The International Criminal Court (ICC) is the first permanent institution of the world committed to impose individual criminal responsibility on the perpetrators of core international crimes. But India, despite having the same vision for the ICC at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, chose to not adopt the Rome Statute of the International Criminal Court, 1998. In explaining its vote against the Rome Statute, India cited three reasons. These reasons are but some apparent problems which allegedly lead the ICC to violate some well-established principles of international law. But a closer examination of these reasons reveals that they do not justify India's decision of staying out of the ICC. It is true that the problems which India highlighted are not altogether unavailing. However, the solutions to these problems lies elsewhere than choosing to stay afar the realms of the ICC. Along these lines therefore, the concerns of India must not be dismissed as insignificant, but they also must not be used to defend India's abstention. In deciding to abstain, India made an error of judgement but now, a good twenty years later, it is time that she rectifies her mistake and accede to the Rome Statute. This bonding is much needed for two primary reasons: firstly, it will usher in reforms in India's deficient criminal justice system with regard to mass atrocity crimes and secondly and consequently, it will also provide to the nation better protection against such crimes.

Keywords: Abstention, Core International Crime, Individual Criminal Responsibility, International Criminal Court, Rome Statute, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

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INTRODUCTION

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter referred to as the "Conference"), held in Rome from 15 June 1998 to 17 July 1998, which ultimately established the International Criminal Court (hereinafter referred to as the "Court"), was attended by 159 government delegations and 250 delegations from NGOs.[2] The Conference saw some strong oppositions pertaining to several legal and political questions, triggered by diverse state interests. Several states struggled to find common political ground with several others. Nevertheless, the Rome Statute of the International Criminal Court, 1998 (hereinafter referred to as the "Statute") was adopted by a tremendous majority.[3] But curiously, India chose to abstain from the same. This curiosity has prompted this research.

On 16th June, 1998, at the 4th Plenary Meeting, the Delegation which represented India at the Conference (hereinafter referred to as the "Delegation") expressed the idea that the Statute should give due importance to the United Nations Charter, 1945[4] More specifically, the ideas of non-discrimination, non-interference in the internal affairs and sovereign equality of states ought to be given utmost importance, which, on the contrary, the Statute was found to be derogating from.[5] As a consequence of respecting these principles, the Delegation had to take a highly pessimistic stand on any inkling of giving compulsory jurisdiction to the Court. Moreover, since the purpose of the Conference was only to establish the Court, it should not have delved into deep processes of codifying the substantive law on international crimes.[6]

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2 Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (1st edn, OUP 2013) 23

3 Press Release, 'U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court' (*United Nations,* 17 July 1998) <http:./www.un.org/ice/pressrel/Irom22.htm > accessed 21 April 2018

4 'Official Records: Reports and Other Documents, Volume II' Conference (2002) UN-Doc A/CONF.183/13 (Vol. II) 86

5 ibid

6 ibid

Thus, India found a number of moral grounds to abstain herself from voting for the Statute. This paper is essentially a critical analysis of the reasons of this abstention. It has been penned purely on the basis of the doctrinal methodology of research. Moreover, it is limited to an examination of the complications which arise because of the officially stated reasons at the face of the legal provisions of the Statute and no further. Accordingly, this narrative proceeds in three steps. The first step consists of an exploratory premise designed to identify the reasons which compelled India to abstain from the Statute. The second step examines the identified reasons in order to assess their justifiable value. The last step analyses the ramifications and responses for India corresponding to her position as a non-party state of the Statute. Finally, it concludes on a policy option for India to reconsider her position at the altar of the Court.

CAUSES OF INDIA'S ABSTENTION IN THE STATUTE

The 9th plenary meeting, convened on 19th July, 1998, was a crucial point for the Conference. It provided room to discuss on *inter alia* Agenda Item 12, which was regarding the adoption of the final Statute.[7] The Indian delegates herein made some significant remarks which explained why India had chosen to abstain from adopting the Statute. India had three primary reasons for its abstention, presented henceforth.

Firstly, the Court was supposed to deal with exceptional circumstances alone. An exception circumstance here would mean a situation of failure of the state machinery. However, the Conference went far beyond this. The scope of the Court was, the Delegates argued, broadened, such that it could be used and abused as political propaganda. Thus, in the strong words of Dilip Lahiri, the Head of the Delegation, there was "a contradiction in terms: a Court framed with Armageddon in mind is set in Utopia."[8]

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7 ibid

8 'Explanation of Vote By Mr. Dilip Lahiri, Head Of Delegation of India, on the Adoption Of The Statute Of The International Court' (*ICC Legal Tools Database*) < https://www.legal-tools.org/doc/9f86d4/ > accessed 12 March 2018

Secondly, the Delegation had strong misgivings about United Nations Security Council's (hereinafter referred to as the "UNSC") power to refer or block situations in the Court. Such power, she contended, was in violation of the established principles of international law; and the Conference, in accepting this role of the UNSC, had only "sow[ed] the seeds of its own destruction."[9] As a matter of fact, the Delegation had previously proposed an amendment to the Statute for deleting Article 13(b) which allowed, and still allows, the Court to exercise jurisdiction if and when a situation is referred to it by the UNSC.[10] This proposal was not agreed upon and consequently, on the last day of the Conference, Lahiri, expressed profound disappointment regarding the same.[11]

Thirdly, with regard to the substantive content of the international crimes in the Statute, the Delegation had a number of contentions. Regarding Crimes Against Humanity (hereinafter referred to as "CAH"), now enshrined in Art.7 of the Statute, the Delegation wanted the Statute to categorically include in its ambit institutionalized racial discrimination.[12] Further, the Statute did not, and still does not, explicitly ban the use of nuclear weapons or other weapons of mass destruction; nor did (and does), it address the issue of terrorism and drug crimes. Like in the case of CAH, in this context too, the Delegation proposed several changes. From the early stages of the Conference itself, she proposed to extend the jurisdiction of the Court to acts of terrorism[13], not just once but many times, each time with a different

9 ibid

10 'Amendments proposed by India' Conference (17 July 1998) UN Doc A/CONF.183/C.1/L.95

11 'Explanation' (n 7)

12 'Proposal For Article 5 Submitted By Bangladesh, India, Lesotho, Malawi, Mexico, Namibia, South Africa, Swaziland, Trinidad And Tobago And United Republic Of Tanzania' Conference (22 June 1998) UN Doc A/CONF.183/C.1/L.12

13 'Proposal Submitted By Algeria, India, Sri Lanka And Turkey' Conference (29 June 1998) UN Doc A/CONF.183/C.1/L.27

revision of the idea.[14] Later on, she mooted for including drug crimes[15] as well. Not only this, she also sought that the Statute recognise the use of nuclear weapons as a separate crime over which the Court would exercise jurisdiction.[16] The Delegation went on to strengthen her stand and suggested that the employment of Weapons of Mass Destruction (hereinafter referred to as "WMD"), be it nuclear, chemical or biological, be one of the acts of War Crimes under Article 8.[17] None of this happened. Towards the end of the Conference, the Delegation did manage to come to terms with her concerns for drug crimes, terrorism and racial discrimination. However, she could not do the same as far as nuclear weapons and WMD were concerned; and this went on to become the third reason of India's abstention in the Statute. [18]

Thus, as the Statute managed to wend its way in the Conference, the Delegation was shrouded by a sense of disbelief in the capability and competence of the Statute.[19] She had deep-seated apprehensions of the Court's ability to address international crimes of the gravest nature. To add to that, she feared that the Court would become a tyrant, a super-sovereign, which would prevail over smaller national legal systems, crushing and trampling all under it. However, there are doubts on how far her fears and apprehensions are justified in the contemporary scenario.**A CASE AGAINST INDIA'S WHYS AND WHEREFORES**

From this time forth, this disquisition would be focussed on building a case against the propriety of each of the reasons which the Delegation officially stated as being the reasons of staying out of the Court.

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14 cf 'Proposal Submitted By India, Sri Lanka And Turkey' Conference (6 July 1998) UN Doc A/CONF.183/C.1/L.27/Rev.1

15 'Proposal Submitted By Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad And Tobago And Turkey' Conference (14 July 1998) UN Doc A/CONF.183/C.1/L.71

16 'Proposal Submitted By India Concerning The Bureau Proposal for Article 5' Conference (15 July 1998) UN Doc A/CONF.183/C.1/L.72*

17 'Amendments Proposed by India' Conference (17 July 1998) UN Doc A/CONF.183/C.1/L.94

18 'Explanation' (n 7)

19 Usha Ramanathan, 'India and the ICC' (2005) 3 Journal of International Criminal Justice 627

Exceptional Circumstances

The Delegation faulted the Statute of expanding the jurisdiction of the Court, whilst it was only supposed to deal with exceptional circumstances. Here, it must be borne in mind that out of the four-dimensional jurisdictional regime of the Court, the Delegation was complacent only with the *ratione temporis* jurisdiction. Her reservations on the other three forms of jurisdiction shall be analysed in the next segment of this paper. At this junction, be it suffice to state that there are sufficient limits on the jurisdictional regime of the Court, all of which are fortified with a reasonable justification. Having said that, one must take a note of the principle of complementary (operating via the provisions of admissibility in Art.17, which, as shall be substantiated henceforth, ensures that the Court will operate in exceptional circumstances alone. Complementarity is officially seen as the prime limitation to the jurisdiction of the Court.[20]

As per the principle of complementarity, the Statute gives grants primacy to national jurisdictions of States and admits situations only when states become wholly ineffective i.e. – *(i)* when the state "is unwilling or unable genuinely to carry out the investigation or prosecution"[21] or; *(ii)* in cases where investigation or prosecution was carried out, the decision "resulted from the unwillingness or inability of the state genuinely to prosecute."[22] Analysing Art.17 in terms of the Hohfieldian Postulates, this obligation of the Court to give primacy to domestic proceedings actually creates an active right on the states to expect non-interference of the Court in their domestic criminal proceedings, provided of course, the thresholds of 'unwillingness' or 'inability' are met. Since complementarity comes as a 'right' as well, even non-party states (like India) can voluntarily choose to exercise this right as part of their sovereign decisions. This means that it can be invoked also when the UNSC refers situations of non-party states

20 'Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I' Conference (1996) UN Doc. A/51/22 (1996), para.153–178.

21 Statute, art 17(1)(a)

22 ibid, art 17(1)(b)

to the Court.[23] Thus, complementarity, as right of all states and as a duty of the Court, works to avoid prosecutions at the international platform.

At this stage, one might argue that "willingness" or "inability" are subjective terms. Now, while some amount of subjectivity is inevitable, however, there do exist some objective standards which negates the effects of such subjectivity. Parts of these objective standards come from the Statute itself. As per Paragraph 2 of Art.17, a state will be deemed to be unwilling if – ***(i)*** there was an intent to shield the perpetrator from criminal responsibility; ***(ii)*** there was "unjustified delay" in the criminal proceedings at the domestic courts or; ***(iii)*** the proceedings at the domestic court were not impartial or independent. In addition to the Statute, objective standards have also been given by the chambers of the Court itself. The Appeals Chamber has stated that a situation of "unwillingness" or "inability" must be distinguished from "inactivity" - the former arise after formal investigation has commenced in the states, while the latter refers an absence of any investigative step.[24] Investigative steps must include steps like conducting a forensics analysis, interviewing witnesses and suspects and collating all documents of evidentiary value.[25] Thus, the Court, in order to determine that a situation is admissible before it, must ascertain that these thresholds are met.

The principle of complementarity in Art.17 is further fortified by the principle of *Ne Bis In Idem* enshrined in Art.20 of the Statute, both of which are constructed in similar wordings. As a concept, *Ne Bis In Idem* is much like double jeopardy i.e. no person can be tried twice. Double jeopardy, albeit in its different variations, is a defence found in all legal systems based on the Rule of Law. In India too, protection against

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23 Rishav Banerjee, 'Rome Statute and India: An Analysis of India's Attitude towards the International Criminal Court' (2011) 4 J. E. Asia & Int'l L. 457, 463

24 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Judgement) ICC-01/04-01/07-1497 OA 8, AC (25 September 2009) para. 85

25 *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Judgement) ICC-01/09-02/11-274, AC (30 August 2011) para. 1

double jeopardy is a fundamental right enshrined in Art.20(2).[26] But, there is a subtle difference in the language of the Art.20 of the Statute and Art.20(2) of the Constitution of India, which create significant legal consequences. Double jeopardy in India, exists with regard to an "offense". Therefore, under the Indian national legal system, when a person is convicted under the Sea Customs Act, 1878, he can still later be prosecuted under the Indian Penal Code, 1860 for the same conduct, simply because the same conduct constitute offenses which are distinct in both the legislations.[27] However, in *Ne Bis In Idem,* protection exists with regard to "conduct which formed the basis of crimes". Therefore, if an Indian domestic court acquits a person for a conduct which forms the basis of 'human trafficking' (under S. 370 of the Indian Penal Code) in an impartial and independent trial without any intent to shield him/her from criminal responsibility, then (s) he cannot be tried in the Court for the same conduct, which may constitute the offense of, for instance, 'enslavement'[28] or 'deportation or forcible transfer of population'[29] or 'other inhumane acts of a similar character'[30] under the Statute. This shows that the complementary principle in the Statute is quite strong and the Court is empowered to look into only those situations which state fail to take care of themselves. This is not to say that the complementary regime is perfect and the Armageddon nature of the Court is impeccable, but to utterly disregard it as a "Utopia",[31] which the Delegation did, is a far cry.

UNSC Referrals Viz-À-Viz Jurisdiction Over Non-Party States

It goes without saying that the UNSC occupies a significant place in the Statute, at least as far as the triggering mechanisms of the Court are concerned. Art.13 contains three triggering mechanisms, out of which, as aforementioned, one is the power of the UNSC to

26 Constitution of India 1950, art 20(2)

27 *Leo Roy v. Superintendent of District Jail,* AIR 1958 SC 119

28 Statute, art 7(1)(c)

29 ibid, art 7(1)(d)

30 ibid, art 7(1)(k)

31 'Explanation' (n 7)

refer situations to the Prosecutor.[32] Art.13 also provides that the jurisdiction of the Court is triggered if a situation is referred to it by a state party or by the Prosecutor *proprio motu.* However, by virtue of Art.16, limitations are placed over the Prosecutor's power to prosecute or investigate a situation; that is to say, the Prosecutor must concede to the superseding authority of the UNSC if the latter requires that the proceedings cease for a renewable period of twelve months – something which the Delegation found "even harder to understand or to accept."[33]

The crux of the Delegation's contention is that Art.13 and Art.16, both vehemently work to amplify the powers of the UNSC. However, this contention is not as legally sound as it appears *prima facie.* The power of the UNSC to refer situations for international criminal adjudication is a power that already exists, notwithstanding the Statute.[34] As a matter of fact, this power was exercised by the UNSC both before and after the Court finally came into existence in 2003. In 1993, it created the International Criminal Tribunal for the former Yugoslavia (ICTY), attesting that it is bent upon putting an end to the International Humanitarian Law (IHL) crimes in the former Yugoslavia and "to take effective measures to bring to justice the persons who are responsible for them."[35] Similarly, it created the International Criminal Tribunal for Rwanda (ICTR),[36] the Special Court for Sierra Leone[37] and the Special Tribunal for Lebanon[38]. Thus, what the Statute does in fact is that it creates a permanent institution in which the UNSC can bring the perpetrators of the crimes to justice. The Statute thus, ensures that UNSC would not need to create a new court or tribunal every time an international crime is committed. Furthermore, under the mandates of Art.13 (b), the UNSC can use this power only within the limits Chapter VII of the UN Charter. Therefore, it can refer to the Court only those

32 ibid, art 13(b)

33 'Explanation' (n 7)

34 Diane F. Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court' (1999) 32:3 Cornell International Law Journal 489, 496.

35 UNSC Res 827 (25 May 1993) UN Doc S/RES/827

36 UNSC Res 955 (8 November 1994) UN Doc S/RES/955

37 UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315

38 UNSS Res 1757 (30 May 2007) UN Doc S/RES/1757

situations which pose as a threat to or which breach international peace and security. This qualifier is not just in theory, as the practise of the UNSC proves. When, in 2005, it referred the situation in the Darfur region of Sudan, it noted that "the situation in Sudan continues to constitute a threat to international peace and security."[39] Similar reasons were given and identical statements were made in the Libya Referral (2011) as well.[40] Another important qualifier is that the power of the UNSC ends once it has made the referral. Whether to initiate investigations or not is a cause for the Prosecutor; it is a decision to be made on the basis of the information available, the admissibility of the case under Art.17 and the nature and gravity of the alleged crimes.[41] On the basis of the same considerations, the Prosecutor, if and after he decides to investigate, may also choose not to prosecute the alleged perpetrators.[42] After such a refusal, the Pre-Trial Chamber may review the decision of the Prosecutor.[43] Thus, the Statute has elaborate mechanisms for checking the powers of the UNSC; and at the end of the day, criminal proceedings against individuals are set in motion by the organs of the Court.

With regard to deferrals under Art.16, once again, the motives of maintaining international peace and security takes precedence over delivering justice. This is clear from the language of Art.16 which mandates that the UNSC act through a resolution adopted under Chapter VII of the UN Charter. Of course, it is an executive prerogative of the UNSC to determine which situations reach the thresholds provided by Chapter VII and therefore, it is susceptible to politics.[44] For instance, after the Court issued an arrest warrant for Omar Al-

39 UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593

40 UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973

41 Statute, art 53(1)

42 ibid art 53(2)

43 ibid art 53(3)

44 Mohamed Abdou, 'Article 16' (*Case Matrix Network,* 30 June 2016) <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/ > accessed 1 April 2018

Bashir[45], several regional organizations, notably, the African Union and the Organization of Islamic Conference, requested the UNSC to defer the proceedings and shelve the indictment of President Al-Bashir[46] but the request was not acted upon.[47] There are various threads of scholarship regarding the justifiability of not honouring the request for deferral[48]; notwithstanding which, however, it is worth keeping in mind that Art.16 gives room to weight the interests of justice and the interests of peace at the same time and on the same pedestal. Surely, some good is to come out of this provision. It must be conceded the composition, procedural mechanisms and substantive goals of the UNSC can be revised in order bring forth some objective standards of assessing situations which threaten or breach international peace and security or of balancing the interests of peace with that of justice and in the process thereby, attain higher levels of cooperation between the Court and UNSC. However, the problem of politicization of the UNSC lies in the UN Charter and, in the rhetoric, not in the Statute. Therefore, the concerns of the Delegation, which are not altogether illegitimate, must be directed towards the UN Charter. She should not have used the Statute as a punch-bag made for venting the frustration surrounding the politics of UNSC.

Another contention which the Delegation made was that the UNSC, through the mechanisms of referrals and deferrals, creates jurisdiction of the Court over non-party states, which is a violation of international law. Against this contention, if nothing, it must be born in mind that the UNSC, till now, has invoked the deferral procedures of Art.16 only to shield the nationals of non-party states from the reach of the

45 *Prosecutor v Omar Hasan Ahmad Al-Bashir* (Order) ICC-02/05-01/09, PTC I (4 March 2009)

46 Assembly of the African Union, 'Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court' (3 July 2009) Doc. Assembly/AU/13 (XIII)

47 UNSC Res 1828 (31 July 2008) UN Doc. S/RES/1828

48 C.C. Jalloh, Dapo Akande and Max du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome State of the International Criminal Court' (2011) 4 Afr. J. Legal Stud 5

Court's jurisdiction. Even in the referrals of Darfur[49] and Libya[50], it invoked Art.16 to provide immunity from the proceedings of the Court to the "nationals, current or former officials or personnel" belonging to contributing states not party to the Statute, unless such a contributing state consents, expressly, to surrender their jurisdiction over to the Court.[51] However, one might still counter these instances by stating that - *(a)* the blanket immunity was merely a prerogative of the UNSC; it is not guaranteed by the Statute, *(b)* the Court got to exercise jurisdiction over the nationals of the territorial state i.e. Sudan and Libya, despite the fact that they are non-parties to the Statute and *(c)* therefore, it creates obligations on third states without their consent, thereby violating Art.34 of Vienna Convention on the Law of Treaties, 1969 (hereinafter referred to as "VCLT") An argument along these lines cannot be sustained for three larges premises -

Firstly, on such UNSC referrals, the Court gets to exercise jurisdiction over the *individuals* of the non-party states, and not the state in itself.[52] This difference cannot be dismissed as a mere technicality for it has certain legal consequences, and these legal consequences can be observed in state practise. There are several bilateral and multilateral treaties for extradition, which allows the contracting states to extradite individuals against whom formal criminal proceedings have begun in some ways by the requesting state, regardless of the nationality of such an individual. India is not an exception herein. For example, the extradition treaty concluded between India and USA in 1999 allows both the countries to extradite "persons who, by the authorities in the Requesting State are formally accused of, charged with or convicted of an extraditable offense."[53] In fact, ten years into the conclusion of the Conference also, India and Australia agreed in 2008 to extradite "any

49 UNSC Res (n 38)

50 UNSC Res (n 39)

51 UNSC Res (n 38) operative para. 6

52 William A. Schabas, 'The International Criminal Court and Non-Party States' (2010) 28:1 Windsor Y.B. Access Just. 1, 5

53 Extradition Treaty between the Government of Republic of India and the Government of the United States of America (India – USA) (adopted 25 June 1997, entered into force 21 July 1999) art 1

person who are wanted for trial, or the imposition or enforcement of a sentence, in the Requesting State…"[54] Apart from extradition treaties, there are other treaties which have similar impact on the nationals of non-party states. The Torture Convention of 1984 requires that state parties obtains jurisdiction over any individual (who may be a national of a non-party state) and who has allegedly committed crimes in their territory and has not been extradited.[55] Although India has not ratified this Convention, she signed it way back in 1997[56], thereby indicating that she endorses the principles of this Convention. Moreover, as recently as in 2017, the Law Commission of India recommended that India ratifies the same.[57] Again, there are the Geneva Conventions of 1949 which offers similar universal jurisdiction. For example, Art.146 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 states that the high contracting parties are obligated to bring before its own courts all such persons who commit or cause to be committed certain specific 'grave breaches', notwithstanding the nationality of such persons. India, despite being aware of the effects of the Geneva Conventions on the nationality of third states, did become state parties to them nevertheless. In contrast, when similar position was given to the Court with regard to third states, India choose not to adopt the Statute. This clearly reflects India's inconsistency as far as its arguments against third state obligations are concerned.

Secondly, it must be acknowledged that certain scholarship tend to express that the Statute is not based on universal jurisdiction.[58]

54 Extradition Treaty between Australia and the Republic of India (India – Australia) (adopted 23 June 2008, entered into force 20 January 2011) art 1

55 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force on 26 June 1987) art 5(2)

56 'Country-wise Status of Ratification: Ratification of International Human Rights Treaties: India' (*United Nations*) < http://indicators.ohchr.org/ > accessed 1 April 2018

57 Law Commission of India, *Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation* (Report No.273, October 2017) 69, para 7.1

58 David J Schedffer, 'U.S. Policy and the International Criminal Court'

However, it must be noted that almost all the crimes over which the Court has *rationae materiae* jurisdiction, do encompass universal jurisdiction themselves as part of customary international law.[59] Also, the subject-matter crimes of the Statute, just like the subject-matter of the Geneva Conventions and other like treaties, also constitute *jus cogens* norms.[60]

*Thirdly***,** the jurisdictional structure of the Court is justified by the theory of delegated jurisdiction[61], under which states or institutions, which have universal jurisdiction over a crime, hand the jurisdiction over to another state or institution. Such delegated jurisdiction also becomes a part of customary international law, considering that there is relevant *opinio juris* and state practise – for instance, one might consider the case of the IMT which operated largely to prosecute German and Japanese nationals but was created without the consent of Germany and Japan after the Allies decided to surrender their universal jurisdiction over the crimes in favour of the tribunal. During this time, India choose to back the standing of the Allies regarding the tribunal[62] when called upon to react to the circumstances. Against this theory of delegated jurisdiction, since India did not object initially, then, adhering to the principles given by *Anglo Norwegian Fisheries Case* (1951), today she cannot invoke the persistent objector rule[63] so far it would possibly pertain in objecting to the application of this theory to the Court's jurisdictional regime. Given the fact that India endorsed the creation of the *ad hoc* tribunals like the IMT for prosecuting perpetrators of international crimes irrespective of the perpetrator's nationality, it is clear that India could have taken a

(1999) 32 Cornell Int'l L.J. 529

59 Orentlicher (n 33) 494

60 M. C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' 59:4 Law and Contemporary Problems 63, 67

61 Madeline Morris, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Party State' (2000) 6 ILSA J. Int'l & Comp. L. 363, 365

62 Peter Calvoocoressi, *Nuremberg, the Facts, the Law and the Consequences* (1st ed, Macmillan 1948) 16

63 *Anglo Norwegian Fisheries Case (UK v Norway)* (Order) [1951] ICJ Rep

similar stand in the Conference, at least as far as the reach of the Court to the nationals of non-party states are concerned.

Crimes Over Which The Court Has Jurisdiction

The Court has *ratione materiae* jurisdiction over four crimes – genocide, crimes against humanity, war crimes, crime of aggression. [64] These crimes constitute ICL *stricto sensu* and it is different from what are called treaty-crimes, which is a well-appreciated distinction.[65] The latter is established by special conventions, which are over two hundred in number[66] governing crimes which have, or which possess the potential to have, transnational effects. The Draft Statutes of the International Law Commission did consider the possibility of establishing jurisdiction of the Court over some treaty crimes, like terrorism, drug-trafficking and use of nuclear weapons etc., which India had mooted for; but all the attempts failed, as is visible from the final Statute. Similar considerations were made at the Kampala Review Conference of 2010 as well; but this time not by India - the Netherlands mooted to include terrorism in the list of CAH[67] while Mexico mooted to include the use nuclear weapons as a War Crime[68]- but like Conference at Rome, it did not yield a result. This was, as was before, primarily due to lack of consensus and support for the cause. Prominent threads for opposition emerged from disagreement about the definitions of these crimes[69] and the fact that the inclusion of these crimes in the Statute, being adequately protected by national courts and other international conventions, would undermine the primacy that is to be given to national legal systems.[70] While such

64 Statute, art 5

65 Kai Ambos, *Treatise on International Criminal Law, Volume II: Foundations and General Part* (1st edn, OUP 2013) 222

66 ibid 223

67 'ICC Report of the Working Group on the Review Conference' (November 2009) ICC ASP/8/20, app. III

68 ASP, 'Report of the Bureau on the Review Conference', (10 November 2009) ICC-ASP/8/43, Annex III.

69 Ambos (n 64)

70 William A. Schabas, *An Introduction to the International Criminal Court* (3rd edn, CUP 2007) 65

disagreements perhaps do not justify, in itself, the non-inclusion of these crimes in the Statute, yet they also do not justify India's abstention in the Statute. By staying with the Court, India could still have mooted for the cause and acted as a catalyst for generating international consensus regarding the same.

Thus, conceding to the fact that the Delegation's concerns were not altogether unsound, it must be submitted herewith that they were not sound enough to justify India's abstention in the Statute.

RAMIFICATIONS OF INDIA'S ABSTENTION IN THE STATUTE

Considering that the Court can reach non-party states like India, it seems as though the status of a non-party state is not of much significance in the Statute. But there is more than what meets the eye. One query which emerges in the natural course of this essay is that of what India has achieved by not adopting the Statute. Yet another question which surface naturally is that of what India would have achieved had she adopted the Statute. Both these queries shall be tended to hereafter.

What Has India Achieved By Not Adopting The Statute?

The key to this question can be found in the difference in the rights and obligations of state and non-parties of the Statute. Although there are many, the most significant variance is seen in the requirement of Cooperation with the Court.

Art.86 of the Statute expresses that state parties "shall…. Cooperate fully with the Court."[71] The use of the word, "shall", shows that it is mandatory for state parties to work together with the Court whenever called for. Art.88 further states that state parties must have procedures within their national laws enabling them to cooperate with the Court. Such procedures need not be there in the national laws of non-party states. Moreover, the mandate of state parties' cooperation is supplemented by a sanction – if these states fail to comply with a request of cooperation made by the Court, then the latter shall raise the matter before the Assembly of State Parties (hereinafter referred

71 Statute, art 86

to as "ASP") or the UNSC (in cases which the jurisdiction of the Court was triggered by the UNSC).[72] In response to such referrals of non-cooperation, the ASP can initiate procedures for dialogues with the state party and take other assembly actions.[73] Some years ago, when Kenya (a state party) refused to cooperate in enforcing a warrant issued against Omar Al-Bashir, Trial Chamber-I did in fact decide to refer the matter to the ASP as well as the UNSC.[74] As recently as two years ago, similar referrals were made by Pre-Trial Chamber-II against Uganda and Djibouti (both state parties), again, for not executing Al Bashir's arrest warrant.[75] Consequently, there is intense politicization of the Court's relationship with the African countries and a set-back to Bashir's trial.

With regard to non-party states however, the Court can only "invite" them to "provide assistance" based on "an ad hoc arrangement", or an agreement or some other appropriate basis.[76] Thus, contrary to what the Delegation asserted, the Statute actually seems to be respecting Art.34 of the VCLT and paying heed to the consent of third states, as far as their obligation to cooperate with Court is concerned. This is substantiated by the fact that the use of the word, "invite", in Art.87(5) which shows that non-party states can help the Court on its own volition. This allows a benefit to non-state countries like India which can choose to not join forces with the Court without any sanctions in order to reap some personal benefits. This can be witnessed from India's state practise as well. When Al Bashir visited India on the occasion of India-Africa Summit on 28 October 2015, she was requested by the Court as well as other human rights groups

72 ibid, art 87 (7)

73 ASP, 'Assembly Procedures relating to Non-Cooperation' (21 December 2011) ICC-ASP/10/Res.5

74 *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Order) ICC-02/05-01/09-107 (27 August 2010)

75 Press Release, 'Al Bashir case' (*International Criminal Court)* < https://www.icc-cpi.int/Pages/item.aspx?name=PR1231 > accessed 11 April 2018

76 Statute, art 87 (5) (a)

like Amnesty International to arrest Bashir.[77] However, she choose to not honour such requests. In doing so, she managed to pacify the apprehensions of the African nations, including Sudan, with whom she, being the second largest exporter, has some 1.4 billion dollars in investment.[78] Thus, India's economic ventures and governmental friendships were saved. In this light, it would not be wrong to conclude that the status of a non-state party actually enables India to fulfil her political motives without much hindrance.

What Would India Have Achieved, Had She Adopted The Statute?

This question must be answered with some speculation. India, ever since she was born, has been witness to some horrifying bloodbath. Sadly, tales of violence have not been left in the past and sadder still is the fact that many of these tales were brewed by the actions of the state and her leaders. One can cite, for example, Sanjay Gandhi's ghastly crusade of forced sterilization, in which an estimated 6.2 million people were sterilized in just one year.[79] Such a crusade might have constituted a CAH under Art.7(1)(g) of the Statute, considering that the thresholds provided by Art.(7)(1) i.e. the thresholds of "widespread", "systematic", "directed against a civilian population" etc. were met. The Sanjay Sterilizations, which permanently deprived hundreds of poor Indian men of their reproductive capacities, were not carried out with their consent nor were sufficient medical safeguards provided.[80] This gives reasonable basis to believe that the thresholds provided by Art.7(1)(g)-5 of the Elements of Crimes Document were also met.

77 Express Web Desk, 'India-Africa summit: Arrest Sudan President Omar al-Bashir, demands Amnesty International' (*The Indian Express,* 26 October 2015) < http://indianexpress.com/article/world/world-news/india-africa-summit-arrest-sudan-president-omar-al-bashir-demands-amnesty-international/#sthash.3TKYElzZ.dpuf > accessed 11 April 2018

78 Veda Vaidyanathan, 'A new phase in India-Africa relations' (*The Hindu: Business Line,* 27 February 2018) < https://www.thehindubusinessline.com/opinion/relationsa-new-phase-in-india-africa-relations/article22869679.ece > accessed 11 April 2018

79 Soutik Biswas, 'India's dark history of sterilisation' (*BBC News,* 14 November 2014) < http://www.bbc.com/news/world-asia-india-30040790 > accessed 17 April 2018

80 ibid

Another affair which fits into the picture would be the state police's collusion in the anti-Sikh riots which occurred as an aftermath of Indira Gandhi's assassination on 31 October 1984. Just months before the Statute came into force in 2002, Godhra Train Burning happened, leading to another horrifying episode of communal riots involving reports of state complicity. Even after the entry into force, episodes having the potential of constituting one form CAH or of a War Crime have occurred, particularly in the internal conflicts of Kashmir and the Northeast. In all of these incidences, the presence of a political incentive is prominent and the judicial response, ineffective. The Indian Judiciary is replete with problems like a huge backlog of cases, unreasonable delays etc. Indian politics is largely organised along communal lines. These problems have existed for so long a time that today, one must question whether there is a political will to resolve these issues or not.

Had India adopted the Statute, she would have run a higher risk of the Court's scrutiny of the state machinery's "unwillingness" or "inability" to conduct criminal proceedings against the perpetrators of the core international crimes. Thus, there would be a great likelihood of India embarrassing herself before the international community of states. Greater still would have been the likelihood of undermining the legitimacy of democratic governance of India. Given this environment, the state would have been compelled to establish a more responsible government and a stronger criminal adjudication system. It would have left less room for the state to be complacent with the occurrence of crimes so grave it shakes one's conscience. It would have acted as catalyst of resolving the problems of the judiciary and the nuisances of party politics. Adoption of the Statute, thus, would have created an operative national criminal justice system for prosecuting the perpetrators of genocide, war crimes, aggression and CAH in India – something which India currently lacks. For instance, the national criminal justice system is structured to prosecute some of the specific conducts of CAH and War Crimes like 'rape', 'wilful killing' etc. Again, some other conducts like 'enforced disappearance of persons', 'forcible transfer of population', 'compelling a prisoner of war or other protected person to serve in the forces of a hostile Power' etc. are not recognised as specific offenses in India. What is even more dismal is the fact

that there is no Indian legislation on genocide till date, although India acceded to the Geneva Conventions way back in 1950. Had India adopted Statute, she would have reaped the benefits of a proficient system criminalizing the worst crimes of the world. It would have provided more security to Indians against such mass atrocity crimes.

CONCLUSION

The Court is far from perfect; but is a laudable step in the history of mankind. It takes a few steps towards establishing a neo-liberal world order with less of violence and inequalities and more of peace and justice. This in itself is a reason enough for India to adopt the Statute and work collectively for punishing the perpetrators of the gravest crimes of the international community. It is true that the Court currently does not have jurisdiction over the use of WMDs and that, such a jurisdiction is desirable. But the lack of jurisdiction over one crime alone must not have prevented India to accept a Court which has jurisdiction over several others. It is also true that the UNSC represents a hegemony of the most powerful nations of the world. But its role in the Court comes with limitations, as does the jurisdictional regime of the Court. Thus, the reasons which India cited in explaining its vote against the Statute are not justified. In accusing the Statute of violating state sovereignty and norms of customary international law, India has seriously erred. Such an error could have come about for only two reasons – either India missed out on conducting a detailed scrutiny of the provisions of the Statute or it deliberately chose to not stay alongside the Court so that she can take advantage of the freedoms of a non-party state and manoeuvre her political motives. Either way, the consequences are being felt by Indian citizens who are inadequately protected by the national criminal justice system. Either way, India is compromising with doing justice not just to her peoples, but also to those of the world. Either way, India is hindering the growth of a Court which works to impose individual criminal responsibility. While it is up to the Indian Government to accede to the Statute, perhaps the Government ought to be reminded that her decisions should be based on sound policies. They must respect India's previously honourable role in establishing a peaceful world order and provide to the people maximum protection possible. India still has time to ratify the Statute and undo her errors. As they say, better late than never.

Judicial Dynamism in India: Supreme Court's Landmark Judgments in 2018

Jayanta Boruah[1]

Introduction

Supreme Court is the custodian of the Indian Constitution and being so it has proved its efficacy from time to time since its origination. In 2018 several circumstances appeared in India which created biggest challenges for the Apex Court to deal with and in an attempt to tackle such challenges it passed several judgments which more or less gave birth to new dynamic system of Rule of Law in India as well as introduced new chapters of Jurisprudence which are unique to Indian scenario. This Article will make a brief attempt to study some of the important cases where the Supreme Court of India passed judgments which will create a long lasting impact on the country's Legal Regime, with an objective to know that whether the Court has adopted a traditional or modern approach in the present civilization or whether these judgments are acceptable by the Indian as well as Non-Indian Citizens by analyzing the views of different scholars and activists in this regard.

A Vignette of 8 Landmark Judgments passed by the Supreme Court in 2018

Upholding the marriage of Hadiya and Shafin Jahan [2]

The Kerala High Court annulled the marriage of Hadiya and Shafin Jahan based on the allegations from the parents of Hadiya that Hadiya was brainwashed to convert to Islam on May 2017. The Supreme Court however considering the love appeal of the couple quashed that draconian order and upheld the validity of their marriage on March 2018.

Hadiya alias Akhila Ashokan, a Hindu woman, aged 26 years, resident of Kerala, converted to Islam and married Shafin Jahan in 2016, but

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1 LLM 2018-19 National Law University and Judicial Academy Assam.

2 Shafin Jahan v Ashokan KM (2018) SLP(Cr) 5777 of 2017 (SC).

subsequently the marriage was annulled by the Kerala High Court. On an Appeal filed by Jahan the Supreme Court Three Bench Judges headed by CJ Dipak Misra upheld the women's liberty to choose their partners and revealed that a woman shall not be forced to be under the custody of parents if attained majority and is capable of taking independent decision herself. Justice A.M. Khanwilkar and D.Y. Chandrachud, the other two Judges of the Bench remarked that the Kerala High Court should not have done this injustice by violating the fundamental rights of the couple guaranteed under the Constitution. The Judgment also spotted the 'Love Jihad' a term used by some sections of Hindu Activists for alleging Muslim men as committing conspiracy for converting Hindu women to Islam in the name of love. The Court found on interaction with Hadiya that she had no objection to the marriage and she willfully affirms to the marriage. However, the Judgment further allowed the NIA to continue its investigation in matters of any criminal nature.[3]

The Judgment seemed to have provided justice to women who have attained majority by allowing them the right to choose their partners even against the will of their parents. But, the other scene is that Shafin Jahan is alleged for being an active member of SDPI (Political Front of Islamic Fundamentalism Organization) with four criminal cases against him.[4] However, on the other hand after the Kerala High Court order it was alleged that Hadiya's father did not allow her to go outside the house and even prevented the Chairperson of State's Women Commission and other activists from meeting her and trespass case was lodged against seven persons.[5]

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3 Mehal Jain, 'Final Hearing of Hadiya Case: Who said What' *Live Law* (8 March 2018) **www.livelaw.in/final-hearing-hadiya-case-said-court-room-exchange.html** accessed 19 December 2018.

4 Outlook Web Bureau, 'Islamic Popular Front Of India 'Involved in Terror Acts', NIA submits Report to Govt Recommending Ban' *Outlook* (National 12 September 2017) **www.outlookindia.com/website/story/islamist-popular-front-of-india-involved-in-terror-acts-nia-submits-report-to-go/301575.html** accessed 19 December 2018.

5 Special Correspondent, 'Josephine saysshe is prevented from visiting Hadiya' *The Hindu* (Thiruvanathapuram 14 November 2017) **www.thehindu.com/news/national/josephine-says-she-is-prevent-**

The Judgment appears to be a courageous one since this case even touched religious sentiment and even had signs of terrorist inclination. But besides all these the Court valued individual freedom and love appeal limiting the hold of parents over their ward. In this material world this judgment, to some extent seems to have granted jurisprudential recognition to a concept of romantic justice.

Euthanasia Case[6]

On 9 March 2018, the Supreme Court recognized the living will made by terminally-ill patients for passive euthanasia with guidelines.[7] The dispute arose from Aruna Shanbug Case where passive euthanasia was allowed but subsequently the matter was again raised where finally in 2018 it was granted legal recognition to living wills. Passive euthanasia means withdrawal of medical treatment facilities of terminally-ill patients with the intention of allowing death of that patient.[8]

The entire matter got highlighted when Pinki Virani pleaded before the Apex Court for passively euthanizing Aruna Shanbug who was in a vegetative stage due to the attacks of Sohanlal Walmiki, a sweeper, on December 2009, on the ground of Pinki being Aruna's 'Next Friend'. The Court while permitting Passive Euthanasia laid down guidelines for framing the euthanasia law in 2011. However, in 2014 the Court held this Judgment to be unconstitutional and thus referred for review to a five Judges Constitutional Bench. At last, finally the Constitutional Bench in 2018 allowed passive euthanasia only if strict guidelines are followed and the Government can also honor 'living-wills'.[9] But Active

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ed-from-visiting-hadiya/article20445494.ece accessed 19 December 2018.

6 Aruna RAMCHANDRA Shanbaug v Union of India & others (2011) WPC 115 of 2009 (SC).

7 ET Online, 'Landmark Ruling: Supreme Court says passive euthanasia is permissible' *Economictmes* (09 March 2018) www.economictimes.com/news/politics-and-nation/landmark-ruling-supreme-court-says-paassive-euthanasia-is-permissible-with-riders/articleshow/63238770.cms accessed 20 December 2018.

8 *ibid.*

9 After 36 yrs of immobility, a fresh hope of death *Express News Service* (New Delhi 17 December 2009) **www.archive.indianexpress.com/news/after-36-yrs-of-immobility-a-fresh-hope-of/555048.html.** ac-

Euthanasia by means of administering lethal compounds to kill one's life is still prohibited in India.[10]

The Court verdict was followed by several opinions amongst them the religious group's opinions were highly remarkable. The Christians and Jains were not reluctant to accept passive euthanasia. Santhara and Prayopavesa as traditional customs were prevalent amongst Jains and Hindus where one fasts until death.[11] While few of the Indian medical establishments showed doubts on the application of passive euthanasia due to country's weak Rule of Law and the huge gap between the rich and the poor.[12] And this issue is even considered as politically contentious in India.[13] However, this Judgment made a way for new paradigm in the concept of Rule of Law in India. Whatever may be the consequences, the debate ends on a positive note that life shall not be a hell for those who want to die for peace, law shall not enforce severe consequences upon people for whom death becomes more valuable than life which is nothing more than suffering for such people.

Sabarimala AyyappaTemple Case[14]

A step towards eliminating gender discrimination was taken when the Supreme Court passed a Judgment prohibiting the practice of restricting women between 10-50 years of age group to offer prayers in

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cessed 20 December 2018.

10 India Allows Living Wills for Terminally-Ill *BBC* (India 9 March 2018) www.bbc.com/news/world-asia-india-43341155.html accessed 20 December 2018.

11 Pheroze L. Vincent, 'Faiths Take Nuanced View' *The Telegraph* (8 March 2018) https://m.telegraphindia.com/india/faiths-take-nuanced-view/cid/414967 accessed 21 December 2018.

12 Supreme Court lays down euthanasia guidelines *LA Times* (8 March 2018) www.latimes.com accessed 21 December 2018.

13 Malini Menon and Sachitra Mahanti, 'India's top court upholds euthanasia, allows living wills in landmark judgment' *Reuters* (9 March 2018) www.reuters.com/article/us-india-court-euthanasia/indias-top-court-upholds-passive-euthanasia-allows-living-wills-in-landmark-judgment-idUSKCN1GL0MF.html accessed 20 December 2018.

14 Indian Young Lawyers Association & Othrs v The State of Kerela & Ors. (2018) WPC (Civil) 373 of 2006 (SC).

the Sabarimala Temple. The Feminist activists held it as a milestone towards gender equality.[15]

The Sabarimala Temple is in Kerala where women belonging to menstruating age were restricted from entering the temple which was even legalized by the Kerala High Court in 1991.[16] It is presumed that Ayyappa is a celibate for which he himself did not want women of reproductive age to enter into the temple so that he do not get disturbed.[17] Further, few women themselves did not want to enter the temple as they believed that this would disturb the prevailing traditions on Ayyappa's faith.[18] Moreover, the temple was located on top of a hill which will make the entry of women practically and physically difficult since there are no proper sanitation facilities as well as no medical facilities.[19] Furthermore, menstruation is believed to be impure as such menstruating women are also held to be impure, thereby restricting them from entering into the temple.[20] The President of Travancore Dewaswom Board opined that women's entry into the

15 Express Web Desk 'Full Text: Supreme Court Sabarimala temple Judgement' *The Indian Express* (New Delhi b28 September 2018) **https://indianexpress.com/article/india/full-text-supreme-court-sabarimala-temple-judgment-5378255** accessed 22 December 2018.

16 Editors of Encyclopedia Britannica 'Ayyappan Hindu Deity' *Britannica Encyclopedia* (20 October 2018) **www.britannica.com/topic/Ayyappan** accessed 22 December 2018.

17 MA Dewiah 'Here's why women are barred from Sabarimala, is not because they are 'unclean'' *Firstpast* (15 Jannuary 2016) **www.firstpost.com/india/why-women-are-barred-from-sabarimala-its-not-because-they-are-unclean-2583694.html** accessed 22 December 2018.

18 Prabhash K Dutta 'Legend of Sabarimala: Love Story that kept women from Ayyappa' *India Today* (28 September 2018) **ww.indiatoday.in/india/story/sabarimala-legend-lord-ayyappa-1351674-2018-09=28** accessed 22 December 2018.

19 Kochi, Practical impediments for women to trek at Sabarimala *Deccan Chronicle* (29 September 2018) **www.deccanchronicle.com/nation/currentaffairs/290918/kochi-practical-impediments-for-women-to-trek-at-sabarimala.html** accessed 22 December 2018.

20 Vikas Sv 'Why are menstruating women not allowed in Sabarimala Temple? Centuries old beliefs and customs' *Oneindia* (28 September 2018) **www.oneindia.com/india/why-are-manstruating-women-not-allowed-sabarimala-temple-centuries-old-beliefs-and-customs-2784065.html** accessed 22 December 2018.

temple might turn the place into a spot of sex tourism like Thailand. It was also argued that the temple shall be treated as a legal person; thereby the right to privacy shall be protected.[21]

While the other side favoring women's entry in the temple held that calling the psychological process of menstruation as impure is a pure sign of gender discrimination.[22] Some Historians are of the view that menstruation was regarded as pure and as a sign of fertility amongst some of the tribal communities and women from such communities were allowed even to enter the temples, besides there were no signs of proved ritual sanctity relating to impurity of menstruating in the Hindu mythology neither any scientific justification.[23] Further, the Chief Minister of Kerala stood for gender equality and ensured all facilities affordable for the protection of women pilgrimage to the temple.[24]

However, in 2018, the Supreme Court's constitutional Bench finally held that restricting women's entry to this place due to Biological Differences was a violation of Right to Equality and Right to Religious Freedom under Article 14 and Article 25 of the Constitution of India respectively and thereby held such practices unconstitutional and allowed women's entry to the temple.[25] This Judgment appears to be a landmark Judgment in a patriarchal country like India where women

21 Anand Misra 'Advocating Women's entry at Sabarimala non believers' *Deccanherald* (20 October 2018) **www.deccanherald.com/national/those-seeking-women-entry-698936.html** accessed 22 December 2018.

22 Manstruation is not dirty, women are not impure: Campaign to counter myths in Kerela *The News Minuite* (08 October 2018) **www.thenewsindia.com/article/manstruation-are-not=dirty-womens-are-not-impure-campaign-counter-myths-kerela-89647** accessed 22 December 2018.

23 Rajan Gurukkal.

24 PS Goikrishnan Unnithan 'Women have the same right to worship as men:Pinarayi Vijayan on Sabarimala, issue' *Indiatoday* (17 October 2017) **www.indiatoday.in/india/storywomen-has-the-same-right-to-worship-as-menprinarayi-vijayan-on-sabarimala-issue-1369509-2018-10-17** accessed 22 December 2018

25 Expess Web Desk 'Sabarimala Temple Protests: What is happening in Kerela?' *Indian Express* (19 October 2018) **https://indianexpress.com/article/india/sabarimala-temple-protest-kerela-women-entry-5408635** accessed 22 December 2018.

were mostly treated as property and several discriminations took place against them. This Judgment paved the way for gender equality and liberty for women in India.

Gay Sex is no more an Offence[26]

The Supreme Court Bench headed by CJI Dipak Misra struck down Section 377 of Indian Penal Code, which made Gay sex an offense and upheld it to be against Right to privacy of individuals as well as consensual sex between two adults can never be a crime and this Section of IPC is discriminatory against LGBT community. This made the Gay couples to have celebrations across the country. However, the Bench also held that Section 377 will still be in application in cases where sex is between individuals and animals or children.

By this Judgment, the Apex Court overruled its previous decision given in 2013[27] where certain consensual sex between adults were held to be unconstitutional but sex with minors, non consensual sexual acts and bestiality still remains as an offence under the said section.[28] The Court found that criminalization of consensual sex between LGBT adults was violation of Right to Equality under Article 14 of Indian Constitution as well as discriminatory. The LGBT communities are also granted with liberties under the Constitution which includes right to choose desired partner, right to have satisfaction from sexual intimacies and also the right not to be subjected to any discriminatory behavior. The LGBT campaigners were waiting outside the Court when this verdict was pronounced and they seemed to have celebrated this judicial wisdom.[29] The Government while on the other hand stood silent and left the matter to the discretion of the Court.[30] Similarly,

26 Navtej Singh Johar v Union of India (2018) SC.

27 Suresh Kumar Kousal v Naz Foundation (2013) Civil Appeal No. 10972 of 2013 (SC).

28 India Court legalise Gay Sex in Landmark Ruling *BBC* (6 September 2018) **www.bbc.com/world-asia-india-45429664** accessed 23 December 2018.

29 *Ibid.*

30 FP Staff 'Section 377: Supreme Court hearing Center defers to 'wisdom of Court'; Maneka Guruswamy says IPC Section violative Article 15 *First-past* (11 July 2018) **www.firstpast.com/india/section-377-supreme-**

the Prime Minister of India, Narendra Modi also stood silent.[31] While this Judgment was also criticized, for instance Subramaniam Swami, a Rajya Sabha member opined that the judgment may be overruled if it reaches extreme levels, including pedophilia, gay bars, increase of HIV cases and so on.[32] However, though Indian National Congress from United Progressive Alliance initially opposed Gay Sex as immoral in 2009 when it was in power,[33] but this time they too have welcomed this judgment. Besides few criticisms it has been welcomed almost from every sections of the world, for instance Human Rights Watch, Amnesty International[34] as well as United Nation[35] supported this decision.

Section 497 of IPC was struck down[36]

Section 497 of Indian Penal Code criminalized adultery according to which the practice of having sexual intercourse with another person

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court-hearing-center-defers-to-wisdom-of-court-maneka-guruswami-says-ipc-section-violative-of -article-15-4713811.html accessed 23 December 2018.

31 Jeffray Gentleman 'India Gay sex ban is struck down, indefeasible court says *The New York Times* (6 September 2018) **www.nytimes.com/2018/09/06/world/asia/india-gay-sex-377.html** accessed 23 December 2018.

32 Subramaniam Swami *Twitter* (6 September 2018) **https://mobile.twitter.com/5129801html** accessed 23 December 2018.

33 Gay sex is immoral and can't be decriminalized, Govt tells HC *Outlook* (28 September 2018) **www.outlookindia.com/newswrite/story/gay-sex-is-immoral-and-cant-be-decriminalized-govt-tells-hc/613434** accessed 23 December 2018.

34 India: Supreme Court's decriminalization of gay sex represents 'new era of equality" *Amnesty International UK* (06 September 2018 **www.amesty.org.uk/press-release/india-supreme-court-decriminalization-gay-sex-represents-new-era-equality** accessed 23 December 2018.

35 United Nation in India welcomes Supreme Court's Judgment on 377 *United Nation in India* (06 September 2018) **http://in.one.un.org/un-news/united-nations-india-welcomes-supreme-court-judgment-striking-section-377** accessed 23 December 2018.

36 Joseph Shine v Union of India (2018) WP(Cri) 194 of 2017 (SC).**www.livelaw.in/statutory-immunity-woman-prosecution-adultery-sc-admits-writ-petition-challenging-vires-section-497-ipc/** accessed 23 December 2018.

without the consent of her husband was made an offence and this Section was prevailing for about 158 years. The SC held that this Section regarded woman as a material rather than human being and thereby this section was struck down. However, Adultery will still constitute a valid ground for divorce. This judgment seems to have been appreciated by the women advocates across the world. [37]

The Court received several petitions for abandoning this Section as it was contended to be a violation of Article 14 and 15 of the Indian Constitution, however in this case the Court found woman as victim and infringement to the individual independent identity of such woman.[38] On the other hand this Section was supported on the ground that it supports stability of marriage and the sacred nature of the institution of marriage as well as it was suggested to be reformed in a way to tackle the gender problem rather than invalidating the entire section itself.[39] But finally the Court held that Adultery will never be a criminal offence though it will still continue to constitute a valid ground for divorce.[40]

This Judgment attempted to raise the standard of woman from the status of being treated as a property of the husband but critics raises the question that if wives are not the property of husband then why husband are entitled for maintenance of their wives?[41] Whatever may be the arguments it has become evident that this Judgment has again showed the extent of Judicial Activism in India.

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37 Mehal Jain 'Husband is not the master of wife', SC struck down 158 year old Adultery Law under Section 497 IPC (Read Judgment)' *Livelaw* (27 September 2018) **ww.livelaw.in/husband-is-not-the-master-of-wife-sc-strucks-down-158-year-old-adultery-law-under-section-497-ipc** accessed 23 December 2018.

38 Mehal Jain 'Challengin the Vires Of Section 497 IPC (Read Petition & Order)' *Livelaw* (8 December 2018)

39 Counter Affidavit Adultery Policy pdf. **https://drive.google.com/file/d/1oRIWfc5YN9wDf1Lf7xDRM9qLIxD4tim/view**

40 Soutik Biswas 'Adultery no longer a criminal offence in India' *BBC News* (New Delhi 27 September 2018) **www.bbc.com/news/world-asia-india-4504927** accessed 23 December 2018.

41 Dr. motiyur Rahman, Assistant Professor, University Law College Gauhati University.

Live Coverage of Court Proceedings[42]

On September 26th the SC permitted live coverage and streaming of Judicial Proceedings of the Supreme Court with an attempt for bringing transparency in the Judiciary. This Judgment is expected to make Judiciary more accountable while performing their Judicial Responsibilities.[43]

This Judgment is expected to provide public's Right to Know as well as to reduce dependence on second hand sources as per D.Y. Chandrachud. This judgment is further expected to increase public confidence on Judiciary. The Court however, made it clear that even if cases of constitutional importance can be live streamed, yet it must not ignore the dignity of the litigants especially in cases involving personal matters.[44] K.K. Venugopal was asked to frame guidelines for implementing this project on stage basis. In return Venugopal made several suggestions like the project shall begin with a pilot project experimenting in Court Room 1 to check whether such project can be extended to further courts, a separate media room accommodating the facilities for interested advocates, litigants, interns, etc. shall be constructed in a manner so to even make it accessible to the disables, a TV channel shall be operated by the center and such other suggestions were provided.[45]

Declaring the Right to Privacy as a Fundamental Right[46]

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42 Indira Jaisingh v Secretary General & Othrs (2018) WPC 66 of 2016 (SC).

43 Krishnadas Rajgopal 'SCfor live-streaming video recording of court proceedings' *The Hindu* I(New Delhi 26 September 2018)**www.thehindu.com/national/sc-for-live-streaming -video-recoeding-of-court-proceedings/article25046286.ece** accessed 24 December 2018.

44 Priyanka Mittal 'SC approves live-streaming of court proceedings' *Livemint* (26 September 2018) **www.livemint.com/politics/GrWwxGSHTeeJAEfinRBAwl/Supreme-Court-allows-for-livestreaming-for-cases-of-constit.html** accessed 24 December 2018.

45 Live-Streaming Of Supreme Court Cases: A Big Step For Transparency *The Leaflet* (25 August 2018) **www.bloombergquint.com/law-and-policy/live-streaming-of-supreme-court-case-a-big-step-for-transperancy** accessed 24 December 2018.

46 Justice K.S. Puttaswamy (Retd.) & Another v Union of India & Others (2018) SC.

When the AADHAR controversy was on full swing as it is criticized on the ground of violating the Right to Privacy, a nine Judges Bench declared the Right to Privacy as a fundamental Right under Article 21 of the Constitution of India, 1950 thereby again widening the scope of Article 21. However, the AADHAR policy has not been completely made invalid but still a step has been taken towards the protection of individual right in the country.[47]It overruled the previous Judgments that Right to Privacy is not a fundamental Right given in Kharak Singh v State of UP[48] and M.P. Sharma v Union of India[49] respectively. The case Nevtaj Singh Johar v Union of India[50] has paved the way for the interpretation of this judgment in 2018.

The Aadhar Act[51] was however held to be constitutional but this judgment restricted the use of the Aadhar number by any private entities or for entering into contract with private parties. This shows that the government can still use this number. Besides all these the Judgment appears to have given emphasis over protecting the Right to Privacy as a fundamental right which was earlier not given such a status.

Scrapping of Article 35A

Article 35A was added to the Constitution of India by a Presidential Order 1954[52] which allowed the Jammu and Kashmir State Legislature to define Permanent Residents of the State along with Rights and Privileges of such permanent residents.[53] This Order was made under

47 Namita Viswanath 'India: the Supreme Court's Adhaar Judgment and the Right to Privacy' *Inguslaw (*11 October 2018) **www.mondaq.com/india/x/744522/data=protection=privacyThe=Supreme=Adhaar=-Judgment=And=The=Right=to=Privacy** accessed 22 December 2018.

48 (1962) AIR 1295 (SCR) 1.

49 (1954) air 300 (scr) 1077.

50 (2016) WP (Cri) 76 SC.

51 Aadhaar (Targeted Delivery of Financial and other Susidies, benefits and services) Act, 2016.

52 The Constitution (Application to Jammu and Kashmir) Order 1954.

53 DA Rashid 'If Article 35A goes all Presidential Orders from 1950-75 will go' *GreaterKashmir* (17 September 2015) **https://m.greaterkashmir.com/news/interviews/-if-article-35a-goes-all-presidential-orders-**

Clause (1) of Article 370 of Indian Constitution and in collaboration with the Jammu and Kashmir State Government. However, the dispute first arose when a RSS think tank challenged the aforesaid provision before Delhi High Court in 2015 and later in the Supreme Court too.[54] This provision is criticized on the grounds that - this Article was inserted into the Constitution by violating the procedures established by law,[55] such insertion amounted for an amendment which can be done only as per provided under Article 368 which was not followed in this case[56], this provision is a violation of Right to Equality under Article 14 of the Constitution of India, it denied woman Right to their immovable property if married to a non-permanent resident of the state besides being herself a permanent resident thereby violating their Right to choose partners[57], discriminated Indian citizens on an unfair basis[58], and many other such grounds. While on the other hand this Article is supported by many scholars, like for instance - A.G. Noorani, a Constitutional expert remarked that all the arguments made against this Article are groundless, he pointed out several such other similar provisions of the Constitution whereby special status have been given to many other states also but no objection was ever raised against

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from-1950-75-will-go/196811.html accessed 24 December 2018.

54 Isfaq-ul-Hassan 'Mufti Mohammad Sayeed government vows to protect Article 370' *DND India* (7 October 2015) **www.dnaindia.com/india/report-mufti-mohammad-sayeed-government-vows-to-protect-article-370-2132281** accessed 24 December 2018.

55 Prof. KL. Bhatia 'Article 35A A Mishmash of the Textual Constitution of India' *WorldPress* (17 April 2014) **https://klbhatia.wordpress.com/2014/04/17/article-35a-mishmash-of-the-textual-constitution-of-india** accessed 24 December 2018.

56 Siddhartha Rai 'In first direct salvo, RSS aims legal missile, at J&K special status' *India Today* (10 July 2015) **www.indiatoday.in/india/story/parivar-poses-legal-challenge-jammu-and-kashmir-special-status-indian-constitution-281647-201507-10** accessed 24 December 2018.

57 Vikas Pathak 'RSS think tank speaks up for SCs in Kashmir' *The Hindu* (26 March 2016) **www.thehindu.com/news/national/rss-think-tank-speaks-up-for-scs-in-kashmir/article7758335.ece** accessed 24 December 2018.

58 Article 370 & 35 *Hansindia* (09 February 2017) **www.thehansindia.com/posts/index/Education-&-Careers/2017-02-09/Articles-370-35/279444//amp** accessed 24 December 2018.

those provisions.[59] One another argument provides that this Article is much suited to Jammu and Kashmir's demographic situation.[60]

On this provision being challenged in the Supreme Court, a rumor broke out that the Court has scrapped this Article which led to serious strikes in Srinagar.[61] However, the Court adjourned this hearing on the request of the Center. This matter was to be heard by a three-bench Judges but since Justice D.Y. Chandrachud was unavailable it was postponed to August 27.[62] But again it was adjourned to January next year (2019).[63]

Conclusion

From the above cases we can conclude that Indian Judiciary especially the Apex Court has played an active role in the name of defending the Constitutional Morality but the term Constitutional Morality itself has not been clearly defined yet. Further, irrespective of the fact that whether these Judgments are right or wrong; it is to be noted that Supreme Court has not only turned down the Judgments of the

59 A.G. Noorani 'Article 35A is beyond challenge'*Greater Kashmir* (29 December 2018) **https://m.greaterkashmir.com/news/opinions/articles-35a-is-beyond-challenge/194167.html** accessed 24 December 2018.

60 Srinath Raghavan 'Kashmir's Article 35A conundrum, New Delhi must treat carefully' *Hindustan Times* (03 August 2017) **https://m.hindustantimes.com/columns/kashmir's-article-35a-connundrum-new-delhi-must-treat-carefully/story-YHxSxHXCZo3J7oPPRKWpGJ.html** accessed 24 December 2018.

61 Spontaneous shutdown at several places in Kashmir over rumours of scrapping Article 35A *Economic Times* (27 August 2018) **https://m.economictimes.com/news/politics-and-nation/shutdown-in-kashmir-valley-over-article-35a-rumours/articleshow/65559030.cms** accessed 24 December 2018.

62 Dhananjay Mahapatra 'Supreme Court adjourns hearing on Article 35A in J&K' *Times of India* (6 August 2018) **https://m.timesofindia.com/india/supreme-court-adjourns-hearing-on article-35a-in-jk/articeshow/65287473.cms** accessed 24 December 2018.

63 SC adjourns to Jannuary next year hearing on pleas challenging Article 35A *Moneycontrol* (31 August 2018) **www.moneycontrol.com/news/india/sc-adjourns-to-jannuary-next-year-hearing-on-pleas-challenging-article-35-a-2902391.html?gold=EAlalQobChMjcj4u6T-D3wlVlQsrCh3Cgw-rEAAYASAEgKyCfD..RwE** accessed 24 December 2018.

inferior Courts in India but in most cases has also challenged the validity of the Acts of the Parliament. In such situation a question on the Concept of Parliamentary Democracy can be validly raised. India is a country where the framers of the Constitution gave the power of law making to the Representatives of the People i.e. The Legislative Body and not to the Judiciary which is not the Representative of the people. The question as to the validity to the role played by the Judiciary in the wake of the Separation of Powers as provided by the Constitution of India assumes much importance at present. The Academic Scholars owes a greater role in determining the validity of the role played by the Judiciary.

However, we must also acknowledge the fact that atleast the Judiciary is trying to defend the Rights of the Citizens and is also striving hard to make the country's rule of law adjustable to the changing needs of time. As such it is our responsibility to be vigilant enough in this regard and to make the other Pillars of Democratic Government more accountable.

BOOK REVIEW OF "*THE INTERNATIONAL CRIMINAL COURT AT THE MERCY OF POWERFUL STATES: AN ASSESSMENT OF THE NEO-COLONIALISM CLAIM MADE BY AFRICAN STAKEHOLDERS*" BY DR RES SCHUERCH, (1ST EDN, SPRINGER, 2017)

- **Aman Kumar**[1]

A. INTRODUCTION

The International Criminal Court (ICC) has 123 members[2], out of which 33 are from Africa.[3] The participation from the Continent in the Rome Conference was overwhelming. The court was brought to life with immense enthusiasm. However, this enthusiasm was to be short-lived. This was because after coming into existence, the ICC prosecuted cases mostly from the African continent. Though much of these cases were 'self-referrals', it didn't stop the critics from calling the ICC as 'International Caucasian Court'.[4] An unprecedented act of 'withdrawal' by its three African members[5] , i.e. Burundi, South Africa and the Gambia shocked the organisation. The withdrawals were 'welcome(ed)

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1 LLM Candidate (International Law), South Asian University. B.A.LL.B. (Hons. in International Law and Human Rights) from National Law University and Judicial Academy, Assam. An earlier draft of this review was submitted as part of my assignment for the paper of Research Methods in Law at the South Asian University.

2 The State Parties to the Rome Statute, (Assembly of State Parties), https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx accessed 03 December 2018

3 The State Parties to the Rome Statute, (Assembly of State Parties), https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx accessed 03 December 2018

4 Siobhan O'gardy, 'Gambia: The ICC should be called the International Caucasian Court' (Foreign Policy, 26 October 2016) https://foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/ accessed 03 December 2018

5 Somini Sengupta, 'As 3 African Nations Vow to Exit, International Court faces its own Trial', (The New York Times, 26 October 2016) https://www.nytimes.com/2016/10/27/world/africa/africa-international-criminal-court.html?mcubz=0> accessed 03 December 2018

and fully support(ed)' by African Union (AU) *vide* a resolution[6] issued on 01st February 2017. While the South African withdrawal was held unconstitutional[7], Gambia decided to re-join the Court[8]. Kenya, Chad, Namibia, Uganda and some other African member states, though, are considering the 'ICC withdrawal strategy'.[9]

All of these claims focused on how the ICC is biased towards its African members. But this line of argument was never supported by any concrete reasoning as to why the court is biased if it is biased. That's why the book *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders* should be considered as a great contribution to this debate. Dr Res Schuerch has tried to explain the behaviour of African nation states towards ICC through the lens of colonialism and neo-colonialism. As has been observed in the foreword to the book written by Dire Tladi, the author takes no sides and 'simply presents the facts as he sees them'[10]. As part of his research, the author had visit(ed) a number of African countries and discuss(ed) the involvement of the ICC in Africa with locals interested in the matter.[11] Thus, his opinion is reflective of the ground realities of this debate.

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6 Decisions and Declarations, (African Union), https://au.int/en/decisions/decisions-declarations-and-resolution-assembly-union-twenty-eight-ordinary-session accessed 03 December 2018

7 Jason Burke, 'South African Judge Blocks Attempt to Withdraw from International Criminal Court' (The Guardian, 22 February 2017) https://www.theguardian.com/world/2017/feb/22/south-african-judge-blocks-attempt-to-withdraw-from-international-criminal-court accessed 03 December 2018

8 Merrit Kennedy, 'Under New Leader Gambia Cancels Withdrawal From International Criminal Court', (National Public Radio, 14 February 2017), https://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court accessed 03 December 2018

9 Aman Kumar, 'The 'African Challenge' to the International Criminal Court (ICC)', (Indian Blog of International Law, 28 October 2017) https://allaboutil.wordpress.com/2017/10/28/the-african-challenge-to-the-international-criminal-court-icc/ accessed 03 December 2018

10 Res Schuerch, *The International Criminal Court at the Mercy of Powerful States An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, (1st edn, Springer, 2017) v

11 ibid 5

B. ANALYSIS

In her book '*Decolonising International Law*', Sundhya Pahuja has added an appendix to explain her preference of the term 'Third World' over others like, rich-poor, North-South, industrialised-non-industrialised. The present author on the other hand 'is not interested in the terminological subtleties of these labels'[12].

The recent request[13] for an Advisory Opinion from International Court of Justice by Mauritius regarding the Chagos Archipelago tells us that colonialism isn't a thing of past. The not so distant Rwandan genocide also had its genesis on the categorisation of locals as Hutus and Tutsis by their Belgian *colonisers*. Against this backdrop, this book must be considered as a welcome research into an area which is much talked about but seldom researched upon. The first thing that strikes about this book is that its Author is from 'neutral Switzerland'. This ensures that the book is free from any biases. The book talks about the historical origins of the concept of colonialism and neo-colonialism, how the western laws and values have been and are being imposed upon the African nation-states through International Criminal Law and how it is detrimental for the indigenous values of Africa.

The book firstly discusses the meaning and evolution of the terms colonialism and neo-colonialism. The author has analysed both patterns of domination (colonialism and neo-colonialism) with respect to the European colonisers only. However, he also mentions neo-colonisers like USA, Russia, China and even MNCs. He mentions USA where he highlights that the USA wasn't a colonizer (only colonized two countries and was itself a colony) but is an aggressive neo-coloniser.[14] IMF and WB's enormous influence on the economic policies of developing countries is also discussed. Similar voice was echoed, albeit in a totally different context, by Brian Tamanaha in his book '*On*

12 ibid 16

13 Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion), (International Court of Justice) https://www.icj-cij.org/en/case/169 accessed 03 December 2018

14 Res Schuerch, *The International Criminal Court at the Mercy of Powerful States An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, (1st edn, Springer, 2017) 27

the Rule of Law: History, Politics, Theory' where he observes that '(i)n the early 1990s, the Western-funded World Bank and International Monetary Fund began conditioning the provision of financial assistance on the implementation of the rule of law in recipient countries'.[15] While such imposition might be passed off as the rule of law, they don't always bode well for the receiving countries as it interferes with their local mechanisms. However, the author holds the position that Neo-colonialism shall not be understood purely in terms of history as it would be fallacious.[16] His citation of examples of USA, MNCs, IMF & WB is intended to make his point clear.

After explaining the historical origins of the concepts of colonialism and neo-colonialism, he turns to answer the most challenging question, i.e. how can the concept of colonialism and neo-colonialism be applied to the discipline of International Criminal Justice? To address this complexity, he focuses on the approach adopted by the European colonisers. He mentions the *French policy of assimilation* and the *British indirect rule*, through which these colonisers validated their colonial rule. This is an exact way to analyse the legal implications of the law in the present context because we know that when these colonies were formed, the colonisers imposed their laws to facilitate trade and settlements of disputes. That's why we see that in the commonwealth countries there are identical, if not same, laws regulating Contracts, Specific relief, Criminal Acts, Civil Acts. This is because, to govern the colonies, the colonisers imposed their laws and their understanding of societies on the colonies. This had resulted in a colonial way of understanding the law, and thus through this law-making 'business', the modern-day neo-colonisers are exploiting the colonies.

The Author tries to explain how this link between law and colonialism can be extended to understand the neo-colonial impacts of international criminal law. He explains how the whole idea of international core crimes is a result of Post-World War II discourse and hence a manifestation

15 Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (1st edn, CUP, 2014) 2

16 Res Schuerch, *The International Criminal Court at the Mercy of Powerful States An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, (1st edn, Springer, 2017) 27

of what the westerners think about international criminal law. This highlights the point that the charade of '*international*' criminal law has its roots in *multilateral* laws and not *universal* laws. He concludes that despite having western origins, most of these crimes have received universal stature.

Returning to the discussion on ICC and Rome Statute, the book notes that the support for the court by the African members shows that the crimes listed are condemned universally.

With regards to the sovereignty of the states, it is often said that ICC, by prosecuting individuals, undermines the national jurisdiction of the state concerned. Such aversions could not have been far from the truth. The basic principle of complementarity is the founding guideline of ICC.[17] The Court only prosecutes if the Nation concerned is either unwilling or unable to prosecute.[18] The author highlights this with a discussion on Article 12[19] and 13[20] of the Rome Statute. The discussion on sovereignty is poised on the basis of a United Nations Security Council referral. Here it becomes imperative that the sovereignty is violated when a situation is referred to the ICC. But how is this conclusion related to the general discussion on neo-colonialism? There is no direct answer to this. It is so because the ICC doesn't prosecute states but individuals. In this regard, it exercises jurisdiction not on states but on individuals who commit statute crimes.

Moreover, this area cannot be assessed properly because thus far the UNSC has only twice referred a matter to the ICC.[21] Even with regards to the ongoing Rohingya issue, it has shied away from any such referral thereby reinforcing the Author's conclusion that the mere fact that a few powerful states have the right to refer a matter to the ICC, thereby breaching the dearest idea of sovereignty, does not imply that the whole institution of ICC violates their sovereignty. Such apprehensions and aspersion are misplaced. Rather the focus should

17 Rome Statute 1998, Preamble

18 Rome Statute 1998, A. 17

19 Preconditions to the exercise of jurisdiction

20 Exercise of jurisdiction

21 The book devotes one full chapter on the discussion of a UNSC referral, see Chapter 10.

be more in the probable misuse of such powers by the powerful states. The author then discusses the legal framework of neo-colonialism by pitting it against the ICC and its rules and laws where he highlights the linkage between neo-colonial asymmetry and influence which powerful states exercise in International relations.

C. CONCLUSION

As was noted earlier, in the debate on the Africanisation of ICC there was not much academic engagement, and that's why this monograph commands authority. This lack of academic engagement is highlighted by the author himself when he concludes that arguments of neo-colonialism often lacks rational backing and are more propelled by traditional inequalities that exist in International relations. The existing inequality, in a way, invigorates the old fear of colonial domination and the inequality it caused. This fear, when seen in the context of International Criminal Law seems more damning. The fear will, more often than not, be a hindrance in the understanding of neo-colonialism and ICC.