

Vol. 10 No. 2

SEPTEMBER 2019

ISSN: 0976-3570

**INDIAN JOURNAL OF
LAW AND JUSTICE**



ENLIGHTENMENT TO PERFECTION

DEPARTMENT OF LAW
University of North Bengal
Darjeeling, West Bengal, India

EDITORIAL BOARD**Chief Editor**

Prof. Rathin Bandyopadhyay

Editors

Prof. (Dr.) Gangotri Chakraborty, Dr. Sujit Kumar Biswas

Associated Editors

Ms. Prerna Lepcha, Ms. Neelam Lama

Assistant EditorsDr. Sangeeta Mandal, Ms. Sanyukta Moitra,
Dr. Soma Dey Sarkar, Dr. Chandrani Chatterjee, Dr. Priya Roy,
Mr. Biresh Prasad, Dr. Dipankar Debnath**Editorial Assistants**Souradypta Paul, Subham Sarkar, Nivedita Barailly, Natalia Ghosh,
Manisha Kumari, Lakpa Doma Rumba, Jona Lepcha, Atindra Chowdhury,
Mingma Doma Sherpa, Sushma Gupta**International Advisory Board**

Prof. (Dr.) T.K. Saha, Dean, School of Law, Mount Kenya University, Nairobi, Kenya.
Prof. Mark Perry, Professor, School of Law, University of New England, Australia.
Prof. (Dr.) Gay Osborn, Professor, School of Law, Westminster University, U.K.
Prof. (Dr.) Anat Peleg, Director, Center for Media, Bar-Ilan University, Tel Aviv, Israel.
Dr. Samuel Awala, Assistant Professor, Albany State University, Albany, New York, U.S.A.
Dr. Jesse J. Norris, Assistant Professor of Criminal Justice, Department of Socio-cultural and Justice Science, State University of New York, Fredonia, New York, U.S.A.
Ms. Ana Penteado, Trade Marks Attorney Registered at the Trans Tasman IP Attorneys Board, Faculty, The University of Notre Dame Australia, Sydney, Australia.

National Advisory Board

Prof. Dilip Ukey, Professor and Vice-Chancellor, Maharashtra National Law University, Mumbai, Maharashtra.
Prof. S.K. Bhatnagar, Professor and Vice-Chancellor, Dr. R.M. Lohia National Law University, Lucknow, U.P.
Prof. Balaraj Chauhan, Professor and Vice-Chancellor, Dharmashastra National Law University, M.P.
Prof. N.K. Chakraborty, Professor and Vice-Chancellor, West Bengal National University of Juridical Sciences, West Bengal.
Prof. B. P. Panda, Professor and former Vice-Chancellor, M.N.L.U., Mumbai, Maharashtra.
Prof. V. Sudesh, Head and Dean, Faculty of Law, Bangalore University, Karnataka.
Prof. N.S. Gopalkrisnan, Professor and Head, Department of Law, C.U.S.T., Cochin, Kerala.
Prof. Ali Mehdi, Professor, School of Law, Banaras Hindu University, U.P.
Prof. B.B. Pandey, Former Professor, Department of Law, Delhi University, New Delhi
Prof. Ved Kumari, Professor and Dean, Department of Law, Delhi University, New Delhi
Prof. Bhagirathi Panigrahi, Head and Dean, Department of Law, Berhampur University, Ganjam, Orissa.
Prof. Meenu Paul, Professor and Head, Department of Law, Punjab University, Chandigarh, Punjab.
Prof. A.K. Pandey, Professor, School of Law, Banaras Hindu University, U.P.
Prof. Subhram Rajkhowa, Professor and Head, Department of Law, Guahati University, Assam.
Prof. (Dr.) Indrajit Dube, Professor, Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur, West Bengal.
Prof. Jyoti J. Mozika, Professor and Head, Department of Law, NEHU, Shillong, Meghalaya.
Prof. Jayanta K. Saha, Professor and Former Head, Department of Law, Bankura University, West Bengal.
Prof. (Dr.) Dipa Dube, Professor, Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur, West Bengal.
Prof. Manik Chakraborty, Director, Amity Law School, Amity University, Kolkata, West Bengal.
Prof. (Dr.) Sarit Sadhu, Former Professor, Department of Law, University of Burdwan, West Bengal.
Prof. (Dr.) Sachi Chakraborty, Professor and former Head, Department of Law, University of Calcutta, West Bengal.
Prof. (Dr.) Sanjeev Kumar Tiwari, Professor and Head, Department of Law, University of Burdwan, West Bengal.

Vol. 10 No. 2

September 2019

ISSN: 0976-3570

INDIAN JOURNAL OF LAW AND JUSTICE



ENLIGHTENMENT TO PERFECTION

DEPARTMENT OF LAW
UNIVERSITY OF NORTH BENGAL
DARJEELING, WEST BENGAL, INDIA

INDIAN JOURNAL OF LAW AND JUSTICE

Cite This Volume as IJJ (2019)

Printed at North Bengal University Press, Raja Rammohunpur, P.O-
North Bengal University, District: Darjeeling, Pin – 734013, West
Bengal, INDIA for the Department of Law, University of North
Bengal.

The Indian Journal of Law and Justice is a biennial publication. Contributions to the Journal are invited in the form of articles, notes and case comments. Contribution should be typed in double space on one side of A-4 size paper and sent in CD or as an attachment with e-mail at: ijlnbu@gmail.com

The Department of Law shall be the sole copyright owner of all the published materials. Apart from fair dealing for the purposes of research, private study or criticism, no part of this Journal may be copied, adapted, abridged, translated, stored in any retrieval system, computer system, photographic or other system or reproduced in any form by any means whether electronic, mechanical, digital, optical, photographic, or otherwise without prior written permissions from the publisher.

The editors, publishers, and printers do not own any responsibility for the views expressed by the contributors and for the errors, if any, in the information contained in the Journal.

INDIAN JOURNAL OF LAW AND JUSTICE

Vol. 10 No. 2

September 2019

ISSN: 0976-3570

CONTENTS

Editorial

Articles

Future Technology and Labour – Are we Heading towards a Jobless Future?
Sunitha Abhay Jain 1

Parsi Divorce: Time to Rethink the Legal Framework?
Anupama Ghosal and Neville Contractor... 16

Conceptualising the Rights of Muslim Women in Context of Islamic
Personal Law
Shaveta Gagneja 26

Role of Police and Prosecution in Eliminating False Rape Cases: Applying
the British No-Crime Label in Indian Criminal Justice Administration
Yophika Grace Thabah and Rini Jincy Paul 46

An Enigma Called Insanity: Exploring the Defence of insanity in Criminal
Law with Special Reference to Multiple Personality Disorder
Souvik Roy and Samantha Ray Das 58

A Critical Comment on Access and Benefit Sharing in India under the
Biological Diversity Act, 2002 in Light of Nagoya protocol on Access and
Benefit Sharing
Paramita Dash and Amlan Chakraborty 79

Right to Privacy as a Fundamental Right and Media Trials in India
Sonakshi Pandey and Snigdha Srivastava 91

Corporate Social Responsibility viz-a-viz Corporate Environmental
Responsibility
Mayank Tiwari 99

Climate Change, Agricultural Practices and Food Security: An Analysis of
the Indian Scenario with Special Reference to the Food Security Act, 2013
Sangeeta Roy (Maitra) 111

Is It Possible to Create a Zero-Waste Environment in West Bengal <i>Monalisa Saha</i> 125	125
Transformative Constitution and the Horizontality Approach: An Exploratory Study <i>Shameek Sen</i> 141	141
An Analysis of Transformative Constitutionalism with Special Reference to Sexual Minorities in India <i>M.P. Chengappa and Vineeta Tekwani</i> 162	162
Relevance of Medical Finding in Rape Cases Post 2013 Amendment of the Indian Penal Code <i>Faisal Fasih</i> 179	179
Cyber Terrorism and International Humanitarian Law <i>Sreoshi Sinha</i> 191	191
Rape Survivor: A Victim Based Approach <i>Surja Kanti Baladhikari</i> 207	207
Groundwater Crisis vis-à-vis Sustainable Development: A Socio-Legal Exploration <i>Pratik Salgar</i> 221	221
The National Bank for Agricultural and Rural Development (NABARD) Act, 1981: A Significant Effort towards Socio-Economic Development in Rural India <i>Sanjay Dutta</i> 231	231
Role of Central Armed Forces in Combating Cross Border Crimes: A study of Indian Legal Framework <i>Joyjit Choudhury</i> 245	245
Notes and Comments Applicability of <i>Res Judicata</i> in the Public Interest, arbitration and income tax proceedings <i>Gurpreet Singh</i> 267	267
Functioning of Adjudicatory Machinery under the Industrial Disputes Act, 1947 in West Bengal <i>Kallol Dutt, Debasish Biswas and Tarak Nath Sahu</i> 277	277

Book Review

A.Lakshminath, Judicial Process Precedent in Indian Law, 2009	
<i>Suparna Bandyopadhyay</i>	284
R. Venkataramani, Judgments By O. Chinnappa Reddy-A Humanist, 1989	
<i>Sagnika Das</i>	287

EDITORIAL

Law has been a dynamic concept all the time. It has various dimensions depending upon the period of time as well as its applicability to the nature of society in which it is to operate. The basic concepts of law remain changing with the changing situation of the social norms, the political strategy and the needs of the common man. The rule of law is the slogan of the day may it be on one side or the other. The act which is legal today may be an offence tomorrow and the vice-versa. At the same time an act which is legal in one part of the world may be a crime in other part of the world. Even in a country a "Law" may be valid in a part of its territory may be illegal and punishable in the other part. The law cannot be studied in isolation. In such a decimal context a common man wonders about to learn what is the true law? The answer of the question cannot be given on looking at the statutory law alone. One has to draw the conspectus of the legislative enactment, judicial interpretation and the opinion of the jurists. It is a sheer paradox that everyone is supposed to know the law of the land while the fact remains that now a days nobody knows the whole law of the land. The Legislators, in general, make law, the judges interpret it and the academics teach it in addition to study analysis and research. Even then the ambiguity remains unclear after repeated amendments. This problem poses a complex issue before a modern man how to know the "law in force". The only solution may be found in deep analysis and research on various aspects of the law. A humble attempt has been made by bringing out the present publication.

The Department of Law, University of North Bengal, although a recent centre of legal education in comparison to others in North India, has played a significant role. The academic excellence of any institution may be judged by the achievements of its students and performance of its teachers in addition to the given infrastructure and the facilities available for such goals. Present shape of the journal has been the product of a long process and initiatives undertaken by our faculty members. The present publication is the testimony to the fact which will go a long way in spreading the inference of multi-faceted research in various fields of law. That may be the source of knowledge on some of the areas of legal discussion.

For a long time we are thinking about to publish a law journal from our department. The ideas were on our mind for a couple of years, to give it a present form that have been possible today. In this academic venture the moral support given by our former Vice-Chancellor Professor Arunabha Basumajumdar is commendable at the same time the journal could see the

light of the day by the support of my esteemed colleagues, in particular, and the whole academic world in general. Over and above to maintain the above spirit, it is not enough, the continual research and publication is necessary. I have firm belief that I would be able to fulfil the need of the hour by your constant support. Such kind of level of confidence in our mind became possible mainly because of successfully completion of number of national and international seminars and conferences by our Department with overwhelming participation and support from every part of our country and also from different countries including SAARC countries.

We firmly believe on one principle that our journal should ideally be a platform for exchange of ideas and dissemination of information not only from established legal luminaries but also for the young faculties and researchers in the field of law and allied subjects who will be the future leaders in the field of legal education in our country.

The present issue of the journal may have some errors and I academically take responsibility for the same in the given circumstances. I would welcome any suggestion and opinion for improvement for the next issue of the journal.

Prof. Rathin Bandyopadhyay

Chief Editor

Future Technology and Labour - Are we Heading Towards a Jobless Future?

Dr. Sunitha Abhay Jain¹

Abstract

Technological innovations and the invention of machines powered by Artificial intelligence² have changed the way we work, interact and carry on our everyday lives. Automation wave has revolutionized the manner in which the traditional manufacturing and service-oriented industries are functioning today. The first industrial revolution was triggered with the invention of steam engine and also led to mechanical production. The invention of electricity and assembly lines resulted in the second industrial revolution where mass production became feasible. The third industrial revolution was driven by computer, digital technology and the internet. The future technologies have resulted in the fourth industrial revolution. The new age technological innovations and inventions such as the automated robots; big data and analytics; augmented reality; the cloud; cyber security; additive manufacturing; horizontal and vertical integration; the internet of things are transforming industrial production and labour relations. There is a drastic improvement in the entire chain of production ranging from design up to productivity, the speed and the quality at which the goods are produced. As a result of the new age technologies various concerns are raised especially its impact on the employment. Many labourers are rendered unemployed and redundant due to automation. The question that arises is whether we are approaching a jobless future?? The job market in India is also undergoing a transformation and posing many social, economic, legal and ethical challenges. Job structure is changing and the workers need to equip themselves with new skills to fit into the new jobs that are emerging as a result of technological innovation. The education system in any country plays a pivotal role in the overall development of an economy as it caters to the needs of the trained and skilled manpower. It is vital for the education system in the country to re-orient itself to cater to the needs of the students to fit into the changing paradigm. The focus of the education needs to be on imparting life-skills and to improve the thinking, problem-solving and decision-making ability of the individuals in a society. In the light of the above, it is also important to address and discuss the various changes, issues and challenges that are taking place in the labour market including the impact of these technologies on the working hours, wages, the working environment and the labour relations amongst others.

Keywords: Redundancy of Labour; Fourth Industrial Revolution; Artificial Intelligence

¹ Associate Professor and LLM Co-ordinator, School of Law, CHRIST (Deemed to be University), Bengaluru. The author can be reached at sunitha.abhay@christuniversity.in

² The term, 'Artificial Intelligence' describes the work processes of machines that would require intelligence if performed by human. It means investigating intelligent problem-solving behavior and creating intelligent computer systems (<https://www.ibanet.org>).

1. Introduction

Technological revolution has transformed human kind in a manner that was never perceived or fathomed before. The future technological innovations have become ubiquitous and all pervasive, touching every sphere of our lives. The impact is such that it has changed the way we live, work, communicate and relate to one another. The “*fourth revolution*”, has given rise to a new category of people who are termed as “*technomy community*”³ who are of the view that technology is actually instrumental in redefining business and society. Researchers from the Massachusetts Institute of Technology, Erik Brynjolfsson and Andrew McAfee in their book, *Race against the Machine*, have observed that as a result of developments in the computing technology, many jobs will be done by computers which at one time was believed unsuitable for computers.⁴ Further they argued that the pace at which jobs are eliminated as a result of technological innovations is much faster than the creation of new jobs. Many economists like David Autor, Dr. Brynjolfsson and McAfee have expressed their concern regarding the paradigm shift in technologies and their impact on labour markets and have observed that as a result of these innovations many high skilled and low skilled jobs are created but the in-between jobs are vanishing.⁵ The business editor of the MIT Technology Review, Mr. Antonio Regalado, is of the view that jobs which are repetitive in nature and also tasks which are well-structured run the danger of automation.⁶ Computer Scientist Janor Lanier in his book *Who owns the future?* observed that internet technology is impacting employment in such a manner that it is jeopardizing the middle class by replacing labour, creating job insecurity and in turn economic instability.⁷ There is a lack of social cohesion and the inequalities have increased in the society as a result of the technological innovations. Elon Musk has stated that there is need for strict regulations in relation to Artificial Intelligence as they pose a threat to humanity.⁸ Bill Gates suggests that the pace of automation need to slow down and that robots need to be taxed to compensate for greater efficiency compared to humans.⁹

³ www.ficci.in/spdocument/20787/FICCI-Indian-Higher-Education.Pdf

⁴ digital.mit.edu/research/briefs/brynjolfsson_McAfee_Race_Against_the_Machine.pdf

⁵ <https://www.technologyreview.com/s/515926/how-technology-is-destroying-jobs/>

⁶ <http://www.strategicbusinessinsights.com/about/featured/2014/2014-02-tech-vs-labor.shtml>

⁷ *ibid*

⁸ <https://www.theguardian.com/.../elon-musk-regulation-ai-combat-existential-threat-test>.

⁹ <http://fortune.com/2017/02/18/bill-gates-robot-taxes-automation/>

Mc Kinsey Global Institute report¹⁰ titled *The Disruptive Technologies-Advances that will transform life, business and global economy* projected that automation of knowledge work will occupy a second place out of the twelve disruptive technological advances. There is a huge potential of automation in various sectors like education, healthcare, drug development, management and law field. The knowledge work is impacted as a result of automation and technologies like the Internet of things, mobile internet etc. Taking proactive steps to deal with the problems that may arise due to future technologies the United Nations Organisation has opened a headquarter in the Hague to monitor development in AI as it is aware that robots could destabilise the world. One of the important goals of the new centre for Artificial Intelligence and Robotics is to understand the threats that may crop up as result of the deployment of robots in addition to the risk of mass unemployment.

The PwC, a consultancy firm has estimated that at least thirty percent of jobs in Britain are affected as a result of breakthroughs in artificial intelligence.¹¹ The International Bar Association has gone a step further by claiming that it would create pressure on the governments and force them to legislate for quotas of human workers.¹²

The United Nations Organisation was urged to initiate action to offset the dangers that are posed due to the use of artificial intelligence in warfare and also for weapons, sometimes referred to as “killer robots” by Elon Musk, the head of Tesla along with more than hundred robotics and artificial intelligence leaders.¹³ Their fears were pinned on the fact that a third revolution in warfare threatens the mankind by the use of lethal autonomous weapons for once developed and permitted in armed conflict then the conflict will be fought at a scale greater than ever before and beyond the boundaries of what humans can comprehend.”¹⁴ Prof Stephen Hawking has warned that powerful artificial intelligence would prove to be “either the best or the worst thing ever to happen to humanity”.¹⁵

¹⁰ https://www.mckinsey.com/~media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Disruptive%20technologies/MGI_Disruptive_technologies_Full_report_May2013.ashx

¹¹ <https://www.pwc.co.uk/...services/.../pwcukeo-section-4-automation-march-2017-v2.p...>

¹² <https://www.theguardian.com/.../sep/.../robots-destabilise-world-war-unemployment-u...>

¹³ www.bbc.com/news/technology-40995835

¹⁴ <https://www.theguardian.com/technology/2017/sep/27/robots-destabilise-world-war-unemployment-un>

¹⁵ <http://www.cam.ac.uk/research/news/the-best-or-worst-thing-to-happen-to-humanity-stephen-hawking-launches-centre-for-the-future-of>

2. Labour Redundancy in India and Future Technology

India is on the threshold of the fourth industrial revolution as many entrepreneurs, industries and business houses have started using technologies that involve AI, the Internet of Things, 3D Printing, autonomous robots, driver less cars, drones etc., to carry on their activities. Over dependence on automation has aggravated India's problem of unemployment and labour redundancy. Many projections have been made by different organization regarding redundancy and job losses due to automation in industries. People Strong a technology company has projected that every one job that is lost out of the four job losses will be because of automation.¹⁶ A study by the International Labour Organisation projects that the labour-intensive sectors like the textile and garment industries, footwear will be hardest hit by the use of robots or automation and the lower end jobs will become redundant.¹⁷ For instance, India's textile giant Raymond proposes to replace 10,000 jobs with robots over the next two to three years.¹⁸

India's top manufacturing industries are cutting on jobs. Just a few years back one of the biggest layoffs was witnessed when Larsen & Toubro (L&T), which is one of the largest engineering and infrastructure firm rendered 14,000 employees redundant as a result of the digitisation and productivity enhancement initiatives taken by the company.¹⁹ This is not of one of instance, many other industries are following suit with Tata Motors' India's largest automaker rendered nearly 1,500 workers jobless. One such example is Maruti Suzuki, which has already started using robots in its factory in Manesar, Haryana. It has nearly around 7000 workers and 1,100 robots. Some analysts are positive about the effects of automation and are of the view that human labour will be required in the industry. The predictions that are making rounds regarding the future of the workforce are that the change that will be witnessed will be dramatic but it will not be catastrophic in nature.²⁰ Mr. Harel Tayeb, the CEO of a New Jersey based firm namely Kryon Systems, is of the opinion that the jobs in various industries such as in BPO's, Information technology based industries and in financial services

¹⁶ <https://www.businesstoday.in/magazine/cover-story/going-going-gone/story/253260.html>

¹⁷ http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_496766/lang-en/index.htm

¹⁸ www.thehindu.com/thread/economy/should-we...taxing-robots/article19949121.ece

¹⁹ <https://economictimes.indiatimes.com/industry/indl-goods/svs/engineering/in-one-of-indias-biggest-ever-layoffs-It-sheds-14000-employees-from-its-workforce/articleshow/55570052.cms>

²⁰ <https://qz.com/990558/machines-vs-humans-the-battle-for-jobs-in-india-is-affecting-not-just-it-engineers/>

are in for a major change but however he is of the opinion that jobs will not disappear.

In countries like Japan and Germany 90% of production line automation is carried out with the use of industrial robotics. This is due to the fact that the labour cost is very high and more than half the population is in the age group of 60 to 65 years.²¹ In India, the level of automation is comparatively less due to the availability of cheap labour and the trade-off is high when it comes to replacing humans with robots. In order to attain automation the Indian strategy is to adopt a process where industrial robots work alongside human beings. For instance, as of June 2015, an average of 30 to 40% automation was standard across all big automobile plants.

Chat bots and even humanoid robots are used by many banks and financial institutions. For instance, Canara Bank, Bengaluru is using a Kannada-speaking robot to direct a customer to the right counter. Ira robot is used in HDFC Bank to help customers choose the right financial products and services. Sometimes robots are used to answer Frequently Asked Questions (FAQs). In course of time human labour will be replaced when robots become more and more sophisticated.²² There is an increase in the use of Industrial robotics by manufacturing units world-wide in order to achieve automation.

The use of data analytics in the agricultural sectors has opened up various avenues which were not in existence earlier. Cargill India had adopted the mobile based pricing data system which is made use of by thousands of traders. India is in the fourth largest app economy according to mobile analytics firm App Annie. Tim Cook, the CEO of Apple company has observed that more than about seven lakh jobs can be attributed to apps on the Apple iOS platform. Indian developers have created one lakh apps; registering a growth of fifty seven percent over 2016.²³

To tackle the problems arising out of automation, unemployed and redundant labour the National Institution for Transforming India (NITI Aayog),²⁴ has proposed to the Government to set up a labour utilisation fund which can be utilised for training and enhancing the skills of the Indian workforce. Mr. Rajiv Kumar, the Vice-Chairman of NITI Aayog emphasised that the labour utilization fund will not be used to pay salaries but should be used for organising training programmes and for payment of provident fund contribution and to cover health costs. In developed countries the Public

²¹ <https://www.mckinsey.com/.../what-the-future-of-work-will-mean-for-jobs-skills-and-...>

²² <https://www.weforum.org/agenda/2017/10/kranti-nation-india-and-the-fourth-industrial-revolution/>

²³ ibid

²⁴ niti.gov.in/

sector undertakings play a pivotal role in generating employment. In labour-intensive sectors such as construction, exports, garments, tourism, education and health should be in focus for the proposed labour utilisation fund.

India needs to collaborate with various countries like USA, Germany and the EU in its effort to create a long term ecosystem with the primary object of training and educating professionals. In order to reap the benefits of the fourth industrial revolution technologies it is necessary for the central government to create a platform where all the stake-holders such as ministers, State Governments and the industrial bodies & organisations can come together to take policy decisions.

3. The Promises as Well as the Pitfalls of the Technological Revolution

Many countries are joining the race of adopting the future technologies in their industries and other workplaces due to various reasons. The most important amongst them being the following:

a. Reduction in Costs

Industries can cut down on their direct and overhead costs by using industrial robots which are flexible and can be programmed to adapt to new production lines without any training. With minimal supervision the robots can function for a longer duration and less margin of error. The end products are free from defects and hence reduce product failure and wastages. Further they do not require additional expenditure on health care, insurance and income. Energy consumption is reduced considerably by the use of these robots as they require minimum heating and lighting. The saving by the manufacturing unit can be routed for skill enhancement of existing employees, and research and development activities.

b. Increased Production

The production of any industries can be increased with the adoption of future technologies when compared to human labour as the humans have their own limitations and can only work for a limited hours. Robots can be put to work without any such limitation. Thus, the initial capital expenditure incurred in procuring robots can be recovered over the course of few years due to increased production and profitability.

c. Quality Enhancement

The quality of goods is enhanced when it is produced with the help of automated machines or by the use of industrial robots as the chances of defect in goods produced is less. Operational deviations are eliminated which are usually caused due to faulty human supervision and standardization in the production can be maintained.

d. Skill Enhancement

In many industries, many technicians and workers are required to perform repetitive tasks and are underpaid inspite of having the potential to

do skilled labour. Use of industrial robots will give the industries an edge over other and they will also benefit financially and this improves their scope for skill enhancement of their employees and better utilization of human resources.

e. Better Industrial Relations

The problems associated with employment of labour can be eliminated by switching to industrial robotics. The India labour and industrial relation laws are archaic and pro-workmen. The pressure on the employers is high as there is strong trade unionism in most of the industrial regions and the process of industrial dispute resolution is long-drawn and cumbersome. Strikes and frequent wage revision demands adversely affect the production output, which has a consequent ripple effect over the entire supply chain. These problems can be eliminated by switching to industrial robotics.

f. Sustainability

Robots foster sustainability by adapting to new tasks without much efforts and reducing redundancy. Manufacturing units become more sustainable due to seamless and efficient manufacturing. The ability to develop and implement the technological methods without jeopardizing the potential for future generation is termed as sustainability.

g. Waste Management

Employment of industrial robots held towards economic utilization of materials, helps in monitoring safety requirement, reduce waste generation due to defaults and quality errors, minimize industrial hazards by predicting malfunctioning of machines and are helpful in monitoring environmental parameters for effluent and waste discharge.

4. Impact of Future Technology on the Labour Market

FICCI, Nasscom and EY have conducted a study and has in its report²⁵ projected the impact of advanced technologies on five important sectors in India like the Information Technology services, textiles, apparel, auto and financial services. The study projected that at least 37% of workers will be in jobs that require different kinds of skill sets and 9% out of the 600 million estimated work forces would be in new jobs that do not exist today. It has also been observed in the report that by the year 2022, an individual will have to upgrade oneself and be a constant learner and no person could afford to rest on one's achievements. The report highlights the fact that the future jobs will depend on a country's response to the megatrends which include demographic changes like a rising middle class, business innovations, adoption of exponential technologies, creation of highly

²⁵ [www.ey.com/Publication/vwLUAssets/ey...jobs...india/.../ey-future-of-jobs-in-india.pdf...](http://www.ey.com/Publication/vwLUAssets/ey...jobs...india/.../ey-future-of-jobs-in-india.pdf)

optimised chains and globalisation linked factors like overseas job market for Indian as well as the level of FDI flows and Indian exports. There will be an increase in the employment especially in the service and the organised manufacturing sectors from the current 38 million to 46-48 million. Research firm Gartner has predicted that by 2022, at least 2.3 million new jobs will be created.

Thus the technological revolution will bring about a sea change in the way industries function, the economic structures, working atmosphere, job profiles, working time and remuneration models. Unemployment, poverty and social distortions will be on the rise. Both the blue collar and white collar sectors will be affected. Not just industrial jobs but it will impact the service sectors also.

In order to keep up with the changes, the future workers need to gear up and upgrade themselves with the qualification, skills, technical and other expertise to carry on the new jobs that may come to the fore. The demand for qualified workers will be higher and the focus will be on the people who can find creative solutions to problems.

It is also necessary that the education system must adapt itself to the changing scenario. According to the World Economic Forum 2016, Universities and schools must not concentrate on teaching how the world was but be more futuristic in approach and concentrate on teaching how the world will be.²⁶ It was also emphasized that there is a need to adopt an interdisciplinary approach. Students must be encouraged to study technology related subjects such as science, mathematics, computer science, information technology etc. Faculty also need to upgrade themselves and be tech savvy. Skill based vocational training in the field of Information Technology, communication and sciences must be made compulsory. In order to make employees ready for the future labour market the employers need to focus on improving their soft skills.

It is also very important to equip the employees with various skills such as the problem solving, analytical, negotiation, communication, management of human resources communication skills, people management and cognitive flexibility. Further, customized training modules need to be developed to help the future job seekers owing to the individual's time constraints, location etc. In order to achieve this innovative use of technology and new pedagogical techniques are required. Pedagogical innovations to promote experiential learning, gamification technique, virtual reality and simulators integrated with the real life experience are the need of

²⁶ http://www2.caict.ac.cn/zscp/qqzkgz/qqzkgz_zdqsq/201705/P020170519521253649145.pdf

the hour to enhance the learning experience of the learners. Universities of the future must encourage change and not resist change.

Due to technological advancement and online platforms new jobs such as crowd-workers have come to the fore which raises many questions that need to be addressed. Crowd-workers are freelancers who offer their skills on the online platform. In the gig economy, the working world has changed for the white-collared workers and crowd-workers are a symbol of such change. The services offered by these crowd-workers range from writing product reviews, helping in testing software, giving legal advice, ghost writings, designing and programming of websites etc. It is cost-efficient to employ the services of crowd-workers in assisting/ rendering legal services. The best example would be American platforms such as Avvo or Legal Zoom on which many American lawyers offer their services. As these are new class of workers various issues come to the fore. Firstly as they are freelancers, whether protection can be extended to them for unfair dismissal or whether they can be given the benefit of continued payment of remuneration during sickness needs to be delved into. Further it is also necessary to check whether the legal rights which extend to workers can be extended to them owing to the fact that they are freelancers. There is also the difficulty with regard to the choice of law that needs to be applied due to internationalisation of online platform on which this crowd workers and click workers offer their services. Further the important question that needs to be addressed is whether we need to apply the law of the country where the order is placed, received or performed? There is a need to determine the legal status of a crowd worker and the minimum levels of remuneration and benefits that need to be applied to them. It is also necessary to delve into the tax regime, social security and welfare rules that need to be applicable to them.

The gap between law and technology is increasing and there is an urge to keep pace with the changing technological landscape. Labour market & relations is one of the most affected areas which need immediate consideration. Law makers need to reconsidered various legislations in the light of the changed paradigm such as the laws relating to intellectual property, information technology, product liability, competition, labour and employment laws. Data protection and privacy issues are also to be addressed.

5. Labour Redundancy and Dismissal: Legal and Ethical Considerations

In a labour abundant country like India the era of artificial intelligence and robotics poses many legal and ethical challenges. When the labour is done by automated machines and robots it is important to align our labour laws to meet the future challenges.

A system of Central and State specific labour laws are followed in

India. The provisions relating to the termination of employment are covered in various enactments like the Industrial Disputes Act, 1947; Model Standing Orders of the Industrial Employment (Standing Orders) Act, 1946 and State-specific statutes applicable to Shops and Commercial Establishments in addition to the employment contract. An employee can be terminated on reasonable grounds of misconduct. However there is no specific definition for the term redundancy. Indian courts have interpreted this term in the context of an employee's role becoming redundant for reasons such as the cessation of a particular type of business and the introduction of new technology. Loss of job on automation, outsourcing, organisational restructuring and other business and trade-related reasons have been held to be valid grounds for termination of employment. Pro-employee approach is usually adopted by the courts while dealing with redundancy and retrenchment of the workforce.

5.1. Concept of 'Retrenchment' under the Industrial Disputes Act, 1947

Section 2 (oo) of the Industrial Disputes Act, 1947 defines, 'Retrenchment' as the 'termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action. Retrenchment excludes termination of employment due to:

1. voluntary retirement;
2. retirement on reaching the age of the superannuation; and
3. continued ill health.²⁷

The Supreme Court of India has observed that the right of employers to retrench the economic deadweight of surplus labour is inherent in the right of employers to manage their business. However, this is subject to compliance with the conditions of retrenchment prescribed under law.

5.2. Concept of Workmen under the Industrial Disputes Act, 1947

Section 2 (s) of the Industrial Disputes Act, 1947 defines a workman, "as any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

²⁷ Anand Prakash, *Definition of 'retrenchment' under the Industrial Disputes Act, 1947: recent pronouncements of the supreme court*, *Journal of the Indian Law Institute*, Vol. 19, No. 1 (January-March 1977), pp. 84-8

- (i) Who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) Who is employed in the police service or as an officer or other employee of a prison; or
- (iii) Who is employed mainly in a managerial or administrative capacity; or
- (iv) Who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.²⁸

Persons who are not workmen may however continue to be governed by state specific legislation applicable in the case of shops and commercial establishments and /or the employment contract.

Whether an individual is a workman remains the most litigated employment law aspect in India.

Factories with minimum of 100 workmen are required to get the prior permission of the labour authorities in order to terminate or retrench its workmen. Reasons behind the termination of employees need to be given. The parties should be given an opportunity to be heard. Any retrenchment of a workman without the permission or in contravention of the order refusing permission will be deemed to be illegal and inoperative in law. In case of both factories with less than 100 workmen and commercial establishments the employer has to notify the labour authorities of the employment termination.

In India, if the terms of the collective bargaining agreement or employment contract are more beneficial to the employees than those provided in the law, the terms of the contract prevails.

If there is no alternative agreement between the employer and workman, the employer must follow the last in, first out process at the time of the retrenchment. However this rule is not immutable.

Courts in India have taken the view that an employer has a right to reorganise its business; however, such a right should be exercised in a bonafide manner and not with the ulterior objective of victimising employees.

²⁸ https://labour.gov.in/sites/default/files/THEINDUSTRIALDISPUTES_ACT1947_0.pdf

6. Issues on the Technological Front

On the technological front the use of AI has raised many legal and ethical questions. The following are the some of the areas that need to be addressed.

6.1. Electronic Contracts

In an AI ecosystem the following questions come to the fore. The question regarding the nature of AI is unclear. AI has not given personhood and does not qualify as a legal person under the eye of law. This raises the questions of how the relationship between robots driven by AI and employers in manufacturing unit should be structured in the absence of the valid contract. The validity of electronic contracts which can be entered into through electronic means if they satisfy the general conditions of a valid paper contract provided for in the Indian Contract Act, 1872 is dealt with under Section 10-A of the IT Act. However, the Indian Contract Act, 1872 provides that a contract can be entered into between “legal persons” who are competent to enter into a contract. With the advent of technology, automation and AI, there is a need to rework existing contractual legal regime in order to accommodate a regulated existence of AI. Contract frameworks also need to establish liability regimes and clarify the validity of smart contracts.

6.2. Liability, Negligence, and Standards of Care Regime

With the changing future the liability regime needs to be reworked in an AI driven ecosystem. There has been a significant debate around whether robots or autonomous systems should be attributed a legal personality and if they qualify as legal persons in order to be held liable in themselves. Further the structure of liability also needs to be determined for instance, whether the liability will change depending on the criticality of the situation. At present in India standards of strict product liability law applies which holds the manufacturer liable if the product is defective. Negligence on the part of an individual will be taken into consideration to determine the liability of an individual. Many legal regimes impose the liability on the manufacturer as AI technology machines or robots cannot be held for damages causes. EU directive holds the manufacturer of the robot liable only in cases where manufacturing defects have led to foreseeable damage. In India, the tort law standard of care requires that there must exist a duty of care towards the injured party, and the breach of such duty must cause a legal damage to her. The law on negligence covers those kinds of harms which are reasonably foreseeable, which poses interesting questions when AI is used. How should liability be determined in a case where both human and machine decision-making is involved which eventually leads to the harm caused? The standard of reasonable foresee ability will need to be examined by the courts to see how they may be applied in cases involving

algorithmic decision making. Globally, the courts have shown reluctance in relying upon the principle of negligence where software products are involved, and prefer to invoke product liability rules.

6.3. Privacy Issues

Privacy concerns over the use of AI across sectors have been raised particularly in light of a lack of comprehensive data protection laws in India. The use and functioning of AI across domains is dependent on the collection of data and analytics to arrive at solutions. This has resulted in the AI technology accessing large sets of data including Personally Identifiable Information (PII). AI systems and technologies now have the ability to track behavioural patterns, individual interests, location and everyday movements of a person. In light of the recognition of privacy as a fundamental right under the Constitution of India in *K.S. Puttaswamy v UOI*,²⁹ these concerns become even more prominent and need immediate remedies. The Hon'ble Supreme Court also recognised growing use of emerging technologies and stated that there is an immediate necessity to come up with a data protection framework in light of technological developments.

The rules mandated under Section 43-A of the IT Act create a quasi-data protection framework and make it compulsory for the body corporate to inform the data provider as to the reason for collecting the said data after taking his/her consent for the same. Further, the data provider should be updated with the information such as the recipients of data in future and should be given details regarding data retention. These rules would have clear applicability to AI driven systems collecting and using the PI of consumers and users.

7. Changes in Law School Curriculum

Roscoe Pound the famous jurist has rightly observed that law needs to be stable but not static. Law schools need to gear up to face the challenges posed by automation and use AI. The use of AI has impacted the legal profession and it is one of the most disrupted sectors of the consulting industry today. Legal profession and practice has changed with the rise in Legal Tech, Artificial Intelligence and block chain technology, the sharing economy, and platform companies. It is high time that lawyers start focussing on developing specialized expertise and acquire technical skills in the areas of digital communication, collaboration etc. The profile of legal professionals is changing with the coming in of new roles tech lawyers, legal process managers, legal technicians etc. Many law schools such BCG & Bucerius Law School and the World economic forum have updated their curriculum and are offering courses on legal tech and case management processes.

²⁹ Writ Petition (Civil) No. 494/2012

It is important for lawyers to become tech savvy and get acquainted with the new technologies in the field of law which will help them to streamline the firm's processes such as matter management, fees tracking, invoicing etc. Being tech-savvy is helpful for law school students with an interest in non-lawyer roles too. Law librarians, legal head hunters, paralegal, management consultants and law firm administrators also need to be prepared with the skills that the market demands.

8. Forward-Thinking Law Schools and Future Technologies- Some Instances

Many forward looking law schools have already starting working in the direction of upgrading and updating themselves with the future technologies to keep pace with the changing times.

a) Open Innovation Lab - Bucerius law School³⁰

One of the most forward thinking law schools in Germany is the Bucerius Law School based in Hamburg. It has opened an Open Innovation Lab; a collaborative platform that includes legal professionals from various sections such the commercial law firms, legal departments, alternative service providers and it studies the latest management and technological legal trends. Further the lab also enables the collection of data and also encourages insights into the future of the legal profession and encourages collaborations between participants for gearing up them to face the future challenges.

b) Law With Out Wall (LWOW)-Miami Law School³¹

Law without Walls (LWOW) is the future of legal education. It is an organization under the umbrella of Miami Law School. It focuses on developing educational projects which will help in preparing students to face the challenges posed by AI and automation. It is a collaborative platform where many international students, mentors, academicians and entrepreneurs work together to develop educational projects that will help law students to be future ready. A collaborative effort is made by a team of law and business school students to use technology to solve legal problems. The focus is on giving students practical projects. Feed forward is a good example of such a project which is performance management software designed to channelize the internal communication of law firms. For example, the failure to receive timely feedback on their work.

c) Legal Research and Development –Michigan State University³²

In order to find out the lacunae in the legal industry it is important to have a system of legal research and development in place. Another forward

³⁰ <https://www.bucerius-education.de/home/bucerius-clp/oil/>

³¹ <https://www.law.miami.edu/academics/law-without-walls>

³² <https://www.law.msu.edu/lawtech/index.html>

thinking law school Michigan State University has set up a Legal Research and Development centre which is dedicated to improve the way legal services are delivered. Students are trained with modern business methods like lean thinking and other areas to shape them for the future. One of the most important work of the centre is to conduct research to improve legal services, engaging with the legal industry, and impart training for the 21st century, T-Shaped lawyers. Innovation and legal technology are an important part of the research and development process of the student centre.

d) Training the next generation of lawyers -Vanderbilt Law School³³

Nashville-based Vanderbilt Law School has trained lawyers for 140 years. This law schools offers a special law program, called Law and Innovation that equips students with the skills needed in today's changing legal environment. The program's curriculum has four main pillars:

- The Legal Industry
- Legal Technologies
- Legal Innovation and Entrepreneurship
- Access to Legal Services

There are various activities which focus on giving a practical exposure to students and expose them to the practical aspects of law which will have an influence on the way they practice law. Students are required to work on legal innovation research and this is done mainly through legal project management, technology and other legal service delivery methodologies.

e) Science, Technology and Law - Stanford University³⁴

One more leap in the right direction is the step taken by Stanford University which offers a course in Science, technology and law focussing on multi-disciplinary approach to law studies.

Thus it is very important that along with imparting traditional legal knowledge, law schools also focus on offering course with multi-disciplinary approach especially technology-oriented programs to study the interface between law and technology. Lack of knowledge on the technological front especially in the legal field has been viewed as an obstacle for legal professionals. All predictions with regard to future of law and legal profession show that technology will be an indispensable part of it. It's time for a change, not only in the legal profession but in educational systems too. Hence, it is high time that we gear up to face the challenges posed by the future technologies.

³³ <https://law.vanderbilt.edu/>

³⁴ <https://law.stanford.edu/stanford-program-in-law-science-technology/>

Parsi Divorce: Time to Rethink the Legal Framework?

*Dr. Anupama Ghosal¹
Neville Contractor²*

Abstract

Unlike other communities, the Parsi community is relatively a small community in India. In pre-colonial period, due to the absence of their code of law, Parsis had to depend on the basic principles of justice and fairness but later they were generally managed by panchayats or five most influential and intelligent persons within the community, for redressal of their grievances, because of which problems arose while resolving the disputes pertaining to inheritance and matrimonial litigations. In the colonial period, the need was felt to enact Parsi Marriage and Divorce Act (PMADA) in 1865 that provided for the jury system. Out of many, two major problems that arose in the jury system was access to the matrimonial courts and time-consuming adjudication of matrimonial disputes. The inherent deficiency and inadequacy of the jury system resulted in the formation of opinions and arguments disfavoured and favoured the jury system. The Supreme Court of India finally laid down the principles which constitute the crux of the fundamental right to access justice for the Parsi community. To suit the current need of the Parsi community with the changing times and for ensuring justice and fairness, a reboot of the existing and prevalent Parsi jury system is a necessity.

Key Words: *Parsi, Marriage, Divorce, Litigation, Jury*

1. Introduction

A community with descendants from the ancient Persians, Parsis are now found mainly in Western India and are followers of the Zoroastrian religion. The mass exodus of the community from Persia was forced under coercion of the Islamic invasion, thus compelling them to seek protection in India many centuries ago. Landing in Sanjan in present day Gujarat it was in the year A.D. 717, the then King Jadao Rana permitted them to reside in the city on condition of their adopting certain local customs.³

The Parsis in India were not in possession of the code of laws that their prophet had formulated as their religious books had been lost during their exodus to India. Initially they depended on basic principles of justice and fairness but later they were generally managed by panchayats or committees of five persons comprising the most influential and intelligent within the community. These panchayats carried out the functions of the

¹ Associate Professor and Coordinator, School of Social Sciences, West Bengal National University of Juridical Sciences (WBNUJS), Kolkata

² 3rd Year B.A. LL.B (Hons), (WBNUJS), Kolkata

³ Dosabhoj Framjee, *The Parsees: Their History, Manners, Customs and Religion* (1858)

courts of justice and their decisions were willingly accepted by disputing parties. This situation continued until the eighteenth century when the panchayat system was found to be partially ineffective.⁴

With an increase in instances of litigation amongst the Parsi community, the need for a recognised code of law was strongly felt as their sacred books did not provide much guidance to courts in civil disputes. Subsequently the legislation on Parsi matrimonial and inheritance law was a contention to create a distinct legal identity for the community.⁵

The British colonial government after seeking advice from various community leaders, tried to simplify greatly diverse family rules and regulations within the gamut of four major religions: Hindus, Muslims, Christians and Parsis.⁶ Subsequently, the Parsi Marriage and Divorce Act 1865 (“PMADA”) was passed. Earlier, in the absence of any provision in the PMADA or before this legislation came into effect, it was presumed that the Common Law of England would apply to the Parsis of Bombay.⁷

The PMADA governs matrimonial alliances of Parsis who are defined as persons professing the Zoroastrian faith. The Parsis continue to maintain control over matrimonial affairs in the community by employing the jury system which came into force in 1865 and was drafted by the Parsi Law Association. Many Europeans were concerned at the time that the jury system would give Indians excess power. The existence of the matrimonial jury system also echoed the strong efforts of Parsi lobbyists in creating a separate legislation governing personal law. It showed Parsi exceptionalism in the legal arena especially through the existing Parsi matrimonial jury. No other communities could at the time have the right to jury trials involving marital cases. Juries were only used in certain criminal trials in a piecemeal fashion at local levels.⁸

Special courts are set up annually or biannually to resolve disputes among parties such as The Parsi Chief Matrimonial Courts in the presidency towns of Calcutta, Madras and Bombay⁹ and the Parsi District Matrimonial Courts in other areas¹⁰ that the respective state government deems fit.¹¹ The unique nature of these courts is their functioning which involves the chief

⁴ Ibid

⁵ Rashna Writer, *Parsi Identity*, 27 IRAN (1989).

⁶ Nivedita Menon, *A uniform civil code in India: The state of the debate in 2014*, 40 FEMINIST STUDIES 2 (2014).

⁷ Naoroji v. Roger (1867) 4 Bom. H. C. R. 1; Payne and Co. v. Pirojshah Nusserwanji Patel: MANU/MH/0099/1911.

⁸ Mitra Sharafi, *Law and Identity in Colonial South Asia* (2014)

⁹ The Parsi Marriage and Divorce Act, 1936, §19.

¹⁰ The Parsi Marriage and Divorce Act, 1936, §20.

¹¹ The Parsi Marriage and Divorce Act, 1936, §18.

justice or any other judge along with 5 delegates, comprising respected members of the Parsi community to decide matrimonial disputes barring the exceptions stated in S.19/20 which do not require the presence of delegates. These 5 member coreligionist juries normally consist of retired persons and decide on certain matrimonial suits.¹² They have the opportunity to exert their social influence over the community in a manner denied to senior men belonging to other religious groups. However, despite uniformity and modernity in similar laws in India, the practice of retaining the jury system in Parsi matrimonial adjudication continues. The issue with this system is the fact that it results in issues with regard to access to justice because these juries only sit for a limited period of time and only in certain cities in India. Moreover, the Indian judicial setup has also moved away from the system of jury trials. Therefore, in light of this, the analysis aims to explore the idea of abolishing the system of jury trials under the PMADA and whether it would allow for better access to justice and quicker dispute resolution for litigants.

2. Background of the Jury System in Colonial Times

The Indian Jury Act 1926 brought into existence the system of trial of cases by juries. Colonial British rulers were skeptical about the implications of native justice and instead preferred to be judged by a jury consisting of members of their own community. They were also wary of having to deal with an unfamiliar legal system prevalent in India. Therefore the need to protect the rights of British subjects through juries manned by their peers ensured the system's survival until Indian independence in 1947.¹³

Parsis as a community had a privileged position amongst the ruling British and therefore chose to closely follow British legalism, accepting their systems readily. Parsi divorce laws were thus extremely similar to and were an outcome of the British covenants on divorce. The PMADA 1865 contained laws for Parsis and was drafted by members of the community to be similar to English laws in those times. The adoption of the jury system was thus an outcome of emulating the colonial legal system.¹⁴ The strong political and financial standing of the Parsi community also helped them to negotiate and have distinct laws for themselves when none existed. Being a numerically insignificant community, these laws were enacted by them with

¹² The British Broadcasting Corporation, *Parsi Matrimonial courts: India's only surviving jury trials* September 24, 2015, available at <http://www.bbc.com/news/world-asia-india-34322117> (Last visited on March 29, 2018).

¹³ The Hindu, *Judged by twelve* October 18, 2016, available at <http://www.thehindu.com/features/magazine/Judged-by-twelve/article14581947.ece> (Last visited on March 29, 2016).

¹⁴ Mitra Sharafi, *The Marital Patchwork of Colonial South Asia: Forum shopping from Britain to Baroda*, 28 LAW AND HISTORY REVIEW 4 (November 2010).

the aim to have and retain a separate entity within law so as to grant statutory acceptance to community involvement in judicial procedures.¹⁵

3. Justifying the Abolition of the Jury: A Violation of the Fundamental Right to Access Justice

In order to dissolve a marriage under the PMADA, Parsi couples have to go through a more strenuous exercise with the procedure being cumbersome and extremely time consuming. The system does not permit mediation or settlement which is the case with Hindu women governed by the family court system. Since Parsi matrimonial courts only sit once or twice a year for a short duration in certain cities, it holds up resolution of matrimonial disputes. With estranged couples working away from metropolitan cities, it also greatly inconveniences the persons involved. This denies couples seeking matrimonial relief, their fundamental right to access justice under Article 14 and 21 of the Indian Constitution¹⁶. In the case of *Anita Kushwaha v. Pushap Sudan*¹⁷, the Supreme Court laid down four principles which constitute the crux of the fundamental right to access justice as follows:

1. “The State must provide an effective adjudicatory mechanism which is just, fair and objective in its approach
2. The mechanism so provided must be reasonably accessible in terms of distance
3. The process of adjudication must be speedy
4. The litigant’s access to the adjudicatory process must be affordable.”

The Supreme court held, “There is jurisprudentially no qualitative difference between denial of speedy trial in a criminal case, on the one hand, and civil suit, appeal or other proceedings, for ought we know that civil disputes can at times have an equally, if not, more severe impact on a citizen’s life or the quality of it.”¹⁸ Therefore, one could argue that the ambit of the right to access to speedy justice extends to civil suits as well. Thus, keeping in mind the constituents of the right to access justice, aspects under each criterion will be analysed in order to ascertain whether or not the present system of redressal under the PMADA is restrictive of the fundamental right to access justice.

4. Non-Neutral Approach

It is argued that the present adjudication method which involves a jury may not be fair or objective in its approach. Delegates may be biased in

¹⁵ Flavia Agnes, FAMILY LAWS AND CONSTITUTIONAL CLAIMS (Vol 1., 2011).

¹⁶ Anita Kushwaha v. Pushap Sudan AIR 2016 SC 3506.

¹⁷ Ibid.

¹⁸ Ibid.

their view points in comparison to judges who are experienced in adjudication as in the case of *K.M. Nanavati v. State of Maharashtra*¹⁹ which was considered the last criminal trial employing the jury system in India. It was felt that the jury's decisions were possibly influenced by the media and the citizens.²⁰

Jury members may also not possess specific skill sets to work on matters under consideration as they may tend to not draw a line between morality and law. There is always the risk of putting the fate of community members in the hands of laypersons. Similarly, judges in the United States, a country which has adopted the jury system, have been scrutinizing complaints regarding jurors invalidating the law by breach of decisions which are not in consonance with the law.²¹

Besides, societal benchmarks and virtues do not go hand in hand with principles of justice and can influence judgements unfavourably. The Parsis being a small community with most people knowing each other, jury members can be influenced by personal biases or their own sense of morality and do not necessarily pass impartial verdicts. For example, in the famous American trial of O. J. Simpson where the racial mix of the jury was cause for concern, there was a debate whether jurors were influenced by race. It was felt that minority jurors declined convicting minority defendants.²² In *Gregory v. UK*²³ a jury member passed a note to the judge stating that at least one jury member was displaying racial prejudice.²⁴

Furthermore, there is a lack of accountability to the legal system, the public and the parties who are involved in the case. Authority is defined by non professional decision makers who make decisions by applying varying standards. Research regarding juries in the United States also shows that juries are not equitable and do not have regard for the opinions of minority member(s) of the jury.²⁵

¹⁹ AIR 1962 SC 605.

²⁰ Telegraph India, *Teachings from a trial* Sept 7, 2016, available at https://www.telegraphindia.com/1160907/jsp/opinion/story_106622.jsp (Last visited on April 5, 2018).

²¹ John D. Jackson, *Making Juries Accountable*, THE AMERICAN JOURNAL OF COMPARATIVE LAW (2002).

²² Ibid.

²³ *Gregory v United Kingdom*, (111/1995/617/707), European Court of Human Rights, 1997.

²⁴ See *supra* note 17.

²⁵ Ibid.

5. Difficulties in Accessing Matrimonial Courts

The mechanism for redressal is not “reasonably accessible in terms of distance”²⁶ as most suits come before the Chief Matrimonial Courts in the presidency towns. Due to a small population, there are not many Parsi District Matrimonial Courts constituted. Often under S.22 of the PMADA, the jurisdiction of the Chief Matrimonial Courts may be extended so as to make aggrieved parties approach Chief Matrimonial Courts in case Parsi District Matrimonial Courts are not constituted in their area of residence. This causes great hardship as couples staying in areas without a Parsi District Matrimonial Court or those living away from presidency towns, are compelled to travel to seek redressal. This clearly makes justice inaccessible in terms of distance as a result of which filing such suits may become costly as parties to the suit would need to travel for hearings on an ongoing basis. On the other hand, it’s easier for spouses married under the Hindu Marriage Act 1955 to file divorce petitions with any district courts which fall within their local limits.²⁷

6. No Procedure of Jury Selection

There does not exist a uniform procedure for appointment of delegates under the PMADA.²⁸ For example, the method of appointing delegates in Mumbai may not be the same as that followed in Pune. This can be problematic as there is an absence of uniformity or specific transparent procedures backed by law in place. As a result, leaving such a procedure to the discretion of courts may not always result in the best selection of delegates to help adjudicate such matrimonial suits and would lack uniformity across the nation.

Jury trials may also not ensure the best outcomes in current times and changed circumstances. The technical, legal and economic concepts involved in present day cases maybe beyond the comprehension of average jury members. Since jury members do not necessarily possess a legal background or training, the possibility of being ill equipped to assess testimonies exists. In *Betancourt v. Marine Cargo Management, Inc.*²⁹, the United States District Court for the Southern District Court of Florida dismissed a number of counts of the plaintiff’s sexual abuse accusations as they covered common law tort claims that would present various legal questions and create confusion for the jury.³⁰ In *Sims v. William Howard &*

²⁶ See *supra* note 12.

²⁷ The Hindu Marriage Act, 1955, §19.

²⁸ *Delferooz Darius Dorabjee v. State of Maharashtra* AIR 2006 (NOC) 916 (Bom).

²⁹ 930 F. Supp. 606 (S.D. Fla. 1996).

³⁰ *Developments in the Law: The Civil Jury*, 110 HARVARD LAW REVIEW 7 (May, 1997).

*Son Ltd*³¹ the Court displayed its disapproval for jury trials in personal injury cases as compensation awarded by them was made without knowledge of the legally permissible scales.³²

Apprehensions about jury capabilities have been of concern to scholars through the history of the American judiciary. There has also been a drastic reduction in civil jury trials in England down to barely two to three percent of all cases. Even the Lord Chief Justice of England Lord Parker has supported abandoning the system or largely modifying it.³³ Currently, a large amount of the judge's time may be wasted in attempting to explain facts or legislation to the jury. Therefore, it is contended that this system should be done away with.

7. Redressal Over Extended Periods

Given that many such courts only sit for a small duration of time once or twice a year, couples seeking redressal do not get access to any redressal mechanism throughout the year. If adjudication is unable to be completed in one session of the court, it causes great hardship as parties may have to wait for a while for the next session. At times, suits are part-heard at the end of one session which results in parties having to wait until the next session of the Parsi Matrimonial Court for complete redressal.³⁴ In addition, the jury's capacity to function judiciously and logically is questionable in highly complex cases. Questions of facts are sometimes complex and the jury is incompetent to decide on them. It is also felt that the length of trials makes jury comprehension difficult even for jurors with above average intelligence.

Since the jury meets limited number of times a year for brief periods, litigants can misuse the system and seek adjournments for long periods, thus delaying the litigation process indefinitely. In *Sohrab Anklesaria v. Feroza Anklesaria*,³⁵ the suit took 3 years to be disposed due to continuous postponement of the matter to each successive session of the court. In view of Parsis not being governed by mainstream family law, it hurts litigants in troubled marriages adversely.

8. Jury Member Absenteeism

In the case of *Sohrab Anklesaria v. Feroza Anklesaria*³⁶, the parties had requested future dates as the arguments had not concluded in one

³¹ [1964] 2 Weekly L.R. 794 (C.A.).

³² T.B.Smith, *Civil Jury Trial: A Scottish Assessment*, 50 VIRGINIA LAW REVIEW 6 (Oct 1964).

³³ Ibid.

³⁴ *Sohrab Anklesaria v. Feroza Anklesaria* : 2016 SCC OnLine Bom 10350.

³⁵ Ibid.

³⁶ Ibid.

session. Thereafter, it was noted that a delegate was travelling on those dates and could not attend the proceedings. This could be a crucial issue because of the inconsistency in attendance of a delegate when he/she is required to vote. The decision could be based on an incomplete hearing of both parties and hence it may not be a completely informed one.³⁷ On the other hand, if 4 out of the 5 delegates remain, the chance for a 2:2 decision may result in the presiding judge voting in a manner contrary to the decision of the jury members, had the absent member been present. Thus, outcomes could completely change. Questions of fact once determined by the jury may not be subject to appeals³⁸ which deal with questions of law. The function of the jury is crucial and contingencies which have the potential to alter or cause inconsistency in decisions could severely hamper appeals relating to matrimonial suits as well.

Jurors are capable of making judgements before both parties or the party in question have presented their cases. Once these judgements are made they tend to hold on through the trial. In a study conducted by researchers D Bridgeman and D Marlowe, they interviewed 65 jurors who had conducted felony trials in California. 35% of the jurors admitted that they were fairly certain about the guilt or innocence of the accused in the beginning or mid way through the trial. 47% stated their decisions were final towards the end of the trial but before having discussions. Also in a majority of cases the jurors final judgement is similar to that of the majority of jurors as the majority generally persuades the minority jurors to toe their line. Where the majority is in favour of conviction or acquittal, the jury in 90% of the cases decided along the course of the initial majority. In cases involving high publicity, biased information can influence jurors to also take certain positions.³⁹

9. Arguments in Favour of the Jury System

The main argument in favour of delegates assisting judges is based on the concept of cultural relativism wherein questions put before the delegates would be judged with regard to the Parsi culture and practices. This is of great significance in recent times where the Supreme Court gave the petitioner relief in the case of *Goolrokh M. Gupta v. Burjor Pardiwala & Ors.*⁴⁰ and members of the community criticised the suggestion given by the court to allow the petitioner into the funeral parlour premises as it came from a 5 judge constitution bench comprising judges from other religious communities. Members of the Parsi community may believe that adjudication must be done in light of the ethos and culture of the community

³⁷ Pistonji Kekobund Bharucha v. Aloo: AIR 1984 Bom 75.

³⁸ Sohrab Anklesaria v. Feroza Anklesaria: 2017 SCC OnLine Bom 8128.

³⁹ Lawrence J. Leigh, A Theory of Jury Trial Advocacy (1984)

⁴⁰ S.L.P. No. 18889 of 2012 (S.C) (Pending).

which is best understood by its own members. Thus, this could justify the jury trial system in Parsi Matrimonial Law on the ground that it is the link between Parsi society and the legal system when dealing with certain personal law issues.

Additionally, it can also be reassuring for the litigants concerned that decisions will be made by a few people rather than only one individual alone and that leads to smaller chances of mistakes in comprehension. Since it also involves a larger group of people, it brings in fresh insights into issues as compared to legally hardened judges. Considering these juries comprise of people of good standing, education and character, litigants would imagine that they would not resort to favouritism and would be of great help in administering justice.

On the other hand, legal knowledge may be of value to the judiciary but will not aid in determining certain facts which can only be obtained from lay persons who form the jury and who are familiar with their surroundings and cultural practices.

A report published by the UK Ministry of Justice states that research conducted in a period of 18 months into over half a million cases heard in England and Wales shows that juries are fair, competent and efficacious. Two thirds of those tried are convicted and there is no display of any racial bias. They fail to reach verdicts in only a small amount of cases which are less than 1% of all cases.⁴¹ Hence, this could be an argument in favour of retaining the jury system.

10. Consequences of Amending the System

Specific qualifications have not been prescribed for persons to be selected as delegates of the jury for Parsi divorces except that they should be senior members of the community. By abolishing the jury, the administration of justice will be devoid of personal prejudices of individual jury members who have adjudicatory powers. The system will also be free of arbitrariness and abuse as it will not be subject to the whims and fancies of individual members of the jury. Besides litigants will not have to face delays in the hearing of cases as they will not have to wait for matrimonial courts to come into session for brief periods of time each year. Delays due to time taken in empaneling juries will also reduce the wait time and ensure speedy settlements.

Likewise, it will facilitate parties involved to have access to Family Courts which have the advantage of providing means of reconciliation with professional counsellors and child care centres, if the model adopted by the

⁴¹ The Guardian, *Why juries work best* February 21, 2010, available at <https://www.theguardian.com/commentisfree/2010/feb/21/juries-work-best-research> (Last visited on March 30, 2018).

Hindu community is followed. District judges dealing with such matters are also better trained in dealing with such cases. Concerned parties will also be able to apply under the jurisdiction of courts where they reside. On the flip side, community intervention in divorce litigation will end, thus making it difficult for Parsis as a community to maintain their own distinct identity. Government intervention into a specific set of laws governing a community in India also results in backlash as it is a sensitive topic and could be perceived as a move to interfere with the religious affairs of a group.

11. Conclusion

Since trial by a jury has been discarded by the Indian judiciary in other matters, it demonstrates that juries are not only unworkable but also ineffectual due to the many difficulties that emerge from such trials. Abolishing the jury system will thus bring consistency in Parsi divorce laws so that they are in uniformity with other statutes. As a result, matrimonial divorce procedures too will become simpler and fall under the jurisdiction of family/district courts.

However, it is noteworthy that the judiciary has taken note of the shortcomings of the jury system and has interpreted the statute, wherever the question has arisen, such that disposal of suits is quicker. In *Minoo Rustomji Shroff and others v. Union of India and Ors.*⁴² it was argued that there is no requirement for a jury for divorces based on mutual consent as there is no “adjudication” involved. Also in *Rohinton Panthaky v. Armin R. Panthaky*⁴³, the court allowed collection of evidence under the Civil Procedure Code by a commissioner which would not take up the time of the judge and help in quicker disposal of other cases in that time.

In conclusion, with changing times in Indian democracy, the laws controlling personal relationships need to evolve with the times. Codified personal laws of various religions have their own peculiarities. An example is the Parsi jury system which continues to be a part of Parsi personal laws. With the Supreme Court declaring the practice of triple talaq void, it is time to relook into the existence of the Parsi jury system which has inconvenienced many and restricted their access to justice which is a fundamental right. Considering that the PMADA was enacted in the pre-independence British era much before the jury system was eliminated in India, it does not justify its existence in the current changed times.

⁴² 2005 SCC OnLine Bom 288 : (2005) 2 Mah LJ 1124.

⁴³ 2014 SCC OnLine Bom 451: (2014) 3 Mah LJ 803.

Conceptualising the Rights of Muslim Women in Context of Islamic Personal Law

Dr. Shaveta Gagneja¹

Abstract

Despite the constitutional commitment for the gender-just laws and equal safeguards for minorities still Muslim women face considerable challenges as a member of largest minority and, are among the poorest, economically vulnerable, educationally and politically marginalized group in the country. Personal law, based on religious laws as modified by state legislation and judicial precedent, governs family relations including marriage, divorce, inheritance and maintenance and applies to individuals on the basis of their religious identity have become the benchmarks of a gender-just existence. According to Sacher Committee report media has extensively highlighted on select cases of Muslim women passionately in identifying the Muslim religion as the sole locus of gender injustice in the Community. In this paper author shall attempt to provide an exposition of statutory and judicial framework of India's religion-state relations and further illustrate the rights of Muslim women laid down under Holy Qur'an for the protection of Muslim Women. It also briefly look in to the legislative enactments of The Muslim Women (Protection of Rights on Marriage) Act, 2019 over the triple talaq.

Key Words:- Personal Law, Muslim Women, Triple Talaq, Marriage

1. Introduction

Muslim women in India face considerable challenges as citizens and as members of the largest minority because they have been broadly represented as passive victims. The status of Muslim women largely specifies the shortage of three essentials: knowledge (measured by literacy and average years of schooling), economic power (work and income) & autonomy (decision making power and physical mobility) as the defining feature of women's low status.² Zoya Hasan and Ritu Menon too pointed out in their survey that recent interventions on Muslim women in post-colonial India are caught up in misconceptions that usually leave Muslim women invisible.³ Muslim women's rights became a subject of considerable debate, because, two sets of notion existing in the society on the status of Muslim women: the tendency to see Muslims, particularly Muslim women, as a monolithic category; and the overwhelming importance attached to Islam, especially the Muslim personal law in defining Muslim women's status.

¹ Senior Assistant Professor, Maharaja Agarsen School of Law (MAIMS), affiliated to Indraprastha University, New Delhi

² Kalpana Kannabiran (ed.) *Religion, Feminist Policies and Muslim Womens* (Sage Publications, New Delhi, 2014)

³ Zoya Hasan & Ritu Menon, *Unequal Citizens A Study of Muslim Women in India* 8 (New Delhi, 2004)

Personal law including marriage, divorce, inheritance, custody rights, etc. is a contested area for the women's movement as well as for Hindu and Muslim conservatives. It not only defines the relationship between men and women in marriage and family relations but also marks the relationship between women and the State. While civil and criminal laws in post-independent India are secular, on the other hand personal laws are governed by the respective religious laws. Accordingly, Muslim women came under the purview of Muslim personal family law. *Shah Bano*⁴ controversy brought Muslim personal law back into focus which had not been subject to any legislative changes since the 1937 Shariat Act and the 1939 Dissolution of Muslim Marriages Act. Despite the commitment for the gender-just laws and, the Constitution of India confers equal citizenship rights on all Indians and provides safeguards for minorities⁵ still Muslim women denies the limited visibility.

Islamic schools still provide training based on Islamic jurisprudence, which developed during the medieval ages, when women's role in public life was extremely limited and they were supposed to be subservient to patriarchal authorities. The body of laws developed by the Islamic jurists is known as *Shari'ah* and the methods followed and intellectual efforts made are known as Islamic *fiqh*. It is argued by the Muslim leaders that *Shari'ah* laws are divine, beyond human intervention and hence immutable and it is obligatory for every Muslim to follow them. However, this is not a correct view. The body of Islamic laws developed over several centuries by eminent jurists is a result of human engagement with divine pronouncements in the *Qur'an* and *sunnah*. Since the *Shari'ah* is a result of human endeavours to understand, it is as much human as it is from Allah and cannot be made immutable. The modernist, liberal and reformist Muslims have been campaigning for change to remove gender inequalities and give women equal rights; which is in line with what the *Qur'an* clearly stipulates. Thus one would see a clear difference between what the *Qur'an* stipulates and what *Shari'ah* laws require⁶. Ashgar Ali Engineer have always argued that women's rights are inherent in Islam but the patriarchal society has taken away rights from women.⁷ The Holy *Qur'an* had laid the framework for the laws protecting the rights of women.

⁴ *Mohd. Ahmed Khan v Shah Bano Begum* 1985 (2) SCC 556

⁵ Constitution of India, articles. 29 & 30

⁶ Asghar Ali Engineer, "Rights of Women and Muslim Societies" 7 Socio-Legal Rev. 44 (2011)

⁷ *ibid*

2. Origin and Development of Islam and the Advent of Muslim Law in India

Islam means peace and submission. The *Shari'ah* is the central core of Islam and is an infallible guide to ethics. But this is not the law in the modern sense. The Islamic jurisprudential law is called *fiqh*. According to Fyzee, "this is the name given to the whole science of jurisprudence. It is the knowledge and obligation derived from the four sources of Islamic law-the *Koran, Sunna, Ijma & Qiyas*".⁸

There are two broad sects of Islam, the *Sunnis* and the *Shia's*. In the course of time the majority and minority of the heyday of Islam came to be known as the (*Sunnis* and the *Shia's have their own law*) respectively. Though sharing all essential religious belief and practices, the two groups gradually developed their own theology and law. Among the *Sunnis* there have been four different schools of theology and law are *Hanafi, Maliki, Shafei & Hanbali*. The *Shia* did not recognize, the authority of any of *Sunni* jurists mentioned above. The most important among the *Shia* schools of law are *Ithna Ashari & Ismaili*.⁹ In India, the Bohras and Khojas (Agha Khani) are Shias belonging to the Ismaili sect.

Islamic law was gradually codified in India under the authority of Muslim monarchs of the past. The first State Code of Muslim law prepared in India was the *Fatawa-e-Ghiyasiya* promulgated under the authority of Ghiasuddin Balban who ruled India during 1266-1288 AD. Later in it was replaced by the *Fatawa-e-Qurakhania* of the Tuglaq rulers. The Mughals began with their first Code, *Fatawa-i-Babari* and ended with the celebrated 30-Volume *Fatawa-e-Hindiya* (Code of India) better known as *Fatawa-e-Alamgiri*. All these codes were based on Sunni Hanafi law.¹⁰

Before the British rule in India the local rulers, both Hindu and Muslim wherever they ruled, had adopted a system of community specific religion based system of law to be applied in the matter of religious rites, personal status, family relations and succession in the Muslim-ruled areas Hindus were governed by Hindu law and vice-versa. The British rulers of India inherited this system and retained it in force. The community specific law applied under this system eventually came to be known as 'personal laws'.¹¹

⁸ Flavia Agnes *Law and Gender Inequality The Politics of Women Right in India* 29 (Oxford University Press, 1999)

⁹ Tahir Mahmood and Saif Mahmood, *Muslim law in India and Abroad*, 8 (Universal Law Publishing Co., New Delhi)

¹⁰ *Id* at 19

¹¹ *Ibid*

Interestingly, the assumption was that Hindu law was the ‘laws of the Shastras’ and Muslim law ‘the laws of the Koran’. This focus on scriptural law was soon modified and by 1793 the Regulations referred to ‘Hindu law’ and ‘Mohammedan laws’. Significantly, in the actual administration of justice, from 1772 until 1864, Hindu and Muslim experts or assessors (pandits and maulvis) were enlisted to instruct the courts as to the nature of Hindu and Muslim laws. The British believed at this time that the personal laws were so interconnected with religious feelings that any attempt at large-scale reform or any endeavor to codify the personal laws would necessarily involve injury to religious susceptibilities. They were probably also worried about upsetting their colonial subjects and creating grounds for anti-colonial agitation.

Mainly for such reasons, legal reform was invoked only after considerable pressure from the communities themselves. Several of the few Acts dealing with Muslim law enacted by the British actually restored traditional Muslim law. The Mussalman Wakf Validating Act 1913 is perhaps the best example of this trend. It should be reiterated in addition that the orthodox Muslim community was responsible in part for the enactment of Muslim Personal law (Shariat) Application Act 1937, which sought to destroy the application of a considerable section of customary law. The only major liberalizing reform of the Muslim personal law in the British period occurred in 1939 with the enactment of the Dissolution of Muslim Marriage Act.¹²

3. Rights of Muslim Women in the Context of Islamic Personal law

Before the advent of Islam, women were treated like slaves or property; women were used for one purpose and then discarded. They had no freedom, could own no property and were not allowed to inherit. In times of war, women were treated as part of the prize. Outside Arabia conditions for women were no better. In Egypt, India and all European countries in the Dark Ages, women were treated worse than slaves. The Arabs were traders and had mastered the Law of Contract. The basic principle of contract was applied to other social relationships including marriage. Although *Shariat* is premised upon a patriarchal familial structure, it is not based on a feudal economic structure. The principles governing marriage transactions were similar to trade contracts-offer, acceptance and considerations forming its base. The Prophet converted the custom of bride price of tribal Arabia to *Mehr* which would be a future security to a married woman. In an era of unlimited Polygamy, the Prophet restricted the number of wives to four with an injunction that each wife be treated with equal dignity and affection.

¹² David Pearl & Werner Menski, *Muslim family law* 38 (Sweet & Maxwell, London, 3rd edn., 1998)

Islam was also the first legal system to grant women the right to inheritance.¹³

It prohibits wanton violence towards women and girls and is against duress in marriage and community affairs. Islam considered a woman to be equal to a man as a human and as a partner in his life.

3.1. Right in Respect of Marriage

Islam made major changes in the law of marriage and brought several reforms. Prior to the Islam the female had no choice in the marriage. So it was not the union of two equals it was a relationship of subordination. Even today under Hindu Marriage Act it does not reflect the union of two equals because father is giving the daughter in marriage as a *daan* and *daan* is always giving of a thing. Making marriage as a contract was a revolution and therefore, Islam is to be given the credit that rather considering marriage as a sacrament as under Hindu Marriage Act 1955 Islam treated it as a civil contract. Fysee stresses that “marriage among Muhammadans is not a sacrament, but purely a civil contract”. It is apparent, however, that a Muslim marriage also has religious elements and is not purely a matter of contractual arrangement between two individual. Indeed a contract before God, it has character of sanctity. The unique feature of the contract of marriage under Islamic law is that conditions can be stipulated within this contract. This is termed as *aqd-e-nikah* (conditions of marriage). During the British period, the Courts in India upheld various conditions stipulated in the *nikahnama*. There is also a slope for drawing up pre-nuptial agreement or *kasin-nama*.

Muslim man has undisputed legal right to marry up to four wives, so long as he is actually capable of treating his wives equally and justly “This implies that he should be able to give each of his wives an equal share of food, clothing, material comforts and whatever kind of treatment he can provide. It also implies that he should not be partial to one wife at the expense of another”¹⁴. Polygamy draws its validity from Verse 4:3 of Holy *Quran*,

“If Ye fear that ye cannot do justice between orphans, then marry what seems good to you of women, by twos, or threes, or fours or if ye fear that ye cannot be equitable, then only one, or what your right hand possesses”.

The practice of polygamy as dictated by the *Quran* is regulated by Ethical Codes than it was in the societies of pre-Islamic Arabia. Polygamy is neither

¹³ *Supra* Note 7 at.33

¹⁴ Rachel Jones, “Polygyny in Islam” 1 *Macalester Islam Journal* 64 (2006) available at: <https://digitalcommons.macalester.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1014&context=islam>

mandatory nor encouraged but merely permitted. The *Quran's* conditional endorsement of polygamy stresses that self-interest or sexual desire should not be the reason for entering into a polygamous marriage. It is a practice associated with the social duty of Islamic men have to protect the social and financial standing of the widows and orphans in their community. The permission to marry up-to four wives is discouraged unless the children of a widow are in danger of being disinherited or forced into unsuitable marriages. In addition to the charitable motivations described in the *Quran*, Islamic scholars have suggested other circumstances in which polygamy is acceptable. Some of these are backed by statements in the *Hadith* and *Quran*, while others are based more on social expedience. In common with the instructions given in Verse 4:3, these interpretations do not encourage polygamy but view it as preferable to the alternatives. In all the pre-Islamic civilizations Persians, Israelites, Athenians, Hindus¹⁵ all practiced polygamy with no restrictions however, *Quran* restricted the number of wives to four with the condition of equal justice between co-wives which implies that polygamy is not the normal condition of Muslim society. While this practice has been banned in several Muslim countries, in others there are checks in place to prevent degeneration of the practice. In South Asia, countries like Pakistan and Bangladesh require that all matters of extra judicial and arbitrary divorce and second and subsequent marriages be submitted before an arbitration council. They also require written permission of the first wife before a second marriage can be contracted. This kind of arbitration councils are missing from the Indian scenario. Increasing incidence of polygamy has impelled the Islamic courts of *Dar-ul-Qaza* to lay down the condition that polygamy will be allowed only if a person shows sufficient cause, and satisfies the authorities that he will be able to bear additional economic burden and not divorce the first wife.¹⁶

Allahabad High Court Court in *Itwari v Asghari*¹⁷ S.S. Dhavan, J. observed that:

“...Muslim Law as enforced in India has considered polygamy as an institution to be tolerated but not encouraged, and has not conferred upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances. A Muslim husband has the legal right to take a second wife even while the first marriage subsists, but if he does so, and then seeks the assistance of the Civil Court to compel the first wife to live with him against her wishes on

¹⁵ Until the enactment of Hindu Marriage Act 1955, Hindu Male was entitle to have unlimited number of wives and polygamy was lawful.

¹⁶ Neera Bharihoke (ed.) *Position of Women Under Muslim Personal Law: Some Observations* 238-239 (Severals Publications, New Delhi, 2008)

¹⁷ AIR 1960 All 684

pain of severe penalties including attachment of property, she is entitled to raise the question whether the court, as a court of equity, ought to compel her to submit to co-habitation with such a husband. In that case the circumstances in which his second, marriage took place are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first”.

So far the Supreme Court of India played a proactive role in striking a balance between the customary practices and the rights of the individual in a welfare State. However, while quashing the Triple talaq in 2017 Supreme Court decided to examine the constitutional validity of prevalent practices of ‘polygamy’ & ‘nikah halala’ among the Muslims and issued a further notice to the Centre and State Law Commission.

3.2. Right to Mehr

In Islam every married woman has a right to receive from her husband, as a token of respect and social security, some money or property or another valuable thing. This is called *Mehr*¹⁸. The concept of *Mehr* occupied a unique position in the Muslim law of marriage. Therefore, dower is inherent in the concept of marriage under Muslim law and it is an integral part of it. It is a sort of deterrent to the husband’s absolute power of pronouncing divorce on his wife, so the main object of dower is to offer protection to the wife against such arbitrary power.¹⁹ *Mehr* is not only the consideration for marriage, *Mehr* is intended to be a mark of respect in which the wife is held by the husband.²⁰ The Supreme Court also in the *Shah Bano case*²¹ observed that “Mehr was not a consideration for marriage but an obligation imposed upon the husband as a mark of respect to his wife, and was therefore not a sum payable on divorce.” C.J Chandrachud further observed :

“Our submission, the Magistrate will have to take this sum into consideration while fixing the amount of maintenance and if he comes to the conclusion that this amount is sufficient to

¹⁸ According to Mulla, “a sum of money or other property which the wife is entitled to receive from the husband in “consideration of marriage.” The word “consideration” is not used in the sense of the Contract Act. According to Muslim law, dower is an obligation imposed upon a husband as a mark of respect to his wife. If dower were a bride price, a postnuptial agreement to pay dower would be void for want of consideration, but such an agreement is valid and enforceable.

¹⁹ *Abdur Kadir v Salima* (1886) 8 All 149.

²⁰ Rakesh Kumar Singh Law of dower (Mahr) in India, “*Journal of Islamic Law and Culture*”58– 78 (2010), <https://doi.org/10.1080/1528817X.2010.528594>

²¹ *Mohd. Ahmed Khan v Shah Bano Begum*, AIR 1985 SC 945. Mehr amount became a part of the maintenance amount under Section 125 of Cr.P.C. through Section 127 (3)(b) of Cr.P.C., 1973.

maintain her, he will have to give a finding that she is not unable to maintain herself and therefore no maintenance amount need be given to her”.

In India the practice is that the nature of dower is determined on the authority of *Hedaya*, *Darul Mukhtar* and *Fatawa Alamjin*.²²

3.3. Right to Maintenance

Nafaqa (maintenance) means all these things which are necessary for the support of life such as food, cloth and lodging. When a woman surrenders herself to her husband, it is incumbent upon him to support her and provide both, food and shelter whether she be a Muslim or an infidel, because such is approved by the holy *Quran* and tradition. The rules relating to maintenance of divorced wives are unfortunately gravely misunderstood, and there is a pressing need for their reappraisal.

The Shah Bano Case

The story begins in 1975 with a Muslim woman, *Shah Bano*, who after forty-three years of marriage separated from her husband Mohammad Ahmed Khan well known advocate in Indore in accordance with Islamic law. The divorce was performed by the procedure of talaq that is the husband declaring (three times) that he ends the marriage. Throughout the duration of the marriage *Shah Bano* had been a housewife who was financially dependent on her husband. After divorce, *Shah Bano* was left with no means to support herself. She sued her former husband under Section 125 of the Indian Criminal Procedure Code for failing to provide her with adequate maintenance after the divorce. Section 125 states that maintenance, up to a maximum of five hundred rupees a month, must be provided by the husband for a former spouse who would otherwise be destitute. *Shah Bano* filed her case in a lower court in the State of Madhya Pradesh, where a Magistrate pass the order that her ex-husband was required to pay a monthly maintenance payment of twenty-five rupees a month. Disheartened at the paltry amount awarded to her, *Shah Bano* appealed to the Madhya Pradesh High Court, which in 1980 ruled that the payment should be increased to approximately one-hundred eighty rupees. Following this judgment, Mohammad Khan (a lawyer by profession) appealed to the Supreme Court of India, reiterating the argument he made in the lower courts: that because he satisfied Section 127 of the Indian Criminal Procedure Code, Section 125 did not apply to him. Section 127 states that Section 125 shall not apply where a divorced woman has received, whether before or after the date of the said order, the whole of the sum which, under

²² Khan Noor Ephroz *Women and Law Muslim Personal Law Perspective* 155 (Rawat Publication, New Delhi, 2003)

any customary or personal law, applicable to the parties, was payable on such divorce.

Mohammad Khan contended that under Muslim personal law he had already paid the "whole" sum to *Shah Bano*, and as a result, he owed her no further payment and, further contested that the Muslim Personal Law in India required the husband to only provide maintenance for the *iddat* period after divorce. Mohammad Khan claimed that he was no longer obliged to maintain his former wife. Furthermore, Mohammad Khan rejected *Shah Bano's* additional argument that the *Quran* required, at the very least, she receive marta or lump-sum payment made by the divorcing husband signifying the end of the marriage. According to Mohammad Khan, marta payments had to be made only by those who were considered pious in the eyes of Allah (muttaqeen). This was a personal description he claimed did not apply to him. Khan's argument was supported by the All India Muslim Personal Law Board which contended that courts cannot take the liberty of interfering in those matters that are laid out under Muslim Personal Law, adding it would violate The Muslim Personal Law (Shariat) Application Act, 1937. The board said that according to the Act, the courts were to give decisions on matters of divorce, maintenance and other family issues based on Shariat. The Supreme Court, in a bench comprised of Justices Chandrachud, Desai, Venkataramiah, Chinnappa Reddy, & Misra affirmed the Madhya Pradesh High Court ruling and held that Mohammad Khan was still responsible to his former wife for maintenance payments. Justice Chandrachud, writing for the Court, rejected Mohammad Khan's interpretation of Muslim personal law. Relying on its own research and understanding of the *shari'a*, the Court opined that the principles of Islam, in fact, require that a husband not "discard his wife whenever he chooses to do so" without first ensuring that she is financially secure. The Supreme Court's arrogating to itself the power to ascertain authentic Islamic law understandably elicited great anger within the Muslim community. Among many Muslims, there was a perception that the *Shah Bano* judgment marked the beginning of the end to Muslim personal law in India. Rather than judicially balancing the general law against the personal law and then selecting the former as the basis for its decision, the Supreme Court's attempt to interpret the *Shari'a*, according to some observers, seemed to be an alarming move to subvert Muslim personal law. Two earlier Supreme Court cases, involving facts similar to *Shah Bano*, had not aroused the kind of hostile reaction among Muslims that was seen in 1985. In *Bai Tahira v. Ali Husain Fissalli*²³ & *Fazlunbi v. K Khader Vali*²⁴, the Court twice upheld the rights of divorced Muslim women to receive maintenance for a period beyond *iddat*. Why was there no uproar by the Muslim community about

²³ AIR 1979 SC362

²⁴ AIR1980 SC 1730

either of these decisions? Perhaps the reason lies in the fact that the author of these two judgments, Justice Krishna Iyer, judiciously weighed the personal law against Section 127 of the Criminal Procedure Code to arrive at decisions that appear to have been accepted and respected by the opposing parties.

In 1986, the government of India passed the Muslim Women (Protection of Right on Divorce) Act, 1986 . This act overturned the Supreme Court decision in *Shah Bano* case. It allowed maintenance to a divorced Muslim Women only during the *iddat* period. But this provision of the new law was seen as a contrast to Section 125 of the Criminal Procedure Code.

The Muslim Women's (Protection of Rights on Divorce) Act 1986 provides that a divorced Muslim is entitled to

1. a reasonable and fair provision within the period of *iddat* (a period roughly three months imposed upon a woman who has been divorced or whose husband has died, after which a new marriage is permissible).
2. two years maintenance for her children.
3. *Mehr* (dower) and all other properties given to her by her relatives, husband and husband relatives.

In case where a woman is unable to maintain herself after the *iddat* period the magistrate can order these relatives who are entitled to inherit her property, to maintain her in proportion to what they would inherit in accordance with Islamic law. If a woman has no such relatives the magistrate would ask the state *Wakf* Board to pay maintenance.

Danial Latifi, Shah's Bano advocate, challenged the validity of the enactment on this ground it violates the fundamental rights and its discriminatory character. in *Danial Latifi v Union of India* in 2001²⁵, the Apex Court not just upheld the act constitutional valid, but further clarified that liability of a Muslim husband cannot be restricted to the period of *iddat* only entire alimony is to be paid during *iddat* period only. Divorced woman is entitled to a reasonable and fair provision of maintenance to be made and paid to her with in the *iddat* period by her husband, but this includes future needs.

This verdict was, thus a step forward on the road to sex equality in as much as it provides a predominantly social, rather than religious grounding for maintenance provisions. Notwithstanding this liberal interpretation, the issue of discrimination on the basis of religion has not

²⁵ (2000) 7 SCC 740

gone away. It remains significant only Muslim women are denied maintenance under the Cr. P.C.

3.4. Right of Muslim Wife of Dissolution of Marriage

Under matrimonial jurisprudence, Muslim wife is certainly entitled to divorce her husband without taking recourse to 1939 Act. Islamic law believes in the 'breakdown theory' and not in the 'fault theory' of divorce and thus causes of breakdown of marital tie are not subject to any scrutiny. If there is 'irretrievable breakdown' of marriage due to 'incompatibility of spouses', law provides for out of court divorce so that spouses part with grace and dignity. Even Shariat Act of 1937 explicitly recognizes these types of divorces by using different terms such as *Khula*, *Mubarat* & *Lian* for the divorce by wife. The *Sharia* has laid down the rule that where a woman has been married before attaining the age of puberty, or with an unequal or where the husband is impotent, an apostate, an insane or is suffering from some disease or is missing, the wife on proving the said facts may seek the divorce as a matter of right and it becomes obligatory on part of the Kazi (judge) to dissolve the marriage. When the wife seeks divorce under any of the said provisions she will not surrender her dower in favour of the husband, as in case of *khula* and *mubarat*. Muslim woman is entitled to *Talak-e-Tafwid* ie delegated divorce which gives her an identical right to divorce at par with men under which she can divorce her husband without going to any court by simply pronouncing divorce on herself.²⁶ There is also a scope for drawing up pre-nuptial agreement or *Kabin-nama*. The British courts also upheld a Muslim woman's right to impose conditions upon her husband through pre-nuptial agreements. Though such agreements were deemed to be against public policy under English law. Some instances of conditional restrains upon the husband are: restraint on polygamy, right to matrimonial home/residence right of *Mehr*, right to work and earn, etc.²⁷

a. Talaq under Islamic Law

Pre-Islamic Period:

Prior to Islam, divorce among the ancient Arabs was easy and of frequent occurrence and that this tendency has persisted to some extent in Islamic law. But to take a fair and balanced view it must be observed that a Prophet showed his dislike to it in no uncertain terms. He is reported to have said that 'with Allah the most detestable of all things permitted is divorce.'²⁸ According to Abdur Rahim, at least four various types of dissolution of

²⁶ available at :<http://www.faizanmustafa.in/2017/05/30/muslim-womens-right-to-divorce-2/>

²⁷ Flavia, Agnes, *Family laws and Constitutional Claims* 49 (Oxford University Press, New Delhi, 2011)

²⁸ Asaf A.A. Fyzee, *Outlines of Muhammadan law* Revised by Tahir Mahmood 117 (Oxford University Press 2008, New Delhi)

marriage who known in pre-Islamic Arabia. These were *Talak, Ila, Zehar and Khula*. A woman if absolutely separated through any of these four modes was probably free to remarry, but she should not do so until sometime, called the period of *iddat*, had passed it. It was to ascertain the legitimacy of the child. But it was not a strict rule. Sometimes, pregnant wife was divorced and was married to another person under an agreement. It is interesting to note that period of *iddat* in case of death of husband then was one year.²⁹

After the Advent of Islam

The Prophet of Islam looked on these customs of divorce with extreme disapproval and regarded their practice as calculated to undermine the foundation of society. It was impossible, however, under the existing conditions of society to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi barbarous community to a higher development.³⁰ Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one and opens a way for the parties to seek agreeable companions and thus, to accommodate themselves more comfortably in their new homes.³¹ The reforms of Prophet Muhammad marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband and gave to woman the right of obtaining the separation on reasonable grounds. Ameer Ali asserts.

"The permission (of divorce), therefore, in the *Koran* though it gave a certain countenance to the old customs, has to be read in the light of the law givers' own enumerations. When it is borne in mind how intimately law and religion are connected in the Islamic system, it will be easy to understand the bearing of his words on the institution of divorce."³²

In considering the institution of divorce glib generalizations are somewhat dangerous. Some years ago, in writing on the subject, Fyzee observed.

"It is sometimes suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his without cause. Dower to some extent restricts the use of the power. But experience shows that greater suffering is engendered by the husbands withholding divorce than by his irresponsible exercise of this right. Under such conditions the

²⁹ Syed Khalid Rashid, *Muslim law* Rev. by V.P. Bhartiya 103-04 (Eastern Book Company, Lucknow, 2009).

³⁰ *Ibid*

³¹ *Yousuf, Rawther v. Sonoramma*. AIR 1971 Ker 261

³² *Supra* note 27 at 117

power to release herself is the surest safeguard for the wife. No system of law can produce marital happiness, but humane laws may at least alleviate suffering. And when marital life is wrecked, the home utterly broken up by mis understanding, jealousy and cruelty, or infidelity, what greater boon can a wife have than the power to secure her liberty? The unfortunate position of woman of India is due to the fact that women, being illiterate, are ignorant of their rights and men being callaous, choose to remain ignorant'.³³

Tahir Mahmood also points out that, "In India the courts, gradually realizing that the concept of *Talak* has been very much misunderstood in the past, have made appreciable efforts to remove the misconception in this respect.

Husbands Unilateral Power to Divorce:

Once it was said by V.R. Krishna Iyer in *Yousuf v. Sowranma*.³⁴

“The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. It is popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage.... However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the holy *Quran* laid down and the same misconception vitiates the law dealing with the wife's right to divorce...”

In Muslim community, one major factor which affects the status of women is the practice of divorce under Muslim Personal law, divorce is an easy matter for the husband as he enjoys an unlimited freedom to divorce his wife at his own will. Several schools like the *Jafari*, the *Hanafi*, the *Maliki*, the *Safai'i*, the *Hanbali* support men's right to triple talaq (talaq in one sitting). The *Quran* emphasizes that divorce should not be a hasty impulsive act but should also be finalized only after a period of waiting during which the couple is counselled and, given a chance to rethink on the decision. *Talaq* is a procedure that can be initiated by the husband alone without the consent of his wife. Besides, the exercise of talaq is extra-judicial and in no way subject to external check therefore, the power of the husband to divorce is absolute. Talaq may be pronounced in a number of ways, e.g., (1) Ahsan (2) Hasan (3) Bid' ah. The Ahsan form of talaq is *Talaq-I-Sunna*. The repudiation does not take place at a single sitting nor can it take place during menstruation. *Iddat* is observed during the period following menstruation that is *tuhr* or the

³³ Asaf A.A Fayzee, *Outlines of Mohammadan Law* 118 (Oxford University Press, 2009)

³⁴ AIR 1971 Ker 261

purity period. Two arbitrators from both sides are appointed to bring about reconciliation. During the period of *iddat* marriage is not dissolved. If reconciliation takes place, the marriage is saved and no *nikah* is needed. In *Ahsan talaq* even after the third pronouncement of *talaq*, after the *iddat* period, the marriage is revocable. The man can remarry his divorced wife. This practice is in accordance with the teaching of the *Quran* and according to Sunna rules. Both Sunni and Shia schools approve of *talaq-a-ahsan*. The Hasan form is *talaq-a-sunna* but is not as commonly accepted as *talaq-a-ahsan*. The man is supposed to pronounce *talaq* during the successive periods of purity or *tuhr*. A couple can live together as husband and wife if the husband so desires before he pronounces the third *talaq*. On the third *talaq*, the marriage is dissolved and the *talaq* is irrevocable. Therefore, he cannot remarry her. If she wants to remarry, she has to perform *Halala*, i.e., marry another man, consummate the marriage, consequently dissolve it, and only then remarry her divorced husband. Prophets and Caliph Ali condemn this process of *Halala*. All Shia and Sunni schools of thought have approved of *Talaq-a-Hasan*. Since it is not irrevocable, it is not very popular; yet, the Hanbali Sunni School gives it more importance than to other types of *talaq*. *Talaq-a-Bidah* is a form of divorce, which is severely criticized since it goes against the rules laid down by the *Quran*. However, the Sunna approves it. In this form of *talaq* the husband unilaterally, without the consent or knowledge of the wife, pronounces *talaq*. Husband can pronounce *Talaq* once or three times simultaneously, without paying attention to the fact whether wife is in a state of *tuhr*. The Prophet did clearly not approve of this form of divorce. Mohammedan law permits the husband to divorce his wife without any misbehavior on her part and without assigning any cause. This result in conferring on women an inferior status compared to their counter parts in other communities. According to Kapadia a system where the wife has continually hanging over her head the apprehension of divorce cannot but prove an abiding source of uneasiness to her."³⁵

On the other hand the woman is not given such freedom she is not free to remarry immediately even after pronouncing *talaq* (divorce). She has to wait for three mensural periods in order to confirm whether she is pregnant or not. The period of waiting is called *iddat*. Though the Prophet had given unlimited freedom to the man, he was not in favour of free divorce, as his aim was the stability of family and is permitted only in exceptional circumstances. Al Ghazali remarks that divorce in Islam is permissible when the object is not to trouble the wife but only in case of

³⁵ M. Indu Menon, *Status of Muslim Women in India' A Case Study of Kerala* 75 (Uppal Publishing house, New Delhi, 1981),

extreme necessity and on just grounds.³⁶ The behest of *Quran* regarding separation is:

Virtuous women are obedient and careful during husband's absence, because God hath of them been careful. But (as to) those for whose refractoriness you fear desertion, admonish them, but if they are obedient, seek not a way against them. Verily God is high exalted. And if you fear a breach between husband and wife, refer the matter to two arbitrators one chosen from the family of each party, if they desire. Allah will effect harmony between them.

In spite of all these restrictions, Muslim men still enjoy much freedom compared to women as far as divorce is concerned. In modern times many women in the Muslim community think that women also should be given freedom like men in seeking divorce.

No More "Talaq-Talaq-Talaq" Legal Precedent in Shamim Ara

In 2002, in a landmark ruling in *Shamim Ara v. State of U.P.*³⁷ The Supreme Court derecognized the husbands dictate to divorce in any manner, from any date past or future and without any proof. In order to a valid, talaq has to be pronounced as per the *Qur'anic* injunction. The term 'pronounce' was explained as 'to proclaim, to utter formally, to declare, to articulate'. While sitting aside the judgements of the two lower courts, the family court and the Allahabad High Court, the Supreme Court commented.

“None of the ancient holy books or scriptures mention such form of divorce. No such text has been brought to our notice which provides that a recital in any document, incorporating a statement by the husband that he has divorced his wife could be an effective divorce on the date on which the wife learn of such a statement contained in an affidavit or pleading served on her”.

Approving the decisions of Guhati High Court in *Jiauddin Ahmed v. Anwara Begum*³⁸, & *Rukia Khatun v. Abdul Khalik Laskar*³⁹ the highest court held:

“The correct law of *talaq* as ordained by the holy *Quran* is that *talaq* must be for a reasonable cause and be preceded by attempt at reconciliation between the husband and the wife by two arbitrators-one from the wife's family and other from the

³⁶ Furquan Ahmad, “Understanding the Islamic law of divorce” 45 *Journal of Indian Law Institute* (2003)

³⁷ (2002) 7SCC 518[

³⁸ (1981), Gau LR 358

³⁹ (1981) 1 Gau LR 375

husbands, if the attempts fail, *talaq* may be effected... We are also of the opinion that the *talaq* to be effective has to be pronounced. We are very clear that mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating *talaq* on the date of delivery of the copy of the written statement to the wife. The husband ought to adduce evidence and prove the pronouncement of *talaq*...⁴⁰

Unfortunately, despite the plethora of judgements cited here, the media continued to project that Muslim women are devoid of rights rather than dwell upon the entire judicial discourse. Which had held instant and arbitrary triple *talaq* invalid and safeguarded the rights of women approaching the courts for maintenance. Courts play an important role in striking a balance between the changing needs of the society and protection of the freedom of the individual. The Supreme Court and High Courts are the protector and guarantor of the fundamental rights, courts by way of several judgements have elaborated the exact extent and the nature of the guarantee given by the Constitution. These judgements in fact have clarified the law to a large extent.

The real law is what they do in actual judicial behaviors. The life of law is not logic but experience and what the court decide and this stresses the empirical and pragmatic aspects of law. Making new rules in legislation and it also includes judicial legislation. According to Dias & Hughes. "Legislation is law made deliberately in a set form by an authority which the courts have accepted as competent to exercise that function".⁴¹

In India judges fully realize that the legalistic approach cannot exclusively further or cater the social goals of the community. The process of social change was very slow in pre-independence period because of British domination and Parliamentary law had no real relationship with social justice in keeping with the life of the people. After independence the judiciary under new framework of Indian polity adopted the attitude of promoting social economic justice for the masses in order to promote welfare of people.⁴²

One of the earliest instances raising in a case of *Moonshee Buzulur Raheem v. Luteefut-oon-Nissa*.⁴³ where the privy council held that if under the Muslim law, no wife can separate herself from her husband under any

⁴⁰ The view referred in reaffirmed subsequently by Bombay high court in *Dagdu Pathan v. Rahimbi Pathan* (Najmunbee v. S.K. Sikander SK Rehman and Delhi High court in *Riaz Fatima v. Mohd Sharif*)

⁴¹ www.shodhgangan.in/flibnet.ac.in/bitstream/10603/54472/10/10-chapter/203pdf-p-181

⁴² *Ibid*

⁴³ (1867) 11 M.I.A. 551

circumstances whatsoever, the law is clearly repugnant to the natural justice and the privy Council was not bound to follow it. The court decided the case in favour of the wife, keeping in view the English doctrine of Justice, Equity and Good Conscience.

The Pre-Independence judicial trend was in favour of recognizing the triple talaq as an irrevocable divorce. The unilateral male repudiation of marriage sometimes favoured men, as it did in *Furzund Hossein v. Janu Bibee*⁴⁴ in which the man gained the right to his wife's conjugal company. The judiciary initially recognized unilateral male repudiation unconditionally and later introduced some conditions for its validity, Adjudication on this issue was based on unmodified Muslim legal traditions, the *Quran* and colonial precedent, not on legislation or the Constitution. As such, even though they had but little respect for the existence of triple talaq they nevertheless upheld its validity provided it followed the correct pronouncement.

After independence the judicial trend towards *triple talaq* till the decision of *Khadisa v. Mohammad*⁴⁵ was recognized as an irrevocable divorced if pronounced in single breath.

b. Journey of Shayra Bano from Supreme Court to Parliament

In February, 2016 Shayara Bano, from Uttrakhand filed a writ petition under Article 32 of the Supreme Court to challenge the validity of *Triple Talaq, Polygamy & Nikah Halala*. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 to the extent permit these practices; and the Dissolution of Muslim Marriages Act, 1939 does not provide remedy to Muslim women against their husbands' bigamy, that was available to women from other religions⁴⁶. in August 2017 by 3:2 majority Supreme Court in *Shayara Bano v. Union of India*⁴⁷ the practice of invalidate the practice of instant *triple talaq* in the eyes of the secular state. The majority of the bench held that *talaq* is not part of essential feature of Islam. Justice Kurian Joseph even stated that *triple talaq* is condemned by *Quran* and therefore cannot be even considered as aspect of Muslim personal law, the minority view of chief justice J.S. Khehar gave the dissenting opinion on the ground *Triple Talaq*, being uncodified personal law, is outside the scope of Article 13 of the Constitution of India. Justice Abdul Nazeer was of the opinion that *triple talaq* is valid form of divorce

⁴⁴ (1878) ILR4 Calcutta 588.

⁴⁵ (1979) KLT 878

⁴⁶ Hindu Marriage Act, 1955 s.17 Punishment of bigamy.—"Any marriage between two Hindus (including Buddhist, Jaina or Sikh) solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly".

⁴⁷ (2017) 9 SCC1

under Muslim law and right to follow personal law is an integral part of freedom of religion. But if parliament so wants it may enact a law on it. No one should question Parliament's power to legislate in respect of personal law in exercise of its legislative powers under Entry 5 of list III and thus it is certainly bring a law outlawing *triple talaq*. Nariman, Lalit & Joseph J.J constituted the majority in holding that triple talaq was un-Islamic, arbitrary and hence, illegal. Every punishment which does not assure from absolute necessity, says Montesquieu, is tyrannical. In fact, criminal law should be used only as a "least resort" (*ultima ratio*) and only for the "most reprehensible wrongs" Excessive use of criminal law for purpose it is ill suited to tackle is the harsh reality of modern state. Every year we are enacting new criminal statutes both at the central and well as in the states. The triple talaq another example.⁴⁸

4. The Muslim Women (Protection of Rights on Marriage) Act, 2019

The statement of objects and reasons note that the Supreme Court judgement has not worked as a deterrent in bringing down the member of instances of triple talaq⁴⁹. In order to prevent the continued harassment being meted out to the hapless married Muslim women due to *talaq-e-biddat*, urgent suitable legislation is necessary to give some relief to them. The legislation would help in ensuring the larger constitutional goal of gender justice and gender equality of married Muslim women and help subscribe their fundamental rights of non-discrimination of empowerment". The Muslim Women (Protection of Rights on Marriage) Act 2019" protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands.

The triple talaq law faced resistance inside and outside the Parliament both on technical and constitutional grounds. No doubt it is a progressive social legislation. The practice of *triple-a-biddat* is prevalent in India and had to be abolished at the earliest. However, the manner in which the Bill has been passed in the Lok Sabha. It has been felt that some provisions bear the character of being a hasty and ill-considered price of legislation.

⁴⁸ Indian express.com/article/opinion/columns/triple talaq-talaq-bill passed-parliament-lok sabha-legal-excess-5002913/

⁴⁹ Union Law Minister Ravi Shankar Prasad said the legislation was a must for gender equality and justice as despite an August 2017 Supreme Court verdict striking down the practice of instant triple talaq, women are being divorced by 'talaq-e-biddat'. He said that since January 2017, 574 such cases have been reported by the media. available at: <https://www.news18.com/news/politics/triple-talaq-bill-must-for-gender-justice-and-equality-says-centre-in-lok-sabha-oppn-terms-it-discriminatory-2245449.html>

5. Conclusion

Section 3 of Muslim Women (Protection of Rights on Marriage) Act 2019 makes the process of pronouncement of *talaq-e-biddat* by a Muslim husband upon his wife either by words, spoken or written or in electronic form "void and illegal"⁵⁰ meaning it would have no legal effect. Under Section 4, it further makes the utterance of *talaq*, *talaq*, *talaq* a criminal offence, punishable up to three years and fine.

The area of the concern is that the pronouncement of *talaq* in a single setting has already been declared void by the Supreme Court in 2017 and, it is an absurdity to make a person uttering it criminally liable, facing 3 years of imprisonment. Will the wife not be allowed to marry for three years. Further, Section 7 states that the offence of pronouncing triple *talaq* is a cognizable and non bailable offence⁵¹. However, by making the offence of triple *talaq* a cognizable offence, the police can arrest Muslim men without any from judicial oversight to determine other a warrant should be issued, and the police can take a Muslim man with custody even if the wife does not file a complaint. In these cases additional burden of proof lies upon the wife when case goes to the court and man denies having said this how will she prove it? Also, making the offence criminal closes the window of opportunity for the man to reconcile or negotiate with his former wife and provide her maintenance

The Act is a classic example of mal-drafting which lawyers have termed as strict liability offence *viz* one where ostensibly, or at least in present language, no mental intent (or *mensrea*) is required. The Act fails to address the crucial aspect of maintenance. Although the Bill provides for the maintenance allowance and custody of her minor children under Section 5⁵² and 6⁵³ but there is no clarity whether an interim relief with the

⁵⁰ The Muslim Women (Protection of Rights on Marriage) Act 2019 s 3 “Any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal”.

⁵¹ Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—“(a) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage; (b) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom *talaq* is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine; (c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person”.

⁵² The Muslim Women (Protection of Rights on Marriage) Act 2019 s.5 “A married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her

allowance can be provided or if the allowance will be provided only after the conviction of the husband. shelter the subsistence allowance provided under the proposed framework, is in addition to the maintenance to be provided under claim 3 and 4 of the Muslim woman (Provision of Rights on Divorce) Act, 1986.

As suggested by Prof. Faizan Mustafa, triple in his article why criminalising triple talaq is unnecessary over kill⁵⁴ triple talaq may be treated as a civil wrong if we really want to send people to jail for giving triple talaq, this too is possible under civil law. There can be imprisonment for non payment of debt or maintenance or contempt of court. Thus triple talaq may be considered civil contempt of supreme court.

husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate”.

⁵³ The Muslim Women (Protection of Rights on Marriage) Act 2019 s.6 “A married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband, in such manner as may be determined by the Magistrate”

⁵⁴ <http://the.will.in/205140/why-criminalising-triple-talaq-is-unnecessary-over-kill/>

Role of Police and Prosecution in Eliminating False Rape Cases: Applying the British No-Crime Label in Indian Criminal Justice Administration

*Yophika Grace Thabah*¹
*Rini Jincy Paul*²

Abstract

The Criminal Law (Amendment) Act, 2013 brought about robust changes in the country's rape laws but not without its concomitant worries. With retribution and deterrence as its holy grail, the landmark legislation emphasised on police sensitisation in rape cases and improving police responses to rape complaints by women. However, this overhaul has led to a surge in filing of rape cases and has proved to be a poisoned chalice for the criminal justice system with numerous instances of malicious filing of false rape cases. When police officers come across false rape allegations, they are left with no discourse as they are bound by the mandate of the new law that gives blanket credibility to the victim's testimony. Such phenomenon has drastically changed the approach of police officers towards rape cases, especially when the offender is an acquaintance of the victim, resulting into spurious investigations. This paper examines the role of police along with the prosecution in eliminating false rape cases through a legitimate and rigorous exercise of fact-finding and drawing a concurrent reasonable conclusion all the while balancing the rights of the accused and justice to victims. Investigation must serve as a sieve to limit the trial of cases that would put the accused to great oppression and prejudice without sufficient grounds. Such can be achieved by applying the Britain-origin 'no-crime' label on reports that are found to be 'untrue' rather than to cases where the complainant withdrew or there was insufficient evidence to prosecute. The paper suggests that the prosecutor and the investigating agency must actively take part in finding out the truth, which is the overarching aim of every criminal justice system.

Keywords: False Rape Allegations, No-crime, Police Sensitisation, Rights of the Accused, Victim's Justice.

1. Introduction

The Criminal Law (Amendment) Act, 2013 aims at retribution and deterrence by enhancing punishment of sexual offenders, protecting victim's integrity during trial and prohibiting appalling police conduct towards rape complainants. With the advancement of legal awareness for the merits of the Act, it is observed that the number of reported rapes per 100,000 women in India have multiplied ever since and as per existing data published by

¹ Assistant Professor at Symbiosis Law School, Pune

² Development Associate at Educate Girls, Andheri (West), Mumbai, Constituent of Symbiosis International (Deemed University), Pune, Maharashtra

National Crime Records Bureau 2016, the total number of reported rape cases in India is 38,947³. This number is likely to have increased over the years till present. However, the law does not provide for a mechanism to prima facie identify real from false cases at the early stage of filing a complaint. Police officers cannot test the veracity of the statement of the victim or complainant. In the cluster of aggregates, truth and rule of law may lose its way as criminal justice will be flouted with unfounded allegations and spurious investigations as police officers are under constant pressure by media and the public based on the new law to ensure that the accused person is put on trial and receives conviction.

The marvel of deceitful indictments of sexual assault is not new to the criminal equity framework in India. The International Association of Chiefs of Police (2005) characterises unfounded indictments as ‘a rape report that demonstrated no wrongdoing was submitted or endeavored after an exhaustive examination’. The steady development of this problem prompts issues in examination and can cause contrary results for exploited people, accused persons and network police connections⁴. Bogus claims of rape often created a hostile environment of distrust between the police and the public, which more often than not negatively influences police’s discernment, for example, seeing high paces of misleading allegations particularly when the injured individual is firmly familiar with the guilty party; acknowledgment of other assault legends, for example, “ladies cry assault” or “men cannot be assaulted” and underreporting⁵. India as a nation is already suffering from high rate of acquaintance rapes and underreporting and false rape allegations only further the problem.

Rooted with motives of revenge, hurt and protecting family honour, Indian women and parents often with contrivance opt for filing a rape case which sometimes lead to victims turning hostile or wrongful convictions. Either way, justice as a concept of fairness and equality stands tainted. The Delhi Commission of Women reported that 53.2 percent of the rape cases filed in the capital between 2013 and 2014 were found ‘false’⁶. Subsequently, The Hindu on July 2014 conducted a six months’ research on

³ Roshan Kishore (2018). *Why the severity of India’s rape problem can’t be captured by crime statistics*, available at: <http://Why the severity of India’s rape problem can’t be captured by crime statistics> (last visited on October 20, 2019).

⁴ Danielle Ostrander, “Police Perceptions on False Accusations of Sexual Assault” Paper 3248 *Electronic Theses and Dissertations* 7 (2018).

⁵ David Lisak, Lori Gardinier, Sarah C. Nicksa, & Ashley M. Cote, “False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases” 16(12) *Violence Against Women* (1318-1334)

⁶ DNA. (2014). 53% rape cases filed between April 2013 and July 2013 false: Delhi Commission of Women. Retrieved from <https://www.dnaindia.com/india/report-53-rape-cases-filed-between-april-2013-and-july-2013-false-delhi-commission-of-women-2023334> (last visited on October 28, 2019).

approximately 600 rape cases that were heard by six Delhi District Courts and the study and reported stark findings, wherein 20 percent of the cases were dismissed due to the absence or hostility of the victim. Out of the cases that were tried, 40 percent dealt with consensual sex, which involves a young couple eloping against the parent's wishes and another 25 percent dealt with cases of breach of promise to marry⁷. A similar study conducted in Mumbai's two Session Courts in Fort and Dindoshi in the year 2015, provided the voices of several investigating officers, who on being questioned about scripted First Information Reports, stated that "if the parents approach us saying their daughter has run away with a boy from the neighborhood, we *have to register a complaint* of kidnap of minor and later when she says she had relations with the boy, we *add the rape charge*, even when the girl is touching 18 years of age. Then it is for the court to decide whether it was rape or not"⁸. Later in 2017, a senior police official from the Jaipur Police Headquarters in his statement revealed that out of 276 cases that were solved in the city, 43% were false. In several of these cases, the complaint was filed to extort money or to falsely implicate an individual⁹. Such instances evince that police officers file charge sheet in a routine manner despite finding that the case is false after thorough investigation, as the current law does not empower them to decide a case on merit due to separation of executive from judiciary. This further contributes to the already existing challenge faced by our criminal justice administration today, which is to ensure a speedy trial to safeguard the rights of the accused as well as the victim.

The objective of this paper is not to shift the attention to victim blaming, which has already suffered a major setback in the 1970s, but it is to identify the role of police along with the prosecution in eliminating false rape cases through a legitimate and rigorous exercise of fact-finding and drawing a concurrent reasonable conclusion all the while balancing the rights of the accused and justice to victims.

2. Procedural Reform in Police Decisions Post Investigation

The whole criminal justice framework in our nation revolves around the Criminal Law sanctioned by the Union Parliament and the State Legislatures. The police function as the essential law implementing organisation of the state apparatus. Their main task in the criminal justice

⁷ Rukmini Srinivasan, "The many shades of rape cases in Delhi" *The Hindu*, June. 15, 2016.

⁸ Ibid.

⁹ Crime & city: 43% rape cases that we 'solved' in 2016 were false, say police. (2017). Available at <https://timesofindia.indiatimes.com/city/jaipur/crime-city-43-rape-cases-that-we-solved-in-2016-were-false-say-police/articleshow/56748082.cms> (last visited on November 4, 2019)

system is to take cognizance of every serious offence as soon as it is committed and then proceeds to the spot to deduce the facts and identify the offender. Investigation as a matter of Criminal Procedure is the sole prerogative of police officers and alludes to all that occurs preceding one's being blamed for a wrongdoing under the steady gaze of a Judge or a Magistrate (Santhy, 2016).

The First Information Report pushes the wheel of criminal law in motion. In the landmark judgment of *Lalita Kumari v. Government of UP*¹⁰, the Supreme Court held that officer in charge of a police station must lodge an FIR mandatorily on receipt of an information disclosing the commission of a cognizable offence. Likewise, Section 166A of the Indian Penal Code, 1860 which was included by the Criminal Law (Amendment) Act, 2013 provides for the punishment of public servants who disobey directions under law.¹¹ However, it must be noted that at the threshold of lodging of FIR, there is no need of scrutinizing into the truthfulness or otherwise of the complaint. This can happen only after thorough investigation.

Section 156 of the Code of Criminal Procedure, 1973 provides for immediate investigation by police officers without the order of the Magistrate in cases showing commission of cognizable offences. The procedure for investigation is given under Section 157 of the Code of Criminal Procedure, 1973¹². The section requires that the officer in charge of

¹⁰ (2014) 2 SCC 1

¹¹ "166A. Whoever, being a public servant, -

(a) Knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or

(b) Knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or

(c) Fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure Code, 1973, in relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509, Shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine."

¹² "157. Procedure for investigation-

(1) If, from information received or otherwise, an officer in charge of a police station has *reason to suspect the commission of an offence* which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that-

a police station on receipt of an information of the commission of a cognizable offence, shall immediately sent the report intimating the same to the nearest Magistrate having jurisdiction and proceed to the spot for the collection of evidence, discovery and arrest of the offender. Proviso to Section 157 further provides that, “if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.” Rape cases are such wherein police officers cannot categorize them into “not serious offences” or “weak prosecution offences” and therefore they cannot use their discretion to disregard or refuse investigation.

The Department of Home Affairs of United Kingdom passed an Order¹³ under section 23 of the Criminal Procedure and Investigations Act, 2016 to set out the way and technique in which investigating officers are to collect and disclose material evidence to the prosecutor that has been obtained during the investigation. The ‘Act’ explains that “the purpose of investigation is to ascertain whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it”.¹⁴ This incorporates three premises:

- (i) Investigations into offences that have been committed;
- (ii) Investigations, whose object is to find out whether an offence has been carried out, with a view to possibly institute criminal proceedings; and
- (iii) Investigations which begin with the presumption of guilt.

The first two premises set out the situational context that allows police officers to direct their crime investigation techniques for search of truth, while the last premise is for crime prevention. In all three, investigation must serve as a sieve to limit the trial of cases that would put the accused to great oppression and prejudice without sufficient grounds.¹⁵

“(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub-section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.”

¹³ Criminal Procedure and Investigations (Code of Practice for Criminal Investigations) Order 2017.

¹⁴ *Criminal Procedure and Investigations Act, 2016*. Article 3, s.2.

¹⁵ *Ibid.*

However, in the Indian context, the criminal justice machinery is based on the “search of truth” premises and not necessarily on crime prevention. Despite having reasonable grounds to believe that the offence is not made out, investigating officers can only use their discretion partially on adjudging the guilt of the accused.

The investigating officer must form an opinion under Section 169 or 170 of the Code of Criminal Procedure, 1973 on completion of investigation regarding the status of the case and the need to forward the accused person to the Magistrate for trial. Section 169 of the Code allows the officer in charge of the police station to release the accused from custody after him executing a bond, with or without sureties when there is insufficient evidence to justify forwarding the accused to the Magistrate. The accused will then appear before the Magistrate whenever he is directed to appear.¹⁶

This provision of law only enables the officer in charge of police station to temporarily release the accused person from custody when there is no sufficient evidence against him, while a final report under Section 173 of the Code is mandated to be filed and submitted before the Magistrate, and the final discretion lies with the Magistrate to decide on the subsequent course of action. At this stage, the accused is not judged innocent by police officers, but it is for the court to decide the same. The investigating officer is only applying his knowledge, experience, and skill to the case. Also, the Criminal Law (Amendment) Act, 2013 inserted a proviso to Section 309 of the Code of Criminal Procedure, 1973 that states:

“Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filing of charge sheet.”

It can be observed that the law stated above attempts to secure the liberty and rights of the accused person, while upholding the principle of ‘prove beyond reasonable doubt’, when it is not clear as to the blameworthiness of the accused person. However, Section 169 of the Code is not enough as the bigger problem arises when the rape complaint is actually ‘untrue’. Mere

¹⁶ “169. Release of accused when evidence deficient- If upon investigation it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground for suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial”.

release from custody because of insufficient evidence or speedy disposal of cases that leads to acquittal, will not cure the problem of stigmatization and labelling by society. The Labelling Theory that originated in the 1960s that were partly contributed by Howard Becker and Emile Durkheim states that people tend to behave and identify in ways that reflect how others label them¹⁷. Men falsely accused of rape are labelled criminals even before being adjudged as one. Yogesh Gupta, a victim of false allegation after being acquitted in 2017 remarked, “nobody listened to what I had to say. The police did not even consult me. I tried everything. Despite the acquittal, I did not get justice.”¹⁸ Cases like Gupta’s are just one of those few reported instances, while there are thousands in the same plight.

Conviction rates in the country is extremely low. Out of 4 rape cases filed, only 1 leads to conviction¹⁹. There may be several factors responsible for low convictions, such as insufficient evidences, disappearance of complainant, victim turning hostile, faulty investigations, etc. In the case of false rape allegation, after a fair investigation is conducted, there is a high likelihood that the subsequent outcome will either be a dismissal, discharge, or acquittal. Even then, courts are unnecessarily burdened with having to deal with such unfounded cases. It is therefore required to empower police officers to label a particular rape report as ‘no-crime’ at the pre-trial stage prior to filing of charge sheet under Section 173 of the Code, so as to do away with the mechanical requirement of investigating officers having to submit a police report to the Magistrate, despite having reasonable and bonafide grounds to believe that the allegation in itself is false. The ‘no-crime’ label is to be applied to those reports that were false, as opposed to those situations where, for instance, the complainant pulled back her charge or where there was lack of proof to indict²⁰. This concept is borrowed from the United Kingdom when the Home Office issued circular 69/1986 that sets out two criteria for an offence to be no-crime, that the complainant retracts the allegation and admits to fabrication²¹. In addition, the ‘no-crime’ label must strictly be used to categorize those rape cases where, in the opinion of the investigating officer after thorough investigation it is found that the prima facie facts as stated never happened or existed in the first place. It

¹⁷ Crossman, A. (2018). An Overview of Labeling Theory [Blog]. Available at <https://www.thoughtco.com/labeling-theory-3026627> (last visited October 5, 2019).

¹⁸ Joanna Jolly (2017), Does India have a problem with false rape claims? Available at <https://www.bbc.com/news/magazine-38796457> (last visited on November 4, 2019). Also see, *State v. Yogesh Gupta* SC No. 08/16

¹⁹ National Crime Records Bureau, “Crime in India Statistics” (Ministry of Home Affairs, 2016)

²⁰ L.J.F. Smith, “Concerns About Rape”, Home Office Research Study 106 (1989)

²¹ Susan J. Lea, Ursula Lanvers & Steve Shaw, “Attrition in Rape Cases”, 43 *British Journal of Criminology* 584 (2003). Also see, a Home Office sponsored study by Harris & Grace, 1999

may be argued that there will be misuse of the “no-crime” label for reasons other than that the allegation was false. In acquaintance rape especially, finding the truth becomes difficult. Thus, investigating officers must take efforts to accurately collect physical evidences with the aid of forensic science. Lie detectors and NARCO Analysis that were often used on the accused persons should also be adopted on complainants or victims, with their consent when the officer has reasonable ground to believe that the allegation is false. Police officers must also be trained in utilizing the Theory of Fabricated Rape in their interrogation techniques. The above mentioned theory is useful in strengthening the prediction of a false allegation from a true allegation of rape based on the principle that “a false complainant of rape has not been raped and has to fabricate a story while the story of a true victim is based on recollections of the event”²². It is pertinent to note that problems like police officers misinterpreting victim’s reactions will undoubtedly remain. It is worth emphasizing on the importance of educating police officers to better understand other variables that may influence police perceptions, such as victim’s reaction to rape, victim’s judgment of how they are treated by officers and external influences by relatives, etc.²³

Therefore, there is a need to include prosecutors in the process of categorizing rape reports as “no-crime” at the stage of investigation so as to provide legitimacy to the police findings. This will be further explained in the latter part of this paper. Also, anonymity of the complainant increases the risk of false allegations²⁴. It is highly recommended that the identity of the accused person also remains to be anonymous until the end of trial. As investigation is a sole prerogative of the police, Magistrates based on the ‘no-crime’ report may pass appropriate orders without further probing or conducting additional inquiry. This will effectively save time and resources of the court and also protect the dignity of the accused.

3. Expanding the Role of Prosecutor to Create Balance of Justice for Victim and the Accused

The fundamental principles of criminal jurisprudence are ‘presumption of innocence’, ‘burden of proof on the Prosecution’ and ‘right to fair trial’. India follows the adversarial system of criminal justice, wherein the prosecutrix and defense go about as rival sides and compete to persuade the judge and jury that their variant of the reality is the most convincing.

²² Zutter De et.al., “Filing false vice reports: Distinguishing true from false allegations of rape” 9(1) *The European Journal of Psychology Applied to Legal Context* 1-14 (2017)

²³ Philip N.S. Rumney, “False Allegations of Rape” 65(01) *The Cambridge Law Journal* 128, 129, 150-152 (2006)

²⁴ Jeanne Gregory and Sue Lees, “Attrition in Rape and Sexual Assault Cases” 36 *British Journal of Criminology* 12-13 (1996)

Trial of the accused under the Indian Criminal Justice System includes the following stages:

1. Courts take cognizance of the case under S.190 of Cr.P.C.
2. Charges against the accused are framed
3. Prosecution evidence is recorded
4. Statement of accused is recorded
5. Defense evidence is recorded
6. Final arguments presented by prosecution and defense
7. On the basis of the evidence and arguments, judge pronounces the judgment

The role of the public prosecutor in a criminal trial is that of a commentator in all of the above-mentioned stages. He does not have the authority to decide if a case should be set up for trial and acts in solely advisory capacity during the pre-trial stages²⁵.

The Indian Criminal Justice System has evolved a great deal over a period of time since its establishment under the British regime. Some call the system archaic due to its almost ancient nature, however, there are others who want to preserve the sanctity of the existing system at all costs with limited scope for any major changes or an upheaval. Right to fair trial is an essential tenet of the Indian Criminal Justice System and 'speedy trial' is inalienable to fair trial. In *Husainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1360 the Supreme Court of India stated that "No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21."

According to a Times of India report on 31st December 2018, pendency of cases is at an all-time high of 2.9 crore cases and out of these, 71% are criminal cases. When the term used is 'Speedy trial' the focus is usually on the judge presiding over the trial who is held responsible for the lethargic process of a case. If the term of 'speedy trial' is re coined as 'speedy prosecution', the whole facet of reflection will change²⁶. The public prosecutor could play a decisive role in a speedy of disposal of cases and contribute at the pre-trial stage through active participation in the process of investigation.

²⁵ Rimpj Bhardwaj, "A Critical study of the role of prosecutor in criminal law" 3 *International Journal of Law* 2-4 (2017)

²⁶ V. Radha Krishna Krupa Sagar, "The Role of Public Prosecutor in Criminal Justice System" (2013) Ph.D. Thesis, Post Graduate Department of Legal Studies and Research Acharya Nagarjuna University, Indexed in Shodhganga available at <https://shodhganga.inflibnet.ac.in/handle/10603/8115> (last visited on October 25, 2019)

It is quite alarming to note that currently, 75% of the prosecution across the country fail to demonstrate the blame of the accused. In the adversarial framework, quittance of a charged just shows that the prosecution failed to prove the guilt of the accused and the unavoidable deduction drawn is that poor arraignment brings about enormous number of vindication. Poor prosecution could be the aftermath of poor investigation on the part of the police or poor performance of the public prosecutor or both. Therefore, repositioning the role of the prosecutor in the criminal justice system could not only improve the number of convictions but also improve the quality of prosecution carried out in trial.

The 41st report of the Indian Law Commission suggested that an individual accused of any crime must get a fair trial as per the standards of natural justice and all endeavors must be made to maintain a strategic distance from delay in investigation and trial. It is the obligation of the Magistrate to take cognizance of the matter if there is adequate material on record to continue against the accused. In nations, where criminal procedures travel through the component of adversarial framework, the accused is assumed innocent until proven guilty. The method and manner of proving the guilt is that of focused presentations by the Prosecution as a lawful agent of the state, and countered by the defense counsel as a delegate of the accused²⁷

Prosecutor is an officer of the court. He holds great importance in a criminal trial. However, the Code does not lay out the role of the prosecutor during investigation. The Supreme Court held in *Hitendra Vishnu Thakur v State of Maharashtra*²⁸ that “There can be no manner of doubt that the Parliament intended that the Public Prosecutors should be free from the control of the police department.” In *Shakila Abdul Gafar Khan v Vasant Raghunath Dhobale*²⁹ the Supreme Court emphasized on the crucial role of the Public Prosecutor saying, “A public prosecutor is an important officer of the state government and is appointed by the state under the Criminal Procedure Code. He is not a part of the investigating agency. He is an independent statutory authority.” It is not debated that the office of the public prosecutor has to remain impartial and neutral to avoid influence and tremendous pressure from different factions leading to contentious actions on their end. However, in the arguments of empowering the investigating officer to label a false rape allegation as ‘no-crime’, the prosecutor must be acknowledged as a positive force in fairly concluding a matter during the investigative process and thereby, leads to quality improvement in the criminal justice delivery system.

²⁷ *Amir Hamza Shaikh v. State of Maharashtra and Anr.* Criminal Appeal No. 1217 of 2019

²⁸ 4 SCC 602, 1994

²⁹ 7 SCC 749, 2003

The office of the public prosecutor in France is closely integrated with the enforcement machinery of the government. They sit at the center of the criminal justice system in France and decide which cases enter the system and influence the way they are dealt with starting from criminal investigations to sentencing. Prosecutors in France are like independent judicial officers with a strong sense of public interest with a mandate to adapt to an accusatorial-type procedure which pitch them in opposition to the defense and to the managerial imperatives of local and national hierarchies. The French criminal justice system is based on the inquisitorial system, in which, a state official, entrusted with collecting evidence, both incriminating and exculpatory, conducts an official inquiry³⁰.

Under the French Criminal Justice system, the prosecutor is given the responsibility of fact-finding for the court to come to a final decision on a case. With the rise of false prosecutions in India especially under the rape laws as per the Criminal Amendment of 2013, the prosecutor could prove to be crucial to the aspect of fact finding in cases of false rape cases filed by complainants. The prosecutor could also assist the police to not only identify false cases but also help victims or complainants who withdraw the case out of fear or lack of any evidence, societal pressure or any other reason.

Article 21 of the constitution provides for “fair and proper investigation” as part of the wider concept of fair trial. The objective of investigation is to prevent pendency of cases with no reasonable evidences before courts which ultimately leads to acquittal. If the search for truth is the overarching aim of every criminal justice system, then truth once founded on investigation or inquiry, based on the tenets of fairness and procedure established by law, can be concluded as a case falling under the ‘no-crime’ category and therefore, need not be filed before a Magistrate for further process.

4. Conclusion

In Common Law countries like India, evidence to show reasonable grounds to prosecute an accused is a must and the responsibility of collecting the evidence has been solely bestowed upon the police. Police function involves not just safeguarding the society and maintenance of peace and order, but it also includes investigation of crimes, collecting evidence and testifying in court on the same. However, with the appalling increase in the number of false rape cases, it has been proposed that the Public Prosecutor should be a part of the investigative process so that the over-

³⁰ Jacqueline Hodgson and Laurene Soubise, “Prosecution in France” *Oxford University Press* (2017) available at <https://ssrn.com/abstract=2980309> (last visited on November 1, 2019)

arching aim of fact-finding is given precedence over all of the other niceties and procedures of the criminal justice system that has developed over time.

Criminal Law (Amendment) Act of 2013 mandates the filing of complaint in case of the offence being rape. However, this mandate does not provide room for exercise of any discretion before initiating an investigation into the complaint. Therefore, with the involvement of the prosecutor in the process of investigation, there would be room for discretion based on reasonable grounds on the foundation of solid evidence and fact-finding. Therefore, post conducting a preliminary inquiry on the complaint filed for rape, if the prosecutor along with the investigating officer concludes that there is lack of sufficient, reasonable grounds for any further procedure to be carried out against the accused, then the accused must not be subjected to any trial. However, if the Magistrate while acting on his supervisory powers, invoke the necessity of a trial, then the same should not be a lengthy one.

The Malimath Committee Report of 2003³¹ has also suggested for the involvement of the prosecution in pretrial stage of a case. The report rightly points out that the amalgamation of the two wings, would neither place the prosecutor below the authorities of the investigating agency nor hamper the constitutionality of his office. Therefore, as it has been rightly said by Andre Gide:

“Everything has been said already, but as no one listens, we must always begin again”³².

To strike a balance between the executive and judiciary for the ends of justice has been a priority since times immemorial, however, when systems stop progressing, dialogue for a reform must begin in order to bring about changes to improve the existing procedure for the welfare of the victim and to protect the rights of the accused.

³¹ Government of India, “Report of the Committee on Reforms of the Criminal Justice System” (Ministry of Home Affairs, 2003)

³² Andre Gide, Goodreads available at <https://www.goodreads.com/quotes/414930-everything-that-needs-to-be-said-has-already-been-said> (last visited on October 30, 2019)

An Enigma Called Insanity: Exploring the Defence of Insanity in Criminal Law with Special Reference to Multiple Personality Disorder

*Souvik Roy¹
Samantha Ray Das²*

Abstract

The human brain is one of the most complex creations of nature and so is the defence of insanity, arising out of the same human mind. This paper elaborately discusses the different landmark rules that have affected the interpretation of this defence from time to time. Next, it also highlights the different forms of insanity mainly dealing with automatism and psychopathy while debating whether these could be fairly categorized under the defence of insanity. Furthermore, explicit discussion on the phenomenon of multiple personality disorder (MPD) coupled with a unique attempt to link MPD with the defence of insanity in criminal law has been ventured upon. The paper, therefore further enumerates the different approaches adopted in order to interpret MPD in the light of insanity defence, namely the Unified Approach, the Host Personality Approach and the Clinical Approach. Lastly, the researchers also proposed of introducing and applying the Brain Electrical Oscillation Signature Profiling Test vis-a-vis BEOS test, to determine the certainty of the existence of the disorder in the suspect, to a great extent. The test could help in ascertaining the criminal culpability to a greater degree. This research piece attempts to justify the above proposition by taking a hypothetical scenario and explaining the technique involved. The authors of this paper hereby declare that the same is original and unpublished before on any platform.

Key Words - *Insanity, McNaughten Rules, Multiple Personality Disorder, BEOS, Automation, Psychopathy, Alters, Intention*

1. Introduction

The human brain is one of the most complex and complicated creations of nature. It has innumerable ways of functioning and many other ways of controlling the body's conduct. Despite the huge leap taken by medical science, towards development and innovation in the same arena as well as that of technology, one can often find studies which indicate that scientists and medical scholars, through emerging technology, have tapped and understood only minimal share of the vast power of the brain. There still remains an ocean of mysteries that need to be solved if one wishes to

¹ Assistant Professor, School of Law, KIIT Deemed to be University, Bhubaneswar, Odisha

² Student, B.A. LL.B. (Hons.), School of Law, KIIT Deemed to be University, Bhubaneswar, Odisha

understand the functioning of the brain wholly; such is the enigma called the human mind.

When one enters the arena of criminal law, the significance of human mind and its consciousness becomes a matter of paramount importance. The two well-established elements of criminal law are *actus reus*, which denotes the action and *mens rea*, that denotes the guilty intention. While *actus reus* can be significantly backed by physical evidence in most cases, proving the requisite *mens rea* is what continues to be a dilemma often witnessed in the courtroom. In criminal law, both *actus reus* and *mens rea* must coexist in order to hold an accused responsible in the eyes of law. Mere evidence of the fact suggesting that the accused committed the crime is not sufficient enough to convict him. It must be evidenced beyond reasonable doubt that the accused possessed an intention to do what he did. Until and unless, the guilt is not proven, any accused is presumed to be innocent. Such is the importance of intention in any criminal case. When this scenario is accompanied by a case where the accused claims to be of unsound mind and that he did so under the influence of such unsoundness of mind, then it becomes even trickier for the Court to decide the matter. Such form of defence is known to be the plea of insanity. The defence of insanity is found in many legal systems. However, the way each system interprets insanity, differs from nation to nation. In India, for instance, Section 84 of the Indian Penal Code lays down the provision for such a defence. It says that “no person shall be guilty of any offense, if he, by reason of unsoundness of mind, is unable to know the nature of his act and that such act is either wrong or contrary to law, at the time of committing the offence”. Here, ‘nature of the act’ refers to the physical aspect of the concerned conduct. This section acquits any person who, while committing the offence, failed to appreciate what he was doing physically, or even if he did so, to know that what he was doing is either a moral wrong or a legal wrong. The Indian Penal Code derives the foundation for this section, from the well-known M’Naughten Rules, which arose out of the famous M’Naughten case which has been later discussed in detail. While India and some countries follow the M’Naughten standards, yet there are others who base their insanity laws on different rules laid down in the legal history.

To understand the working and application of the defence of insanity, one must look into the four different landmark standards established over time, to interpret the issue of insanity with respect to criminal responsibility. Proper acquaintance of these standards would enable one to identify the common universal ingredients that strengthen the claim of insanity and also the loopholes in each one of them. Further, a closer look at the supposed forms of insanity and their respective interpretations in the courtroom would be of immense help in acquiring a clearer understanding of the issue and moreover, to suggest and formulate possible reforms or

improvements that would enable delivery of maximum quantum of justice to the individual parties concerned as well as the society as a whole.

2. Landmark Rules

2.1. The McNaghten Rules

In 1843, Daniel McNaghten was constantly under a hallucination that Sir Robert Peel, the Prime Minister of that time, was after his life and would soon persecute him. Frustrated with this imagination, McNaghten made up his mind to kill the Prime Minister in order to end his ordeal. He did make an attempt but mistakenly shot Mr. Drummond, the Private Secretary, who resembled the Prime Minister in outward appearance. Following this, McNaghten was tried at the Central Criminal Court at Old Bailey and was found to be not guilty by reason of being insane. The “House of Lords” propounded a group of questions for the Crown’s Judges to answer. Their answers framed what came to be famously known as the McNaghten Rules. The answer in its essential parts read³,

“The jurors ought to be told in all cases that every man is presumed to be sane, to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be proved that (A) at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, (B) as not to know (1) the nature and quality of the act he was doing, or, if he did know it, (2) that he did not know that he was doing what was wrong. (3) that if the defendant labours under a partial delusion only, and not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.”

The McNaghten case was the foundation stone of the plea of insanity which had laid down a set of precisely defined rules that are to be applied in any case involving the defence.

In *R. v. Kemp*⁴, the defendant lashed out at his wife with a hammer. He argued that his act was a result of loss of consciousness due to arteriosclerosis. Arteriosclerosis is a condition which leads to thickening and hardening of the arteries, as a result of which the arteries lose their elasticity leading to congestion of blood in the brain. Among the symptoms of arteriosclerosis are confusion, difficulty in understanding, speech and vision.

³ Glanville Williams, *Textbook of Criminal Law* (Universal Law Publishing Co. Pvt. Ltd., Delhi, India, 2009)

⁴ (1957) 1 QB 399

The prosecution used the McNaghten Rule to strengthen their argument by asserting that arteriosclerosis was not a “disease of the mind”, rather it was a bodily impairment. Hence, the plea of insanity would not work in the present case. The court held that arteriosclerosis could amount to a ‘disease of the mind’ due to its effect on a person’s reasoning or decision-making faculty. Devlin J. observed that the term ‘mind’ in law does not specifically refer to brain. It refers to “the mental faculties of reason, memory and understanding”.

The Court also observed that for enjoying the usefulness of the plea of “unsoundness of mind”, no line of differentiation should be constructed between ailments of the brain, and those of the body hampering the functioning of the brain. Thus, allowing the plea of insanity and widening the interpretation of the McNaghten Rule, the jury gave a judgement of guilty but insane.

These Rules, though followed widely, are alleged to be broad and narrow simultaneously. They are too broad because it is suggested by them that each failure of a human to judge the “nature and quality of the act” or that it was immoral will be enough to negate liability.⁵ If the defendant has made a cognitive or critical error, then it is entitled to be excused only and only if his evaluation and cognition is radically isolated from his background values and beliefs.⁶ On the other hand, the Rules are too narrow in the sense that it does not protect people who are aware of “the nature and quality” of their act but whose general capacities are sufficiently lacking that they do not possess status-responsibility at all.⁷ The Rules do not appreciate the importance of time for responsibility. There maybe defendants who undergo a persona change such that the desires and beliefs that they carry are not indicative of their settled character.⁸ Such people may have all of the capabilities of a sound accused at the time at which the action is performed, but they lack liability for their actions on the grounds that during that time *they were not really themselves*.⁹

2.2. The Irresistible Impulse Test

The “Irresistible Impulse” principle announced its entry into the legal system of the United States of America in 1844. Abner Rodger murdered a prison guard, after stabbing him inside the prison where Rodger was held. The sole plea put up was that he suffered from an “unsound state of mind” during the stabbing. Following this, Rodger was held not to be

⁵ Victor Tadros, *Criminal responsibility*, (Oxford University Press Inc., New York, 2005)

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.

guilty of the offence by reason of insanity, by applying the Irresistible Impulse Test. In this case, the Chief Justice stated;¹⁰

“If then it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgement, and whether the prisoner...acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.”

In *Parsons v. State*¹¹, the court ruled that despite the fact that the accused was capable of distinguishing correct from incorrect, he was subjugate to "the duress of such mental disease [that] he had ... lost the power to choose between right and wrong" and also that "his free agency was at the time destroyed," and hence, "the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely." In the year of 1897, the US Supreme Court applied the "Irresistible Impulse test" and hence, disapproved of the McNaghten Rules absolutely.¹² Another popular case in which this standard was utilized is the case of Lorena Bobbitt, who had mutilated her spouse's penis after he came back home, intoxicated and ravaged her¹³, in 1994 where she was held to be not liable of homicide when her counsel put up the plea of the Irresistible Impulse principle.

In English law, the standard was introduced in *R. v. Byrne*¹⁴, where Chief Justice Parker gave a broader meaning of "abnormality of mind" to consider those people who lack "the ability to exercise will-power to control acts in accordance with their rational judgment".

The essence of the Irresistible Impulse Rule lies in the idea that the accused, although knew his act to be criminal in nature, was overcome with such a sudden, uncontrollable and irresistible impulse that he lost his power to regulate his own acts. However, this test somewhere loosens the grip over those offenders who unfairly walk away with the advantage of being given the benefit of doubt just because they were allegedly not able to control their actions, despite it being proved that they were very well aware

¹⁰ *Commonwealth v. Rodgers*, 7 Metcalf 500 (Mass. 1844)

¹¹ 222 A.2d 326 (1966)

¹² A. H. Garrison, "The history of the M'Naghten insanity defence and the use of post-traumatic stress disorder as a basis of insanity" . *American Journal of Forensic Psychology*, 39-88 (1998).

¹³ R. Bell, Crimes below the belt: penile removal and castration.(2010).

¹⁴ (1960) 2 QB 396 (CCA, England)

of the wrongful nature of their act. Also, the lack of scientific evidence to prove the degree of impairment of will power caused while commission of the offense facilitates the misuse of this test in the court of law. The defendant often gets the benefit of doubt in such cases as it is extremely difficult for the prosecution to prove the degree of impairment caused in the mind of the accused and thus, judge whether it was controllable or not. Thus, there is a great chance of witnessing gross miscarriage of justice in such cases.

2.3. The Durham Rule

In the well-known case of *Durham v. United States*¹⁵, the concerned person was charged with a break-in. He was adjudged to be dealing with “psychosis with a psychopathic personality” by two psychiatrists. He also had a prolonged history of prior imprisonment as well as hospitalization. Ultimately, a new standard of testing the insanity defence came up which came to be popularly known as “the Durham Rule”.

The “Durham Rule” was considered a very momentous progress of the insanity plea in history as it substituted chaste discourse with more impartial scientific determinations as a consequence of advancements in the subject area of psychological research¹⁶. The Durham Rule preaches that the accused is not “criminally responsible if his unlawful act is the product of a mental disease or defect.” This rule demanded the jury to determine as to whether the accused was troubled by disease or not, and whether or not there was actually a causative kinship between the illness and the act committed. The object of “the Durham rule” was to withdraw from focusing on mere indications to accepting the actual diagnosis of intellectual disorderliness. It was a method to make a concrete proof stand against the determination of a mental state based on mere symptoms without scientific and psychiatric finding.¹⁷

The Durham Rule regrettably was deemed unacceptable without gaining complete assistance in 1972 with the *US v. Brawner*¹⁸ case in the D.C. Circuit of Appeals¹⁹. The trials were to judge whether or not the defendant had a psychological illness, imperfection, or disorder and whether

¹⁵ United States Court of Appeals, District of Columbia Circuit (1954) 214 F 2d 862, 45 ALR 2d 1430.

¹⁶ “A Crime Of Insanity, 2012”.

¹⁷ R. Simon, “The defence of insanity”. *Journal of Psychiatry and Law*, 29-40 (1983)

¹⁸ 471 F.2d 969 (D.C. Cir. 1972)

¹⁹ A. H. Garrison, “The history of the M’Naghten insanity defence and the use of post-traumatic stress disorder as a basis of insanity”. *American Journal of Forensic Psychology*, 39-88 (1998).

that had any causative relationship to the offense done.²⁰ The Court stated that the primary reason they were departing from this test of insanity was that it put greater undue reliance upon the testimony of medical experts.

2.4. Model Penal Code

The then prevalent tests for insanity were vulnerable to certain criticisms, following which, the American Law Institute (ALI) established a brand-new principle for its Model Penal Code in 1962. According to this test, “a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law”²¹. Also what is to be noted is that the Model Penal Code Test is designed in such a way so as to incorporate the emphasized principles from all the previous tests. It aimed to bind them altogether and present an inclusive and extensive test. There was cognition of the conflict between wrong and right from McNaughten, absence of controlling ability as in the “Irresistible Impulse Test”, and finding of psychological imperfection as in Durham.²²

The Model Penal Code presents a different conceptualization of the insanity defence. According to this test, a man is not liable for criminal action if, while commission of the same, he suffered from a mental ailment or flaw which resulted in the him lacking the substantial ability to acknowledge the unjustness and immorality of his or her actions or to comply his or her actions as per the necessities under the law. He must be substantially incapable to control his own conduct, even if he were conscious of his actions.²³

3. Forms of Insanity

The defence of insanity is known to be a complicated defence with respect to its application in the legal history. The trouble arises from the fact that, irrespective the distinguishable characteristics of every plea, the defences also have shared nodes of deviation. One of these is embedded in the flaws of cognizance. On one hand, the point that pops up is whether the imperfection in knowing is so grave, that the action concerned may be considered as incognizant, in which scenario it is therefore unwilled. At the other end of the tunnel, the imperfection in awareness usually stems in a

²⁰ H.Fingarette, “What is criminal insanity, in ethics, public policy, and criminal justice”.
Gunn and Hain, Publishers Inc. (1982).

²¹ *Inderbitzin, R. (1969). Criminal Law—The ALI Model Penal Code Test.*

²² “CriminalLaw.” (2012) *Enotes.com*. Retrieved from <http://www.enotes.com/criminal-law-reference/insanity-defence> (last visited on 31st March 2018)

²³ *R. v. Codere* (1916) 12 Cr.App.R.21

disorganized mind. In the later case, the defendant might suitably take a defence of insanity.

With respect to imperfection of awareness, conduct leading to present claims of insanity and nonvoluntary actions may be rationally grouped into three categories:

- (1) "Conduct that falls exclusively within the kingdom of insanity, namely conduct caused by a malady of the mind which may result in defects of consciousness but does not lead to unconsciousness, for example, a condition that causes the accused not to understand the guiltiness or nature of his action, although he may be fully conscious."
- (2) "Conduct that falls solely within the arena of unwilled conduct, namely conduct caused by a defect of consciousness independent of mental incapacity, as, for example, actions performed immediately following an affliction that has handicapped the actor from regulating his behaviour.²⁴ This category is known as sane automatism or non-insane automatism."
- (3) "Conduct that falls within the shared area of both insanity and involuntary behaviour, which is known as insane automatism. At one extreme of this category are cases in which the action was clearly committed unconsciously, but it is doubtful whether the malfunction is the consequence of mental illness. Especially advanced cases of arteriosclerosis would fall into this category.²⁵ At the other extreme are cases in which the behaviour stems apparently from a sickness of the mind, yet it is doubtful whether during the same time the actor was unconscious. Especially intense forms of dissociation states might fall into this category.²⁶"

Greater trouble occurs when one attempts to construct the line of distinction 'tween "non-insane and insane automatism". For this purpose, the lawful structure has evolved a couple of deciding standards - the social and the medical. The varied interpretations of these two criteria may become clearer by scrutinizing the Charlson²⁷ and Kemp²⁸ cases. There are many fact-based sameness between both the cases: in Charlson, a father was charged with "striking and pushing his child through the window" during an episodic attack caused by a "cerebral tumour" which tended to "trigger episodic violent" and "ungovernable sudden urges". In Kemp, the defendant

²⁴ Hill v. Baxter [1958] 1 All E.R. 193, 197

²⁵ R. v. Kemp (1956) 40 Cr.App.R. 121

²⁶ Parmerkar v. The Queen (1973) 33 D.L.R. (3d) 683

²⁷ R. v. Charlson [1955] 1 All E.R. 859

²⁸ R. v. Kemp (1956) 40 Cr.App.R. 121

harmed his better half through an affliction stemmed from “arteriosclerosis” i.e a condition leading to thickening and hardening of the arterial walls.

Both of the defendants, without a doubt, behaved under the force of “organic diseases” which led to some important alterations in their minds, and both of them were found to be unaware of the acts done by them. However, in Charlson, the court ruled that as it had not been established that the accused was troubled by any psychological illness, therefore he cannot be said to not have acted unconsciously, thus acquitting him. In simpler terms, the court held automatism, that is derived from “cerebral tumour”, is to be considered as “non-insane automatism”. However, in Kemp, the court held that the defendant's conduct was due to a “disease of the mind”, summing up that due to absence of awareness the defendant could not comprehend the essence of his action, and thus, the Court proclaimed him to be of unsound mind.

The antonymous derivations are seemingly caused by a difference in ways of approaching the same issue. In Charlson, the court stressed more upon the root of the involuntary demeanor. Only “diseases of the mind” which are sourced from mental disorders that satisfy the criteria defined in the McNaghten rules. A brain tumour, which originates physically, cannot, therefore, be regarded as a mental disease and the accused cannot be proclaimed to be unsound mind. In Kemp, the court uttered the opinion that the law must not be worried about the source of the disease, rather plainly with the psychological state that gave rise to the action.²⁹ The finding of the Kemp view is that in shaping the meaning of a sickness of the brain, the spotlight must be on the impact of the ailment of the mental faculties of “reason, memory and understanding”.³⁰

In conclusion, at present the present law surrounding the pleas of insanity and automatism are still seriously inadequate for what they were designed to do, which means the public will continue to be failed by the system until substantial reforms are brought in to bring it in line with current medical expertise and definitions, as well as reforming the sentencing guidelines in order to effectively reflect the changes to the defences.

4. Psychopath and Insanity

One of the most intriguing topics at the intersection of law and mental health is whether or not should psychopaths be able to utilize the insanity plea. However, the common typical factors needed for a successful insanity defence include the incapacity to acknowledge the nature of one’s conduct or to recognize the wrongfulness or immorality of an act, or else the

²⁹ Id, p.127

³⁰ Id, p.128

incapacity “to conform [one’s] conduct to the requirements of the law”.³¹ Because psychopaths are not delusional, and because they are often highly sensible and purposeful³², they are generally stopped from claiming the insanity defence.³³ Yet the more we learn about psychopathy, the harder it becomes to say whether psychopaths truly carry the *mens rea*, or “the criminal mind necessary for criminal liability”.³⁴

At the core of “psychopathy” lies the idea that the patient lacks capacity for empathy and remorse.³⁵ However, this cannot ignore the fact that psychopaths are often highly intelligent and charismatic—what McAleer calls “charming but callous”. A good deal of this research focuses on neurons that produce what is called “mirroring”.³⁶ Mirroring appears to be the reason behind the observed phenomenon where we often yawn when the person next to us yawns - the biological source of empathy.³⁷ Brain scans reveal far less mirroring activity in psychopaths as compared to sound people, indicating that psychopaths are devoid of the biological execution required to feel sympathy and produce regret.³⁸ However, authors of certain study hypothesize that psychopaths may have something akin to an empathy “switch”---the ability to turn empathy on and off at will.³⁹

A defendant generally cannot use psychopathy as the basis for an insanity defence.⁴⁰ Experts such as Stern acknowledge that the psychopath may lack the ability to “grasp and control his behavior in light of distinctly moral considerations”.⁴¹ Despite this, he considers the illegal and immoral behaviours of a psychopath to be a product of his failure to control his will. According to him, psychopaths are intelligent enough to not only understand and comprehend the moral rules, but also to understand the rules so well so as to manipulate them to suit their own purposes. However, a contradicting school of thought argue that the moral choices are “primarily guided by spontaneous, effortless emotional responses that operate automatically and unconsciously”.⁴² They prefer emphasizing upon the mirroring function in this respect. Empathy allows the normal individual to experience the pain of a victim which helps produce an aversion to behaviors that would cause

³¹ Legal Information Institute, 2010; paras. 7-10

³² McAleer, 2010; Lilienfeld & Arkowitz, 2007

³³ Stern, 2012; Glenn, Raine, & Laufer, 2011

³⁴ Stern, 2012, p. 3

³⁵ McAleer, 2010; Lilienfeld & Arkowitz, 2007

³⁶ Whiteman, 2013, para. 5

³⁷ Whiteman, 2013

³⁸ Id.

³⁹ Id. para. 16

⁴⁰ Stern, 2012; Glenn, Raine, & Laufer, 2011

⁴¹ Stern, 2012, quoting Litton, 2008

⁴² Glenn, Raines, & Laufer, 2011, citing Haidt, 2001

harm.⁴³ If this idea is held to be valid, then the psychopath's limitations give them an image more like people who cannot acknowledge the wrongful nature of their acts in the first place.

The more we learn about psychopaths and the biological origins of their non-conformity for laws, the less we may be able to back the idea that psychopaths are merely debauched people who disregard the regulations, as Sterns states. However, it is highly probable that psychopaths who commit crimes with full wilful enmity towards the victim, might take undue advantage of the insanity defence, if it is allowed to them. While we should have an open mind towards new understandings of legal and moral conduct of humans, along with the brain functions that enable it, we should be careful before taking a step towards extending protections to new groups of criminally insane people.

5. Multiple Personality Disorder and Its Relevance In Law

Multiple Personality Disorder, also scientifically known as Dissociative Identity Disorder, intricate psychological condition. Such a condition is usually effected by many factors which may include any severe trauma experienced by the person during his childhood days. The trauma could be caused due to any abuse of physical, emotional or sexual nature which is inflicted upon the individual repetitively. "Dissociative Identity Disorder" is said to be an immoderate form of dissociation which is unlike the innumerable moments of mild dissociation that we face in our day-to-day life such as daydreaming or getting lost while doing some work. It involves a lack of connexion of a person with his thought processes, emotions, feelings and self-awareness. It is accepted that MPD is a "coping mechanism" developed by the brain in which the person dissociates himself from the identity that suffers the traumatic experience. However, the reality of such disorder is still disputed as it becomes a matter of immense difficulty for the mental health professionals to judge and accurately identify the multiple emotional personalities, if any.

"Dissociative Identity Disorder" is defined by the occurrence of more than one different personality states that continuously regulate the person's conduct. The alters possess their own sex, age, or race. Every alter has his or her own unique body language. Sometimes the alters are even animals. The process of transforming into and revealing the alter while allowing it to take over the control over one's behaviour is named "switching". Switching might happen in any time frame. There exists a lost persona within the person, who is associated with the individual's true name. The host personality maybe unconscious of the existence of other personalities but not in all cases. After the early detachment of personalities (splitting), an alter

⁴³ Glenn, Raines, & Laufer, 2011

finds personality creation simpler; fresh identities are tallied whenever “stressors” are experienced on the far side the capability to deal with it. Every multiple executes “a definite set of psychological, physiological, or maintenance tasks” for the physical structure.⁴⁴ The multiples born and the jobs they are allotted are specific to every multiple system.⁴⁵ For instance, a sexually ill-treated kid might discover it to be essential to produce more than one personas to deal with the “psychological effects” of ill-treatment.⁴⁶ “One alter might be needed to house the horrifying memories, another to protect bodily integrity, a third to discharge rage, a fourth to contain sexual urges, a fifth to impose self-punishment, a sixth to insulate pain, and so forth”.⁴⁷

Diagnosing MPD is a Herculean task for the psychiatrists and other mental health experts. It might takes years in order to accurately prove the existence of such condition in the individual. This is usual, due to the fact that the database of indications that compel an individual suffering from a “dissociative disorder”, to search for aid is very akin to those of the other psychiatric study. In fact, numerous persons who possess “dissociative disorders” also have “coexisting diagnoses of borderline or other personality disorders, depression, and anxiety”.

The DSM-5⁴⁸ provides the following basis to detect “dissociative identity disorder”:

“Two or more distinct identities or personality states are present, each with its own relatively enduring pattern of perceiving, relating to, and thinking about the environment and self. Amnesia must occur, defined as gaps in the recall of everyday events, important personal information, and/or traumatic events.”

Coming to criminal law, one of the most wrenching questions that arises with respect to MPD is that when a multiple commits the offense, should the host personality be responsible for that crime? Since the past few decades, the defendants have been claiming pleas of MPD in scenarios including a mixture of crimes. MPD defences are out-of-the-way because defendants aver that another amply developed personality houses itself in a single human torso and that personality did the impugned act. Thus, even if the actus reus belongs to the host individual, the question that intrigues the Court is who is the owner of the mens rea involved in the crime - is it the

⁴⁴ Jacqueline R. Kanovitz, et al., "Witnesses with Multiple Personality Disorder," 23 Pepp. L. Rev. 387 (1996) citing Wilbur, Cornelia B., The Effect of Child Abuse on the Psyche in Childhood Antecedents of Multiple Personality Disorder 21 (1985).

⁴⁵ Frank W. Putnam, Diagnosis and Treatment of Multiple Personality Disorder (1989)

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, 2013

host personality or the alleged personality? If it turns out to be so that the host personality committed the criminal act with full consciousness about him committing the act, then there is nothing left to doubt the existence of mens rea along with the actus reus. However, if there is a reasonable possibility of a multiple committing the act through the host personality, then it takes the form of a challenging job for the Court to ascertain criminal responsibility because one cannot surely associate the mens rea to either the alleged personality or the host personality.

It was not until 1982, in *Ohio v. Grimsley*, that the first and most common state approach, the Alter Approach, was adopted.⁴⁹ Six years down the line, in *New Jersey v. Badger*, the New Jersey Superior Court introduced the Unified Approach, which is utilized in a minority of states.⁵⁰ The Tenth Circuit Court of Appeals introduced a third approach - the Host Approach - in 1993 in *United States v. Denny Shaffer*, which has since become federal precedent.⁵¹ In addition to these three culpability approaches that have been devised by courts, there also is a fourth approach - the Clinical Approach - that is often used in the clinical assemblage for curative purposes, but has not been adopted by any courts in criminal cases.

In *Ohio v. Grimsley*⁵², the accused took the plea that she was in the "state of cognizance" of a second identity named "Jennifer" when she was driving under the force of intoxicant. She was also previously detected with MPD. She contended that the act was not done by her conscious self but by Jennifer, who took over her consciousness. The Court rejected the plea by stating that even if the action was performed by another conscious personality of mind, still it was a voluntary action. Irrespective of the alter, if the action was a product of one's own volition and consciousness, then criminal responsibility cannot be waived. This case gave rise to the Alter Approach. Later in *Kirby v. Georgia*⁵³, William Kirby, the accused, was found guilty but mentally unsound. He was found to have with MPD and had a couple of personalities during commission of the crimes: Kirby, who committed the crimes, and Bill, who was inactive during the crimes. The Georgia Court of Appeals affirmed the conviction. The court observed that, "in the case at bar, it is undisputed that appellant was conscious and acting under his own volition. Moreover, appellant was able to recognize right from wrong and was not suffering from delusional compulsions."

⁴⁹ S. M. Owens, (1997, January-February). "Criminal responsibility and multiple personality defendants". *Mental and Physical Disability Law Reporter*, 21(1), pp. 133-143; 444 N.E.2d 1071 (Ohio Ct. App. 1982), 7 MPDLR 248.

⁵⁰ *Id.*; 551 A.2d 207 (N.J. Super. Ct. Law Div. 1988), 13 MPDLR 197.

⁵¹ *Id.*; 2 F.3d 999 (10th Cir. 1993), 18 MPDLR 23.

⁵² *Id.*; 3 Ohio App 3d 265

⁵³ *Id.*; 410 S.E.2d 333, 333 (Ga. Ct. App. 1991), 16 MPDLR 145.

The Unified Approach⁵⁴ is founded on the notion that a single body carries one person irrespective of the spectrum of personas present in the individual. The belief follows that if only one person did some illegal work, then only such one individual is liable. This view is comparatively easier to enforce legally as it is akin to the conventional concept of criminal liability which eases the onus upon the Court there is only one culpability determination to make. Although comparatively easier for a court to implement, the Unified Approach is not fair to alters in appreciating the peculiar character of the ailment. With this approach, one person equals one legal entity regardless of the number of personalities present. Advocates of the Unified Approach do not refuse the presence of MPD outright, but they do not give any leeway for differing positions of mind. In *Nebraska v. Halcomb*⁵⁵, Anthony Halcomb sexually assaulted two girls, each of five years of age. He was found to be a mentally disordered sex offender. He argued that the confessional statements that he provided to police are inadmissible because he had been detected to have MPD. Ultimately, the court ruled that it was unnecessary to adjudge whether the accused had MPD or not. The court reasoned that irrespective of the presence of the alleged personality named Oman, the person who committed the criminal act was actually Anthony Halcomb. Even if it is assumed that the so-called personality Oman had taken over during the commission of the crime and also while the confessional period, the fact that it was a voluntary confession cannot be ignored. Unlike confessions made out of police coercion, the law admits the confessions produced in whole or in part by shades of the personality of the accused.

The Host Personality Approach⁵⁶ is a host-oriented approach which is mostly centred around the state of mind of the host personality. The pertinent question to be focused upon is whether the identified host personality was conscious of the crime and indulged in the criminal act or not. If the host is found to be unaware during the commission of the crime or even if he was aware, he was unable to intervene into the act, then the law would favour the host personality due to lack of mens rea. Such an approach stems from the belief that no innocent host must be imprisoned for the crimes committed by his alters, of whom he was unaware and unable to intervene. In the famous case of *United States v. Denny-Shaffer*⁵⁷, a labor and delivery nurse named Bridget Denny-Shaffer kidnapped an infant from the hospital she was employed in. While committing the crime, she reportedly wore a lab jacket and represented herself as a medical student doing pediatric rounds. She was detained for kidnapping and evoked the

⁵⁴ Id. at 136

⁵⁵ Id.; 510 N.W.2d 344, 346 (Neb. Ct. App. 1993), 18 MPDLR 243.

⁵⁶ Id. at 137

⁵⁷ Id.; 2 F.3d 999, 1002 (10th Cir. 1993), 18 MPDLR 23.

insanity weapon. It was agreed upon by both sides that Denny-Shaffer was suffering from MPD and that a replacing persona named Rina had “taken over control” during the kidnapping. The mental health experts who testified in the Court agreed that her host personality did not participate in the abduction, but they could not agree on whether the alter personality was legally insane. The Trial Court found her guilty by rejecting her plea of insanity on the ground of lack of evidence concerning her alternate personality. Denny Shaffer contended for putting more emphasis on the host personality as opposed to the alter personality. She argued that when the evidence produced in the Court sufficiently demonstrates that the accused is indeed suffering from MPD and the host personality is identified who was not aware of the planning or carrying out of the criminal activity and was unable to prevent or control it, then the Court should emphasize upon such lack of guilty mind. The appellate Court upheld this contention and applied the Host Personality Approach to decide the case.

The Clinical Approach⁵⁸ is an approach which does not find much use in the court of law, though it is commonly used as a therapeutic tool for patients suffering from dissociative disorders. It holds the host personality responsible for all the actions of its own self as well as those of its alters, irrespective of their awareness about it. This is done with a view to integrate all the alters into a single whole personality by holding the host personality liable for the activities of all its alters regardless of whether he is aware of them or not. Clinicians prefer envisioning the multiples as one entity because only by doing such, they believe, the different versions of a personality can be blend together in order to give rise to a single wholesome personality.

These approaches helped the legal scholars to find different ways of viewing the peculiar problem of determining culpability of a person suffering from MPD, though in most cases, the Court has granted leeway to the host personality if it had been proved that the host personality was not aware of his alters and their actions. This is based on the fundamental reasoning of criminal law which preaches that no individual should be held blameworthy of an offence without possessing the requisite mens rea for committing that offence.

Although such approaches have proved to be of little help to the legal field in handling cases of dissociative disorders yet it continues to serve as a serious problem with respect to its application in the courtroom. The most disturbing problem lies in proving the existence of Multiple Personality Disorder in the accused. Disorders relating to the brain are as such quite deceptive when it comes to their medical diagnosis and when the case is such that a single individual houses multiple contrasting versions of

⁵⁸ Id. at 137

his personality, its diagnosis becomes even more baffling and trickier. MPD diagnosis is not something that can be successfully done overnight. It takes time to study the behaviour of the alleged patient, to wait for the different alters to take control. There may be one such alter or a hundred, who may or may not have a fixed time of appearing, who may or may not be of the same gender as the host personality. And on top of that, it becomes extremely difficult for the accused to prove that he was indeed 'someone else' while committing the crime because in instances where the plea of unsoundness of mind is provoked, it must be established that the concerned person possessed an unsound mind at the time of committing the crime following which he was "unable to know the nature of his act and even if he did, he did not know what he was doing was either wrong or contrary to law". Thus, it becomes really important to be able to diagnose MPD as claimed by the defendant, during the material time. Medical history of the disorder definitely helps the defence to build up their case but it is not conclusive, like in general defence of insanity, the law relies more deeply on legal insanity than medical insanity. Presence of history of medical insanity would surely serve as an aiding tool to the defence but unless and until, legal insanity is proved, the plea of insanity cannot be claimed successfully. Thus, in cases of MPD, it is important to adjudge as to whether the accused was his usual self during the commission of the crime or 'somebody else' had taken control over him.

6. Conclusion

Insanity is a peculiar defence in criminal law. It is so because of its nature which deals with the state of the impugned mind. Deciding the exact state of mind of the concerned person at a particular given point of time is a Herculean task in itself. This is because of the fact that it is only the accused person who experienced such state of mind during the material time. Therefore, only he knows best as to the presence or non-presence of such state of mind. However, in the case of an insane person, even the person himself, if truly insane, would be unaware of his own state of mind at the particular time in question. This makes it even more complicated. It is, however, interesting to note that the defence carries upon itself the onus of proving that he was insane during the commission of the crime. Once proved, it becomes an absolute defence for the accused, leading to complete acquittal. Medical insanity is usually easier to establish, as the claim of insanity is supported by medical proof which can seldom be disputed. However, law gives more importance to legal insanity. Hence, if a sort of medical insanity is of such nature that it does not impair the general capability of the person to reason out between the right and the wrong, then legal insanity cannot be established. As a result, despite being medically insane, he cannot take the absolute defence of insanity.

The evolution of the different standards, as discussed initially in the paper, gave varied interpretations of the plea of insanity. However, this is not to say that such rules or tests are perfect, without any loophole. In fact, one can witness a pattern where, the shortcomings in one standard lead to the birth of another. Also, it is cardinal to state that the different legal systems across the globe have their own preferences when it comes to complying with the above mentioned standards. This brings us to the requirement of a comparative analysis of them. The McNaghten Rules were the landmark set of rules that paved way for a specific interpretation of the defence of insanity. According to these rules, there must be a presumption of sanity, unless the contrary is proved. Also, it has to be particularly proven that, while commission of the act, the accused was troubled from “a defect of reason from disease of the mind”. Further, the above phrase has been interpreted in various ways in different case laws. While the McNaghten Rules stress upon the lack of reasoning capacity of an individual, the Irresistible Impulse Test relies upon the arousal of a sudden impulse to act, which is not resistible on the part of the individual. According to this standard, in spite of the fact that the accused was able to demarcate a line between that which is right and that which is wrong, if he was unable to exercise his choice between the two, then he qualifies for a plea of insanity. This test puts primary focus upon the will power of the individual over his physical acts. However, this test allows those individuals who unfairly walk away with the advantage of being given the benefit of doubt just because they were allegedly not able to control their actions. Also, the lack of scientific evidence to prove the degree of impairment of will power adds to the loopholes of this test. The Durham Rule, on the other hand, relies extensively upon scientific evidence. Thus, as per Durham Rule, if a person is scientifically or medically diagnosed to be having a mental disease and by reason of such disease, he was found to be of unsound mind. Thus, the testimony of medical experts and psychiatrists was given the utmost importance in this standard. However, the difference in the various opinions of the experts created a problem. The Model Penal Code is a comprehensive and inclusive standard. It is so because of the fact that it carries within itself the elements of all the previously existing standards. According to this standard, an individual is not to be held liable for criminal action during commission of such act, he is devoid of significant power either to acknowledge the guiltiness of his action or to comply his acts with the essentials of the law, as a byproduct of mental ailment or flaw which has been medically diagnosed by the medical experts. Each and every standard, therefore, has its own set of advantages and shortcomings. However, it cannot be disputed that they gave a direction to the legal interpretation of the defence of insanity.

Further, the paper has a special reference to a particular disorder of the mind called Multiple Personality Disorder. It has already been discussed

in detail as to it means and how it translates into human psychology as an effect. However, there still lies a gray area when one looks at the way MPD is approached in law in relevance to the law regarding insanity. The paper discusses four types of approaches. The Alter Approach adopts a strict policy wherein irrespective of whether the accused was in his original consciousness or in one of his alters, during the commission of the act, the fact that he acted out with his full consciousness and volition, will not help him in escaping liability. Hence, the Alter Approach does not give any leverage to the condition which forms the crux of MPD. The next approach is the Unified Approach which simplifies the determination of culpability for the court. It simply follows the logic that one body embodies just one person, irrespective of the varying states of mind. Hence, when such person does something illegal, the court shall not take into consideration any of his supposed alters and will hold the person responsible for the act. This makes the process easier for the court, however, it becomes unfair on the part of the actual patients suffering from MPD, in cases where one of the multiples or alters has actually committed the crime without the person's original consciousness. The Host Personality Approach, as the name suggests, is centred around the host personality only. Here, the question arises as to whether the host was aware of the 'taking over' of the alter or even if he was aware, he was not able to intervene into the action of his alter. The awareness or unawareness of the host as to the act done by his alter leads to a verdict of conviction or acquittal accordingly. This is a reasonable approach as it is based on the fair principle that no innocent host should be punished for the illegal act done by one of his alters or multiples. However, what proves extremely difficult in adopting this approach is the burden of proving that the host personality was unmindful of the act committed by his alter. The last approach discussed is the Clinical Approach which is more of a therapeutic approach rather than a legal approach, hence being rarely used in the court of law. It holds responsible the host for acts committed by himself as well as by any of his alters. The medical experts consider it a therapeutic tool as the person carrying all the alters is compelled to be responsible for each and every act committed by him, irrespective of the fact that whether it was committed by himself or by any of his multiples.

Thus, MPD is a peculiar form of disorder which needs to be adjudged with care and proper attention. Even in cases of MPD, if mens rea is established on the part of the original consciousness of the accused, then it become easier for the court to impose liability. Similarly, lack of mens rea would enable the accused to successfully claim the defence of insanity. However, establishing mens rea and the correct facts are extremely difficult tasks, especially when the case involves peculiar instances such as MPD. With the advancement of technology over time, scientists have evolved various scientific techniques which attempt to estimate the actual condition of mind of the accused as far as practicable, during commission of the crime.

One such test which is used to establish the knowledge or awareness of the alleged sequence of facts or incidents is the NARCO Analysis Test. In this test, the individual is made to be in a “semi-conscious state”, thus neutralizing his imagination. It is based on the principle that in such a condition the person is less likely to falsify and his answers would only be confined to facts of which he is conscious. Another example is that of the Polygraph Test or the lie-detector test. However, the veracity of these tests are often questioned as it is vulnerable to manipulation. One such another emerging technique is trying to make its way into the legal system. It is called the Brain Electrical Oscillation Signature profiling test, hereinafter referred to as the BEOS Test. “It is a technique developed by Dr. C.R. Mukundan in the year 2003 after lot of research. This technique is currently been used in a Forensic set-up to identify the presence of Experiential Knowledge in the perpetrator of the crime. Knowing and Remembering are two Neurocognitive processes, of which Knowing refers to the cognitive process of recognition with or without familiarity, whereas Remembrance is the recall of episodic and autobiographical details from a person’s life.”⁵⁹ When a person does an act in a situation, he is said to experience the doing of such act. The brain registers an ‘experiential knowledge’, which is quite different from ‘remembering’. Extensive study research in neuroscience has shown that the activation design of the brain is clearly different during “remembering” and “knowing”. Remembrance is often concerned with past personal episodes which constitute the experiences of the person while on the other hand, knowing signifies recovery from the knowledge depository of the brain used for recognition of the entities of world and their conceptualizations. For example, if A and B are both asked do they know Mr.X, then B who has met X will trigger an ‘experiential knowledge’ as opposed to A who had only read about X in a newspaper. This happens because while ‘remembering’, the brain retrieves or relives the autobiographical experience, which is not the case in simply ‘knowing’ the facts. This is what forms the basis of the Brain Electrical Oscillation Signature Profiling Test, also referred to as the BEOS Test. Statements, called Probes, are put forth to the individual, instead of questions, that reconstruct the series of events leading to the crime and post it. The individual is not required to say anything. The required number of electrodes are fitted on his head at multiple places, which help recording the response of the brain to each probe. If the individual triggers an EK or Experiential Knowledge response on a probe, it means that his brain is reliving the event mentioned in the probe by way of remembrance, which further supports the claim that the individual was indeed present in that particular place at that

⁵⁹ D.A.Puranik, S.K. Joseph, , B.B.Daundkar, M.V.Garad, Brain Signature profiling in India. It’s status as an aid in investigation and as corroborative evidence – as seen from judgments. Proceedings of XX All India Forensic Science Conference, 815 – 822, November 15 – 17, Jaipur.(2009)

particular time. The aim of incorporating the technique of BEOS while discussing insanity is for laying out a proposition for its usage to determine the condition of mind of the accused during the concerned time frame. The BEOS Test is yet to be applied to cases of insanity. However, one can witness the usage and admission of this test in a few cases. When a 24 year-old defendant was tried for the homicide of her fiancé, her “brain was the chief witness for the prosecution”. She agreed to undergo the “highly controversial Brain Electrical Oscillations Signature test” (BEOS). Her condemnation witnesses for the first time, an Indian court accepting the BEOS results as evidence of a guilty conscience.⁶⁰

Insanity is a terminology that encompasses a wide array of complex behaviors of human beings within itself. Due to the peculiarity of the human mind, the issue of insanity becomes an even more complex subject to study. It continues to bewilder the judges and legal experts with its newly emerging forms that make it difficult for the concerned institutions to adjudge and classify them under a broad heading and accordingly, interpret the concerned law. However, the silver lining in this whole scenario is the progress made in this regard, by the legal field over the years. With the advancement of science and technology, it has become comparatively easier to conclude the existence of medical insanity, as well as, to deduce from there, the presence of legal insanity in a case. New research studies and scientific findings are showing up that give us a deeper insight into the working of the human mind. And the best part about such findings is that it is often backed by reliable scientific evidences which are undisputed to a great extent. Also, over time, the legal field has witnessed a variety of cases, defendants, factual circumstances, backgrounds, etc. that give the judges enough exposure to identify the various ways in which the defence of insanity can be applied. This sharpens their skill of interpreting a law beyond the letters of the text. New propositions and hypotheses are emerging which need to be focused upon in order to formulate and discover new channels of application of this defence.

In the defence of insanity, what is important is the “state of mind” of the accused during the commission of the crime. It becomes very important to conclude the nearest to the accurate phase of mind of the defendant while he was committing the offense. Although a Herculean task, it is an issue of immense importance which is required to be determined almost accurately for ensuring that justice has been done. The cause of the unsoundness of mind is also to be taken into account; whether some trauma was the reason behind such unsoundness of mind or was it due to a mental illness, or was it induced as a result of any voluntary act done on behalf of the accused. The

⁶⁰ State of Maharashtra v. Aditi Baldev Sharma Sessions Case No. 508/07, June 12, 2008, p. 66.

answer to such questions affect the degree of criminal responsibility that is to be held by the accused. The Court must also look into the question whether the mental impairment was sudden and strong enough for the accused to be able to resist and control himself. Although there exists no scientific and undisputed means to measure the degree of impairment caused, but the testimonies of the licensed mental health experts can be reliable. However, sole reliance on the statements of the medical experts is unfair and unreasonable as it could lead to the Court imparting a biased verdict, unfairly inclined more towards the medical perspective only, while the legal systems view the defence in terms of legal insanity.

There have also been propositions suggesting an absolute abolition of the insanity plea. This could be harmful for the objective of justice as abolition of the defence could mean that all the doers of criminal acts are liable to be punished even if they were not conscious of their own act during the material time. The insanity defence is a much needed defence. Hence the fundamentally just defence must be retained in the legal field with certain fair and sensible modifications, rectifying the practical loopholes found with it.

A Critical Comment on Access and Benefit Sharing in India under Biological Diversity Act, 2002: In the Light of Nagoya Protocol on Access & Benefit Sharing

Paramita Dash¹
Amlan Chakraborty²

Abstract

In recent times the importance of biological/ genetic resources has increased manifold because of their use technical and scientific researches leading to various kinds of invention which gets commercially exploited giving rise to revenue generation. This growing importance has posed a new threat to the biological/genetic resources in the form of unauthorised use of the same. This was realised when developing countries like India faced several cases of bio-piracy in the mid-90s. These bio-piracy cases surfaced when a peculiar phenomenon was observed in which developed countries like USA started misappropriating the bio-resources and the associated traditional knowledge of the developing countries in creating inventions and claiming exclusive rights over them through Patent system, thereby stopping the rest of the world from using those resources and/or associated knowledge. This led to a situation where the country which provided the bio-resource and/or the associated knowledge also known as the Provider country was at complete loss as even after contributing in the process of creation of the concerned invention by providing resources and knowledge, it could not secure a share of the benefit arising from commercial exploitation of the invention, in its account. And In order to address this new challenge an attempt was made at the international level to come up with a framework which will allow the countries to secure their right of sovereignty over their bio-resources which in turn will help them in preventing cases of bio-piracy. With this, came the Convention on Biological Diversity which brought the concept of state sovereignty over bio-resources, their conservation and sustainable use and fair and equitable benefit sharing which further was discussed in details in its Nagoya Protocol on Access and Benefit Sharing. Authors in this paper will look in to this identified threat and would specially focus on the concept of ABS under Nagoya Protocol and under the Indian law i.e. Biological Diversity Act, 2002.

Keywords: *Convention on Biological Diversity, Access and Benefit Sharing (ABS), Nagoya Protocol on ABS, Biological/Genetic Resources, Associated traditional knowledge, Biological Diversity Act, 2002.*

1. Introduction

Biodiversity as a whole plays a very significant role in various sectors of development. A rich biodiversity always serves as a boon for a nation, bringing an all-round development for itself and its people, including

¹ Assistant Professor, KIIT (Deemed to be University), Bhubaneswar, Odisha

² Ph.D. Candidate, Gujarat National Law University, Gandhinagar, Gujarat

the two major forms of development i.e. social and economic development. The role of biodiversity in accelerating a nation's development even becomes more crucial and significant when it comes to various developing and underdeveloped countries which mostly have a rich biodiversity and a comparatively poor skill based research and developmental set-up including technological infrastructure, unlike developed nations whose strength is considered to be their technology and infrastructure. In such a scenario, it becomes essential for the biodiversity rich nations to acknowledge their strengths and make proper provisions for preservation, conservation and use of various components of their biodiversity. In this context, it is important to understand the evolution of the concept of 'nations claiming their rights over biodiversity'. This concept was an outcome of the mutual consensus achieved among the debating nations through numerous deliberations at the 'Convention on Biological Diversity' (CBD) which introduced the idea of 'State's sovereignty over the biodiversity available within its territorial limits', thereby rejecting the 'idea of commons' with respect to biodiversity i.e. biodiversity to be a part of public domain and no nation to have exclusive rights over it. This empowered the nations not only to regulate the access by other nations over the various biological resources that are available as a part of the biodiversity within their territories, but also to stop the unauthorised use of these biological resources by such nations, thereby significantly contributing in the attempt of curbing the menace of 'Bio-piracy', which is often termed as an unauthorised exploitation of the available biological resources of one country by another country. Biodiversity is commonly understood to be the diversity/variety found among the various life forms under two broad categories i.e. Flora and Fauna, which on a larger scale is observed as Ecosystem as a whole. Hence the concept of biological resources would also be broadly categorised in to plant bio resources and animal bio resources. Considering the growing importance of bio-resources, for example the use of medicinal properties exhibited by the medicinal plants and the associated traditional medicinal knowledge in modern healthcare systems worldwide, it is essential for the nations to have proper legislative frameworks in place to protect their bio resources and prohibit the unauthorised use and exploitation of such bio-resources and associated traditional/ indigenous knowledge. And in an attempt at achieving the above mentioned goal of legislating a comprehensive legal framework which will not only ensure protection against the unauthorised use of biological resources available in India but also ensure the fair and equitable sharing of benefits arising out of the commercial exploitation of biological resources among the stakeholders involved in such commercial exploitation, majorly between the provider of the biological resources and/or associated knowledge and the receiver of the same who in turn use such resources and/or associated knowledge to generate revenue, India legislated The Biological Diversity Act in the year

2002 (hereinafter to be read as the Act). This Act came in to force as a step towards compliance of the TRIPS mandate³ and CBD's obligation⁴ on the member countries. One of the most highlighted features of this Act is the unique structural framework of Access Control mechanism involving the 3 tier statutory authorities regulating the access to biological resources available in India on one hand and the concept of determination of Benefit Sharing arising out of commercial use of such biological resources with respect to which, access has been granted under the Act to the party who has used such biological resource/s in commercially generating revenue/benefit on the other. (Both being discussed in the later segment of this paper). The other highlight of this paper would be the discussions of the concept of "Access and Benefit Sharing" under the Nagoya Protocol on Access and Benefit Sharing tracing the evolution of this protocol which was adopted as a protocol to the Convention on Biological Diversity. The authors, in this paper will also attempt at the discussions on the concept of ABS in India in the light of the Biological Diversity Act, 2002 and will examine to what extent these provisions under the Indian Act have been able to be in compliance with the obligations placed by CBD upon India as a member country to CBD and to what extent the provisions relating ABS under the Nagoya Protocol has been justified under the Biological Diversity Act, 2002 and will finally conclude by making an overall remarks on the whole concept of ABS from an global as well as Indian standpoint.

2. Evolution of The Nagoya Protocol on Access and Benefit Sharing

The Convention on Biological Diversity (hereinafter to be read as CBD) which is considered as one of the leading international frameworks and one of its kind first attempt at focusing on the protection of biodiversity at large as a global concern and advocating for the protection of biological resources and interests of the communities safeguarding such resources and holding associated knowledge, was adopted on 22nd May 1992 at the United Nations Conference on Environment and Development (UNCED) also

³ Article 27 (3) allows member countries to make appropriate domestic legal frameworks to ensure protection and regulation of plant and animals including the plant and animal based biological/genetic materials/resources which can act as an alternative protection framework to patents because as per the general consensus achieved at TRIPS that Plants and animals are to be excluded from the Patent protection yet to be protected in the light of these plants and animals generating inventions and innovations and hence this placing of the obligation on the member states to come up with alternate protection framework.

⁴ CBD places obligations on its member states to make such domestic legal frameworks which will ensure protection to biodiversity in general and biological/genetic resources in particular with basic objective of conservation and sustainable use of the biodiversity and its components respectively and ensuring fair and equitable sharing of benefits arising out of commercial utilization of the biological/genetic resources/materials.

called as the Earth Summit at Rio de Janeiro. It was opened for signature on 5th June 1992 and finally came in force on 29th December 1993 with the following chief objectives under Article 1:

- Conservation of biological diversity
- Sustainable use of its components
- Fair and equitable sharing of the benefit arising out of the utilisation of the genetic resources.

As the first attempt by the global community to address the concern of biological diversity as a whole, CBD placed its foundations on the broad ecosystem approach unlike the sectoral approach focusing on single ecosystems, species, sites etc. and their concern, which had been adopted by many protection & conservation international and domestic frameworks prior to CBD.⁵ CBD defines biological diversity (biodiversity) as the variability among living organisms from all sources, occurring at three levels:⁶ diversity within species (genetic diversity)⁷ diversity between species, and diversity of ecosystems.

The CBD objectives are a result of the two opposing visions of two worlds of the globe, which is also better known as the difference in the vision and approaches of the developing and developed countries and even more popular in terms of the North-South divide. While the developing nations pushed more for the conservation, protection, access to biological resources and in turn benefit sharing arising out of the use of such resources, the developed ones were more concerned with the commercial use of the biological resources and the corresponding rights arising out of that which are more proprietary in nature. So in order to create a balance between these two sets of differing ideas, certain concepts were introduced in CBD like, “State Sovereignty on biological resources available within the territorial jurisdiction of the nation”, “need for regulating the access to such biological resources”, “Commercial utilization of biological resources with authorization” “use of biological resources in scientific researches”, rights of the entities creating novel inventions using biological resources”, “rights of the indigenous communities and other knowledge holders holding traditional or otherwise knowledge over the biological resources”, “Benefit Sharing arising out of utilization of biological resources” etc. Out of all these concepts, the one which attracted substantial debate and discussion was that of the concept of “Access and Benefit Sharing” to such great extent that a separate legally binding and supplementary agreement to CBD had to be

⁵ Thomas Greiber, Sonia Peña Moreno, *et.al.*, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing*, 3 (IUCN, Gland, Switzerland, 2012)

⁶ *Ibid.*

⁷ Genetic diversity refers to the frequency and variability of the gene pool within a single species. It includes the variation both within a population and between populations.

adopted in the year 2010 in the name of The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, also known as the Nagoya Protocol on Access and Benefit Sharing.

3. The Nagoya Protocol on Access and Benefit Sharing: An Overview

Nagoya Protocol establishes a framework for regulating how users of genetic resources and/or traditional knowledge associated with genetic resources (for example, researchers and commercial companies) may obtain access to such resources and knowledge. It provides for general obligations on sharing the benefits arising from the utilization of such resources and knowledge. And it obliges Parties to ensure that users under their jurisdiction respect the domestic ABS legislation and regulatory requirements of the Parties where the resources or knowledge have been acquired.⁸

As far as the objective of the Protocol is concerned it derives its force from the third objective of CBD which reads as “Fair and Equitable Sharing of Benefits arising out of utilization of genetic resources” and hence focuses on the various facets of Benefit Sharing which includes appropriate access to genetic resources, appropriate transfer of relevant technologies, and appropriate funding.⁹ Accordingly, benefit-sharing entails more than sharing a certain percentage of the profits when a product is developed on the basis of a genetic resource. Furthermore, it is re-stated that when sharing benefits, the rights over the accessed resources and to the transferred technologies have to be taken into account.¹⁰ While focusing on the main objective of Access and Benefit Sharing, Nagoya Protocol also doesn't undermine the importance of the other two objectives of CBD i.e. Conservation of biodiversity and sustainable development of all its components as all the provisions drafted under Nagoya Protocol are in consonance with these two objectives of CBD.

As far as the scope of the Protocol is concerned there was a lot of debate and discussions among the member countries of the CBD during the negotiations of the Protocol and after much deliberations a general consensus was achieved that the scope of the protocol will be same as the scope of CBD i.e. the mechanism of access and benefit sharing has to be understood with respect to genetic resources as defined under the scope of CBD, because, as envisaged at the outset of the negotiations of the Nagoya Protocol, there could not been a general agreement among the deliberating countries with regard to any positive list as to what could be included or any

⁸ *Supra* note 3

⁹ The Nagoya Protocol on Access and Benefit Sharing, art. 1

¹⁰ *Supra* note 6

negative list as to what is to be excluded in terms of certain biological resources which can be brought under the purview or put out of it to while deciding the scope of applicability of the Nagoya Protocol. In absence of any specific list defining the subject matter of protection under the Nagoya Protocol, a general provision was included defining its scope that refers to “genetic resources within the scope of Article 15 of the Convention” and to “traditional knowledge associated with genetic resources within the scope of the Convention”

Another important aspect of the Protocol which reflects on its applicability with regard to other international instruments and processes relating access and benefit sharing says that Protocol’s provisions shall not affect rights and obligations from existing international agreements; that Parties may develop and implement other specialized ABS agreements in the future; that such specialized ABS agreements prevail if they are in line with the objective of the Nagoya Protocol; and that due regard should be paid to ongoing international processes.¹¹

3.1. Some important provisions relating to “Access” & “Benefit Sharing” under Nagoya Protocol

As the basic objective with which the Protocol was adopted as a part of the CBD was to have some general international consensus with regard to access and benefit sharing concerning biological resources available within the territorial limits of the member countries and also to put an obligation on the member countries to ensure the authorised access to their biological resources and fair and equitable sharing of benefits among the various stakeholders involved in the utilization of the resources through apt domestic legal frameworks, it is important for the authors here to look in to the relevant provisions of Nagoya Protocol concerning the access to biological resources & associated traditional knowledge and the provisions relating to fair and equitable sharing of benefits arising out of utilization of such biological/genetic resources.

3.1.1 Access

Nagoya Protocol reaffirms the concept of state sovereignty¹² over the bio resources available within the territorial jurisdiction of such state thereby making these bio resources a subject matter of State regulation and hence giving powers to the individual states to make domestic frameworks which will regulate the access¹³ to these bio resources with the help of the involvement of the regulatory authorities to be established under such domestic framework. As per Nagoya Protocol, before granting access to any

¹¹ *Ibid.*

¹²The Nagoya Protocol on Access and Benefit Sharing, art. 6(1)

¹³The Nagoya Protocol on Access and Benefit Sharing, art. 6(2)

biological/genetic resources available within the territorial limits of the member states, states are required to take the prior informed consent (PIC) (as also envisaged under Article 15 of CBD) from the community/communities who have been identified as the benefit claimers because of the fact that they safeguard the biological resource in question and/or possess the associated traditional knowledge over such biological resource in question. In addition to the PIC states through their relevant regulatory authorities also will have to ensure that the parties involved in the access and utilisation of any biological/genetic resources i.e. the provider at one hand and the receiver at the other must enter into mutually agreed terms (MAT) (as also envisaged under Article 15 of CBD) with regard to the manner and methods of the determination of the quantum of benefit sharing between the stakeholder. Below mentioned are few points which can be taken into consideration by the provider country while making provisions with regard to seeking a PIC certificate in connection with granting of access over certain biological/genetic resources:¹⁴

- Provision for fair and non-arbitrary access rules and procedures;
- Provision of information on PIC applications;
- Provision for written and cost-effective PIC decisions within a reasonable period of time;
- Issuance of a permit or equivalent as evidence of PIC and MAT and notification of the ABS Clearing-House;¹⁵
- Establishment of criteria and/or processes for obtaining PIC or approval
- Establishment of clear rules and procedures for establishing MAT

3.1.2. Fair and Equitable Benefit Sharing

Nagoya Protocol on Access and Benefit Sharing provides for a detailed analysis of the concept of “Fair and Equitable sharing of benefits” through the following provisions:¹⁶

- Benefits to be shared shall include those arising from the utilization of genetic resources but also those arising from subsequent applications and commercialization;
- Benefits shall be shared only with the Party providing such resources, which is “defined” as the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the CBD; and

¹⁴ *Supra* note 6.

¹⁵ The Nagoya Protocol on Access and Benefit Sharing, art. 14

¹⁶ The Nagoya Protocol on Access and Benefit Sharing, art. 5(1)

- Specific benefit-sharing arrangements will be established through MAT between the provider and the user of genetic resources, thus on a contract basis.

The Protocol puts obligation¹⁷ on the member states to take appropriate measures within their domestic frameworks to implement the above mentioned provisions relating to determination of the quantum of the benefits and thereby its fair and equitable sharing between the stakeholders.

The Protocol also provides for the provision whereby the benefits once quantified and modes of sharing evaluated, should be directed towards the conservation and sustainable use of the biodiversity as a whole thereby creating a linkage with the other two basic objectives of CBD.¹⁸

It also provides the legal basis for consideration of a potential global multilateral benefit-sharing mechanism that could be established in the future in order to address the fair and equitable benefit-sharing in specific cases where bilateral ABS on the basis of PIC and MAT is problematic¹⁹. The Protocol further provides for specific provisions relating to the modes of sharing of benefits and clearly identifies two modes, one being the monetary sharing and the other being the non-monetary sharing. While the former includes upfront payments, royalties and continuous sharing of benefits the later includes measures like capacity building, taking steps for the development of the local/indigenous communities, sharing of the skill and knowledge, transfer of relevant technology, promoting technical and scientific research through collaborative projects between the provider country and the receiver country.²⁰

4. Access and Benefit Sharing in India under the Biodiversity Act: An Analysis

India is renowned globally to be rich in biodiversity due to its unique bio-geographic locations, diversified climatic conditions and vast eco-diversity and geo-diversity thereby being one of the world's largest store-houses of biological resources.²¹The other side of this development

¹⁷ The Nagoya Protocol on Access and Benefit Sharing, art. 5 (3)

¹⁸ The Nagoya Protocol on Access and Benefit Sharing, art. (9)

¹⁹ The Nagoya Protocol on Access and Benefit Sharing, art.(10)

²⁰ The Nagoya Protocol on Access and Benefit Sharing, art. (23)

²¹ United Nations Development Programme India, *India Biodiversity Awards, 2018* available at : <http://www.in.undp.org/content/india/en/home/climate-and-disaster-resilience/successstories/IBA2018.html> (last visited at Oct. 15, 2019, 12 PM). India is one of the 17 mega-bio diverse countries in the world having just 2.4 percent of the earth's land area and accounting for 7 to 8 percent of world's species. It is home to 96,000 species of animals and 47,000 species of plants and near about half of the world's aquatic plants.

poses an important challenge of biodiversity maintenance for the sustainable development of these biological resources.

The negotiations undertaken by different nations of an international regime on Access and Benefit sharing through the Convention on Biodiversity (CBD) and the Nagoya Protocol were precisely in that direction of which India was a party to. The need for comprehensive legislative framework in India was imminently felt due to rising number cases of bio piracy like the Neem case²², the Turmeric Case²³ and the Basmati case²⁴, wherein India's biological resources and traditional knowledge was sought to be misappropriated in foreign jurisdictions, thus denying the traditional local stakeholders or governmental authorities.

In this backdrop, India secured its access and benefit sharing obligations mechanism under the Biological Diversity Act, 2002 and the Protection of Plant Varieties and Farmer's Rights Act, 2001. The Biological Diversity Act and the Biological Diversity rules were enacted by the government to act precisely as a tool to combat bio piracy on one hand and the rights of those local knowledge holders on the other hand by providing them their due share of benefits.

The Convention on Biodiversity (CBD) which entered into force on the 29th of December in 1993, is the lone international instrument which comprehensively addresses the sustainable use of biological diversity and mandates the parties to create an Access and Benefit Sharing (ABS) Mechanism. To fructify the objective of CBD on access and benefit sharing, several years later in 2014 the Nagoya Protocol on Access to genetic resources and fair and equitable sharing of benefits arising from utilization of genetic resources was adopted. India is a party to both of these international instruments and consequently the objectives enshrined in its domestic enactment, Biological Diversity Act of 2002 reflects the ideals of both these conventions.²⁵

Since, access and benefit sharing (ABS) is the core issue within this paper, it is imperative to discuss the ABS mechanism under the Act. The establishment of the ABS provisions and their effective implementation,

²² Federal Public service, *Bio piracy: the case of neem tree* available at <https://www.health.belgium.be/en/biopiracy-example-neem-tree> (last visited at Oct. 25, 2019, 12 PM).

²³ Raj Chegappa, "Patents: India wins a victory over turmeric but the war is on", *INDIA TODAY*, Sept. 8, 1997, available at <https://www.indiatoday.in/magazine/science-and-technology/story/19970908-patents-india-wins-a-victory-over-turmeric-but-the-war-is-on-832438-1997-09-08> (last visited at Oct. 25, 2019, 12 PM)

²⁴ Uzma Jalil, *Bio piracy: The patenting of Basmati by Rice Tec*, Uzma Jalil, available at <https://www.sdpi.org/publications/files/W37-Biopiracy.pdf> (last visited at Oct. 25, 2019, 12 PM).

²⁵ The Biological Diversity Act, 2002

more specifically the access to biological resources and traditional knowledge to foreign citizens, companies and NRIs based on prior approval of the National Biodiversity Authority (NBA) under the Act is provided under Sections 3, 4 and 6 of the Act and in the corresponding rules under rules 14-20 of the Biological Diversity rules. Similarly, the access permits to Indian citizens, companies, associations and other organizations registered in India on the basis of prior intimation to the State Biodiversity Authority (SBA) along with providing exemption of prior approval for certain communities, local people including growers and cultivators of biodiversity under Section 7 of the Act.

The overall implementation of the Act is governed by three functional bodies, the National Biodiversity Authority (NBA) at the apex level, the State Biodiversity Boards (SBBs) in respective states and the Biodiversity Management Committees (BMCs). The NBA is the national body to discharge all decisions pertaining to ABS, including prior informed consent process, approval for access and transfer of biological resources and scientific research results and technologies to foreign citizens, companies and non-resident Indians (NRIs), prior approval for applying for Intellectual Property rights based on biological resources or traditional knowledge obtained from India, thus fixing criteria for benefit sharing, approval of third – party transfer of accessed biological resources and traditional knowledge, and several other matters pertaining to ABS.

It is pertinent to note that there is no overlap in the functions of NBA and SBBs on the issues of access and benefit sharing (ABS). Foreign individuals, companies or institutions, and non-resident Indians (NRIs) are required to seek prior approval from the NBA to obtain any biological resource occurring in India. Further, prior authorisation of the NBA is required to transfer the results of any research relating to any biological resource occurring in, or obtained from, India to any foreign individual, company or institution, and also for applying for Intellectual Property Rights (IPRs) for any invention based on any research or information on a biological resource obtained from India.²⁶

Indian citizens or firms registered in India can obtain any biological resource for commercial utilization or bio survey and bio utilization for commercial utilization after giving prior intimation to the State SBB only. As of October 2013, 28 states of India have established SBBs, and 32,221 BMCs have been set up at the local level. There is significant unevenness in the number of BMCs across states. Almost three-fourths of these BMCs have been set up in Madhya Pradesh (23743). The number of BMCs in

²⁶ The India habitat research centre, "National Study on ABS Implementation" , available at <https://snrd-asia.org/wp-content/uploads/2018/04/National-Study-on-ABS-Implementation-in-India.pdf> (last visited at Oct. 29, 2019, 12 PM).

Karnataka and Kerala are 4374 and 1043 respectively. Uttarakhand, Maharashtra Andhra Pradesh and Mizoram have 598, 340, 222 and 221 BMCs in that order. All other states, barring Haryana, Orissa and Sikkim, where BMCs are yet to be established, have less than 100 BMCs.

The Biodiversity Act, 2002 mandates punishment under section 55 for the implementation of the provisions under section 3, 4 and 6 which states that for failure to implement the provisions imprisonment may be extended for an imprisonment for a term which may extend to five years or with a fine which may extend to ten lakh rupees.²⁷

The relevant provisions of the Biodiversity Act, 2002 in access and benefit sharing are provided under Section 21 of the Act which stipulates that National Biodiversity Authority while granting approvals under section 19 or section 20 has to ensure that the terms and conditions subject to which approval is granted and secures equitable sharing of benefits arising out of the use of accessed biological resources, their products, innovations and practices associated with their use and applications and knowledge relating thereto has to be in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers. Rule 14 of the Biodiversity Rules, 2002 lay down the procedure for access to biological resources and associated traditional knowledge that any person seeking approval of the Authority for access to biological resources and associated knowledge for research or for commercial utilization shall make an application in Form I and this form shall include the following, namely: general objectives and purpose of the application for seeking approval; description of the biological resources and traditional knowledge including accompanying information; intended uses of the biological resources (research, breeding, commercial utilization, etc.) conditions under which the applicant may seek intellectual property rights; quantum of monetary and other incidental benefits. If need be, a commitment to enter into a fresh agreement particularly in case if the biological material is taken for research purposes and later on sought to be used for commercial purposes, and also in case of any other change in use thereof subsequently restriction to transfer the accessed biological resources and the traditional knowledge to any third party without prior approval of Authority; submitting to the Authority a regular status report of research and other developments; independent enforceability of individual clauses, provision to the extent that obligations in benefit sharing clauses survive the termination of the agreement, events limiting liability (natural calamities), arbitration and any confidentiality clause.²⁸

²⁷ The Biological Diversity act, 2002

²⁸ The Biodiversity rules 2002

5. Conclusion

The Access and Benefit sharing mechanism put in place through the Biodiversity Act, 2002 in India has in recent times emerged as a tool in the hands of the developing nations to bargain with their developed nation counterparts, which these nations provide for the later.

The access and benefit sharing mechanism has developed as a tool for combating bio piracy, which was amply highlighted in the paper be it in the Turmeric case, Basmati case or the Neem case, wherein India's valuable biological resources were tried to be misappropriated.

The Nagoya Protocol on Access to genetic resources and fair and equitable sharing of benefits arising from utilization of genetic resources was adopted in the year 2014 to fructify the objectives of the CBD and India realizing the importance of it adopted this protocol in the same year.

India, on the other hand has had a fair share of ups and downs in its domestic biodiversity protection regime. The Biodiversity Act of 2002 despite its shortcomings, on a number of occasions was able to push through for a fair and equitable sharing of biological resources for the numerous stakeholders, who constitute an important part of biodiversity regime. The examples are in the case of the Kani tribes from the state of Kerala in India, where the herb 'Arogyapacha' became the first case of successful access and benefit sharing. Similarly, the Pepsico case wherein benefits from the seaweed procured by Pepsico was shared with local fishermen off the coast of Tamil Nadu in India.

The Nagoya Protocol has tried to be implemented in India wherein certain provisions from the protocol have been put in the existing Biodiversity regime in India. However, a complete justice to the Protocol and its provisions remain far from the reality and there are many aspects of Access and Benefit Sharing like Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT) which remain out of the picture thus making it actually difficult to call that principles enshrined in the Nagoya protocol have been implemented in true letter and spirit. It is in this sense, that there lies a tremendous scope for full implementation of the Nagoya Protocol thereby improving the access and benefit sharing mechanism in India.

Right to Privacy as a Fundamental Right and Media Trials in India

*Sonakshi Pandey*¹
*Snigdha Srivastava*²

Abstract

In this research it is planned to analyze the Right to Privacy as forming an intrinsic part of the fundamental right of 'right to life and personal liberty' under Article 21 of Constitution of India, and the way it is being abused via media trial being carried out by various media houses. Media is considered as the fourth pillar of our Indian democracy and plays a very important role in our daily lives as well as for safeguard of democracy, dilution of concentration of power within the country, it is very important to keep the check and balance and due to lack of Constitutional and legislative measures to protect privacy, the big role media plays in our democracy having such laws expressly can be viewed as hindrance in letting the media express their views openly that too beyond the reasonable restrictions as imbibed in the Constitutional framework of our Country.

Keywords : *Article 21, Constitution, fundamental rights, UDHR, privacy, democracy.*

1. Introduction

The Right to Privacy has been very much in news lately, so as for determination as an important aspect of fundamental right of 'right to life and personal liberty' under Article 21 and as a part of the freedoms, that have been guaranteed by Part III of the Constitution. There has been almost an evolution of the very subject through various landmark decisions taken over the course of time. Starting with the decision in **MP Sharma v. Satish Chandra**³ that got carried forward with the Judgment in **Kharak Singh v. State of Uttar Pradesh**⁴ establishing that privacy is not a fundamental right. Over the period of time, through various judgments, now such an interpretation has been made and such an expansion has been done that now, Right to Privacy stands embedded in the foundation of right to life and personal liberty under Article 21 as well as various freedoms guaranteed under Article 19 in Constitution of India. Now, it is the right to freedom of speech and expression that gives the media, the right to publish any information. But along with this right being provided, entails a very important aspect of maintaining the privacy of individuals as well.

¹ Assistant Professor, Siddhartha Law College, Dehradun

² Assistant Professor, Siddhartha Law College, Dehradun

³ (1954) S.C.R 1077.

⁴ (1997) S.C.R. 332.

In India, lately concept of media trial has emerged out as to be a very dangerous trend, putting in danger the very fabric of justice which needs to be preserved. Media bashing on the basis of allegations put by one side, without giving an equal opportunity to be heard to the other side has become like a trend followed by every other media house, like as if they are managing the judicial framework of our country on their own. Press Council of India clearly reiterates that the media should not intrude "the privacy of an individual, unless outweighed by genuine overriding public interest, not being a prurient or morbid curiosity."

2. Historical Background

In India, starting with the case of **Kharak Singh v. State of U.P.**⁵ in 1962 wherein on the question of right to privacy being given a status of fundamental right, minority was established, still it was also established that, it provides both the right to personal liberty as well as freedom of movement, but with passage of time, more recognition was provided to it in the case of **Govind v. State of M.P.**⁶ in 1975, wherein a confirmation entailed as with regards to the status of Right to Privacy as a fundamental right, which was contended to include and thereby protect the bonds of marriage, motherhood, privacy of family and ultimately it was regarded as to be a matter of state subject, which needs to be looked upon with priority.

Further in 1978, the Apex Court in the case of **Smt. Maneka Gandhi v. Union of India & anr.**⁷ brought forth the triple test for any law as to which would interfere with the personal liberty and privacy being such an important aspect of the liberty in the Grundnorm law was given the utmost importance. In 1994, in **R. Rajgopal v. Union of India**⁸, Apex court was of view that the very right pertaining as to be a part of right of personal liberty requires to be treated as covering all the protection as given to a fundamental right and be brought forth as an actionable claim. But it was in 1996, that with the case of **People's Union for Civil liberties v. Union of India**⁹, regulations were brought forward in interception provisions and the necessity of such information was primarily to be considered. Further, in 2004 with the case of **District Registrar and Collector v. Canara Bank and Another**¹⁰, Apex Court again discussed that the freedoms provided under Article 19 are meant to provide and strengthen the right to privacy further. It was in year 2010 when the case of **Selvi v. State of Karnataka**¹¹ brought a very important analogy forth as because of observations made by

⁵ *Supra* note 3.

⁶ (1975) S.C.R. (3) 946.

⁷ (1978) A.I.R. 597.

⁸ (1995) A.I.R. 264.

⁹ (1997) 1 S.C.C. 301.

¹⁰ Appeal (CIVIL) 6530-6374 of 1997.

¹¹ Criminal Appeal No 1267 of 2004.

Supreme Court regarding the classification of privacy into mental and physical privacy, a very important aspect was discussed and it straightaway directed the right to privacy being linked to fundamental right of Article 20(3).

Evolution of varied aspects of Right to privacy as a human right continued as when in 2014 in the case of **Unique Identification Authority of India and anr. v. Central Bureau of Investigation**¹², when the Central Bureau of Investigation asked for the access into the database of Unique identity Authority of India, it was denied same, as for the purpose of investigation into the criminal offences, such an act would require the consent of individuals so as to protect their privacy.

3. Negation of Right to Privacy by Media Trial

3.1 The Decline in Importance of Media as Fourth Pillar of Democracy because of Media Trial and Negation of Privacy

There has been a big decline in the very importance of media, the way that importance is perceived in the society, as it is quite evident these days, that in wake of competition, all the media channels seem to be trying to get better of each other. India became party to the United Nations Declaration on Human Rights 1948 (UDHR). Press had played a very important and productive role in the independence movement, through its strong support for the popular movement of Satyagraha and abdication of foreign goods and other similar forms of freedom struggle. Such was the impact of the print media that it frightened the British, as it gave a picture of a strong India, though the reality was a disintegrated India ruled by princely kings and people in deep poverty. The framers of our Constitution knew the immense power vested in the print media, therefore they imbibed the Freedom of Speech and Expression in Article 19(1) (a) of the Indian Constitution from Article 19 of the UDHR, and also reflected similarly in Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR). UDHR 1948 in Article 12 and ICCPR 1966 in Article 17 give protection to the concept of privacy. Though freedom of speech and expression given in Article 19 of the UDHR 1948 and ICCPR 1966 was enshrined in Article 19(1)(a) of the Indian Constitution. We do not find such constitutional recognition given to privacy in India. Here, privacy is not given any separate constitutional status. Right to life, liberty and security of person is enshrined in Article 3 of the UDHR 1948. This is recognized in Article 21 of the Indian Constitution. Privacy was not included in this Article. In **Nihal Chand v. Bhagwan Dei**¹³ during the colonial period, as

¹² Petition(s) for Special Leave to Appeal (Crl) No(s).2524/2014 in the Supreme Court, Order dated March 24, 2014.

¹³ (1935) A.I.R. S.C. (1002).

early as in 1935, the High Court recognized the independent existence of privacy from the customs and traditions of India. But privacy got recognition in free India for the first time in **Kharak Singh**¹⁴ case. Privacy was recognized as a separate right in UDHR 1948. This has failed to materialize in the same spirit as a fundamental right in the Indian Constitution, like the right to speech and expression and right to life. Privacy has been defined by Supreme Court in **Sharada v. Dharampal**¹⁵ as, the state of being free from intrusion or disturbance in one's private life or affairs .

3.2 Incidents Of Media Trail

The exponential growth of media, particularly the electronic media in recent years has brought into focus issues of privacy. The media has made it possible to bring the private life of an individual into the public domain, exposing him to the risk of an invasion of his space and his privacy. In India, newspapers were for many years, the primary source of information to the public. This has change today with the growth in public consciousness, a rise in literacy and perhaps most important , an explosion of visual, electronic and social media which have facilitated an unprecedented information revolution.

Some of the form of Media trials that violate the Right to Privacy are :-

3.2.1 Photographs

This is more intrusive than news reports, some of cases are **Hannover v. Germany**¹⁶ (Princess Caroline case), in this case the eldest daughter of prince of Monaco named Caroline was photographed in her childhood despite of her efforts of not being getting photographed by German press. In 1999, an injunction was also issued by the German courts to prevent the publication of her childhood pictures but German constitution ruled that there was no breach of her right to privacy since she was a public figure. On June 2004, the court unanimously held that taking such photographs is a breach of Article 8 of European Convention on Human Rights and public figures are protected from getting photographed without their permission and knowledge. The another case is **Murray v. Express Newspapers Plc.**¹⁷ Where again the right to privacy of a child of celebrity was recognized by the court. The case is related to the famous author Mrs. Murray who has penned down the Harry Potter books and is commonly recognized by the name of J.K. Rowling. in this very case, Dr. Neil and Mrs. Murray were walking in the streets of Edinburg with their 19 months old son named David and they were photographed by Big pictures Ltd. They filed

¹⁴ *Supra* note 2.

¹⁵ (2004) 1L.J.R. 540.

¹⁶ (2004) EMLR 379; (2005) 40 EHHR.

¹⁷ (2008) WLR 1360.

a case against the said publication house on the behalf of David and asserted that such publication of photos seriously injured their right to privacy provided under article 8 of ECHR. The case went to court of Appeal and they ruled that a child has a right has a freedom of normal living without the interference of media and this right is protected by the law.

3.2.2 Biographical Works

In **Kaleidoscope (India) Pvt. Ltd. v. Phoolan Devi**¹⁸, Phoolan Devi once India's most dreaded dacoit, sought an injunction restraining the exhibition of the controversial biographical film 'Bandit Queen' both in India and abroad. The said film contained various naked scenes of Phoolan Devi and atrocities done on her by the villagers. The court passed a 37 pages judgment and ordered the prevention of exhibition of the film in India and abroad because such cinematographic work seriously destroys her right to privacy which is enshrined under Article 21 of Indian Constitution.

Another case of **R. Rajagopal v. State of T.N.**¹⁹ strikes a balance between the Right to privacy and Right to freedom of speech and expression. In this case a prisoner was prevented from getting his autobiography being published in magazine as it could defame the state. Jail officials pressurized the prisoner so that he refused to publish his autobiography but court pointed out that there is a balance between the Right to privacy and freedom of expression and jail officials do not have a right to prevent the prior publication of those works which may eventually defame the state.

3.2.3 Medical Records

Does the disclosure by a hospital of the medical conditions of an AIDS patient to his fiancée amount to a breach of the patient's privacy? in **Mr. X v. Hospital Z**²⁰, the SC was confronted with the task of striking a balance between two conflicting fundamental rights. There was therefore no infringement of the right to privacy.

3.2.4 Privacy of the Dead

It is often assumed that deceased persons have no privacy. One tragic instance of this was in the aftermath of **Arushi case**²¹, involving the mysterious killing of a school girl in her own home. Case involved the insensitive media coverage of the Arushi's dead body, the SC passed a series of interim directions to protect the honor and reputation of the deceased minor girls. The court in this very case gave protection to dead persons also of their right to privacy. After the killing of Osama Bin Laden

¹⁸ AIR (1995) DEL.316, ILR 1996 DEL. 586.

¹⁹ (1994) S.C.C. (6) 632.

²⁰ Appeal (civil) 4641 of 1998.

²¹ (2013) 82 A.C.C. 303.

by the American forces in Abbottabad, Pakistan in May 2011, there was pressure on the US government to release photographs of his corpse. President Obama stood firm on his decision not to allow publication of the photographs as it could create chaos and stress at the international level.

3.2.5 Sting Operations

On 30 August, 2007 Live India, a news channel conducted a sting operation on a Delhi government school teacher forcing a girl student into prostitution. Subsequent to the media exposé, the teacher **Uma Khurana**²² was attacked by a mob and was suspended by the Directorate of Education, Government of Delhi. Later investigation and reports by the media exposed that there was no truth to the sting operation. In this case, the High Court of Delhi charged the journalist with impersonation, criminal conspiracy and creating false evidence. The Ministry of Information and Broadcasting sent a show cause notice to TV-Live India, alleging the telecast of the sting operation by channel was “defamatory, deliberate, containing false and suggestive innuendos and half truths.”

Subsequently, in 2001, the sting operation conducted by Tehelka named “**Operation West End**” exposed corruption in defense contracts using spy cams and journalists posing as arms dealers. The exposé on defense contracts led to the resignation of the then defence minister George Fernandes. Sting operations gained legitimacy in India, especially in the aftermath of the Tehelka operation, exposing corruption within the government. The original purpose of a sting operation or an undercover operation was to expose corruption. Stings were justifiable only when it served a public interest. Subsequent to the Tehelka exposé, stings have assumed the status of investigative journalism, much of which has been questioned in recent times, especially, with respect to ethics involved in conducting sting operations and the methods of entrapment used by the media. Further, stings by Tehelka, where the newspaper used sex workers to entrap politicians have brought to question the manner in which stings are operated. Although, the overriding concern surrounding sting operations has been its authenticity, as opposed to, the issue of personal privacy.

4. Trial By Media and Media Victimization

The rights of an accused are protected under Article 21 of the Constitution, which guarantees the right to fair trial. This protects the accused from the over-zealous media glare which can prejudice the case. Although, in recent times the media has failed to observe restraint in covering high-profile murder cases, much of which has been hailed as media’s success in ensuring justice to the common man.

²² 146(2008) DLT 429.

For instance, in the **Manu Sharma vs. State of Delhi (NCT)**²³, very famously called Jessica Lal murder case the media took great pride in acting as a facilitator of justice. The media in the case whipped up public opinion against the accused and held him guilty even when the trial court had acquitted the accused.

The Apex Court observed that the freedom of speech has to be carefully and cautiously used to avoid interference in the administration of justice. If trial by media hampers fair investigation and prejudices the right of defense of the accused it would amount to travesty of justice. The Court remarked that the media should not act as an agency of the court.

The Court, commented, "Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending."²⁴

5. New Dimension to Right to Privacy

The most liberal and biggest dimension to Right to Privacy was given by the historic 9 judge bench of the supreme court in Justice **K.S. Puttaswamy vs. Union of India**²⁵. The bench overruled the earlier decisions given by the 8 judge bench in the cases of **Kharak Singh**²⁶ and **M.P. Sharma**²⁷ and held that Right to privacy is an integral part of Part III of Indian Constitution. The whole judgment given in the case consists of 547 pages, six different opinions and a lot of observation. Court highlighted that Right to privacy finds its space under article 21 of Constitution which talks about personal life and liberty. The said case arose out of an ADHAR scheme provided by government which ensures that every citizen must have a Adhar card for availing various government schemes and benefits. Controversy arose because the Adhar consists of individual's biometric and personal details including his/her fingerprints and this destroys right to privacy. The court in this case gave the welcoming decision and held that right to privacy comes under the ambit of right to life and personal liberty and includes right to have autonomy over one's personal decisions, bodily integrity and personal information as well. Although this right is not absolute in nature and every law framed by the legislation which directly or indirectly infringes the right to privacy of any person must be tested on the ground of justness, fairness and reasonableness.

²³ (2010) 6 SCC.1.

²⁴ *Ibid.*

²⁵ WRIT PETITION (CIVIL) NO. 494 OF 2012

²⁶ *Supra* note 2.

²⁷ *Supra* note 1.

6. Conclusion

It may be concluded that although media plays a very important role in our daily lives as well as for safeguard of democracy, dilution of concentration of power within the country, it is very important to keep the check and balance and due to lack of Constitutional and legislative measures to protect privacy, the victims of press abuse have no other option but to take the help of tort law, because taking into consideration, the big role media plays in our democracy having such laws expressly can be viewed as hindrance in letting the media express their views openly that too beyond the reasonable restrictions as imbibed in the Constitutional framework of our Country.

Rights to privacy need extending and intensification in the digital time. Also as stated in **Rajendra Sail v. M.P High Court Bar Association**²⁸, we need a strong press council in India. It should be a strong regulatory authority with representatives of legal, social, common man and press. Presently the Press Council is dominated by the different newspapers. Also, importance of media cannot be undermined but lately there have been humongous advances in technology which has acted as both boon and bane for the common people, on the one hand it has revolutionised the communication of information, ultimately providing the shot in arm for better connectivity and conveying of information, which is must in a democracy and on the other hand, which has led to evils of sting operations, tapping of private conversations, hacking into personal information of an individual without taking the consent and so on, and to curb the same, need for a specific law to safeguard the personal interests of an individual is clearly the foremost requirement at present. Media is a necessary evil, if the democracy is to function properly, but out of this necessary evil to some aspects of evil like media trial need to be curbed as soon as possible, because safeguarding the privacy of an individual, which is an important aspect of liberty as guaranteed in the Constitution of India is equally important as well.

²⁸ Appeal (crl.) 398-399 of 2001.

Corporate Social Responsibility vis-a-vis Corporate Environmental Responsibility

Mayank Tiwari¹

Abstract

Corporate Social Responsibility (CSR) is a basic responsibility of the corporate sector and the Companies Act, 2013 has made it compulsory for the companies to spend a share of their profit for society at large. It has also been observed that the companies responsible toward the society at large have good repute among the customers and create long term value for shareholders. The Environmental Pollution and globalisation have direct relationship. So, it is required for the corporate sectors to take proper steps for prevention of degradation of the environment. It is helpful to create a balance of development and protection of natural habitat by promoting good practices among corporate through CSR.

In modern times, the corporate sector is getting more responsible towards environment protection and several initiatives are taken by them to create healthy environment by revival of lakes, cleaning of rivers, protection of wild life species, management of national and local parks etc. The main aim for a business enterprise is to perform social – cum – economic responsibility. In spite of mandate of law, many companies find reasons for not complying with CSR norms. But the general observation is that the corporate trend is changing with times and now the corporate are taking CSR as business strategy. In light of the environment protection initiatives by corporate it can be said that Corporate Social Responsibility is emerging as Corporate Environment Responsibility.

Key Words: *Corporate Social Responsibility, Corporate Environment Responsibility, Business Performance, Environment Protection.*

1. Introduction

India is the land of multi-culture and humanity where the concept of “Vasudev Kutumbkam”² is followed. The Indian scriptures also pave more importance to the General and Common interest than the personal or individual interest. The general interest is not limited to the economic tenets but extends to the social and culture of people. It includes the general life of individuals which is influenced by the surroundings, living habits and environment. The traces of environment protection are also evident in Kautilya’s Arthashastra. Indian culture respects natural resources like rivers, trees, plants, sea, air, fire etc as deities. Hindu scriptures also mention that

¹ Assistant Professor of Law, National Law University Odisha, Cuttack.

² Vasudev Kutumbkam finds its origin from the combination of Sanskrit words ‘vasudha’ which means earth and ‘kutumbakam’ means family. It means the whole world is one family. The concept is enshrined in hitopadehsa.

the human body is composed of jal (water), agni (fire), vayu (air), aakash (sky) and prithvi (earth).³

From the very inception, the economic set up of the country was based on the spiritual, moral and religious practices. Likewise, the business organisations were also working in a way profitable to them and not destructive to society. With industrialisation and globalisation, people's economic aspirations increased leading to accumulation of wealth which replaced by the ethical and traditional concepts. The scenario changed globally and the new dimensions of corporatisation make the corporate more responsible to the individuals than the society. It was due to emergence on new theory of shareholders. Milton Friedman supported that the business is not accountable to the society but its main responsibility is towards the shareholders.⁴ But in present scenario, the corporate trend is towards the social responsibility. Edward Freeman came up with the Stakeholders Theory which provides that the business is not merely responsible to the shareholders but stakeholders at large.⁵

2. Corporate Social Responsibility and Business Performance

Initially, it was not compulsory for all the companies to perform social obligation. But the organisations which did something for betterment of the society have good reputation in minds of general public. These socially working organisations were adding handsome amount of profits in their wallets.⁶ The concept of CSR in India can be traced out from the olden times. Many institutions were set up by the corporate houses working for the benefits of the society. It has been proved in the study that the Indian Companies performing corporate social responsibility activities are getting reward through increase in financial performance.⁷ The concept has become

³ Gurdip Singh, *Environmental Law*, Eastern Book Company, Lucknow (2016), p.3.

⁴ Milton Friedman, *The New York Times Magazine*, September 13, 1970.

⁵ R.Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, *Business Ethics Quarterly*, Vol. 4, No. 4 (Oct., 1994), Cambridge University Press, pp. 409-421.

⁶ Rubén Hernández-Murillo and Christopher J. Martinek, *Corporate Social Responsibility Can Be Profitable*, *The Regional Economist*, April 2009, p.5 retrieved on November 25, 2017 from <https://www.stlouisfed.org/publications/regional-economist/april-2009/corporate-social-responsibility-can-be-profitable>.

⁷ Supriti Mishra, Suar Damodar, *Does Corporate Social Responsibility Influence Firm Performance of Indian Companies*, *Journal of Business Ethics*, Vol. 95, No. 4 (September 2010), pp. 571-601. The research was conducted on 150 Indian Companies. The researcher comes to the conclusion that corporate social responsibility is an important factor for the companies. It affect the financial performance of the companies but in regard to non-financial performance, the researcher is not conclusive. Further the listed companies spending on corporate social responsibility are getting more rewards through increase in financial performance than the non-listed companies.

more important after the Companies Act, 2013 came into force wherein the CSR was made compulsory for the companies qualifying the threshold limits. Schedule VII of the Companies Act, 2013 provides the list of activities for which expenditure shall qualify as the CSR.

In Indian Scenario, it has been observed that many of the companies which are performing the activities of social responsibility towards the society are getting good repute among the citizens. In a country like ours, where government is having paucity of funds but lot of things are required to be done for development of nation there is need of voluntary - cum - mandatory help from the corporate sector.⁸ The general opinion of an intellect person is that if the provision of Corporate Social Responsibility will get implemented in its true spirit, it will be a miracle for the development of our nation. In a study, 187 companies across the globe have shown that reduction in carbon release shall not amount to reduction in profits.⁹ It is a glaring example that the companies working for improvement in environmental field are not facing financial loss. The Companies complying with the high standards of CSR by caring for all the stakeholders create long term value for the shareholders.

3. Corporate Social Responsibility: The Indian Scenario

Social responsibility is inherent in the Indian culture. The businessmen were performing these activities as philanthropy. The corporates undertook several duties like construction of temples, schools, higher education institutions and other infrastructures for public use.¹⁰ But the efforts taken by them towards the society as well as industrial development were not only influenced by the religious inclination but also by caste group and religious motives.¹¹ During the independence struggle the

⁸ Mayank Tiwari, *An effective implementation of Corporate Social Responsibility in India: A need of hour*, International Journal of Legal Research and Governance, Vol. 1 Issue II (2014).

⁹ 5 Indian Companies in Global A list of green firms, Times of India, October, 16, 2014 retrieved on December 01, 2017 from <http://timesofindia.indiatimes.com/home/environment/globalwarming/5IndiancompaniesinglobalAlistofgreenfirms/articleshow/44831606.cms>

¹⁰ Dr. Amit Das, *Managing Business Ethics and Compliance*, Educreation Publishing, New Delhi, p.120.

¹¹ P. Sivaranjini, Rekha T, *Issues and Challenges Faced By Corporate Social Responsibility In Community Development, India Human Resource Development*, IOSR Journal of Business and Management, National Conference on Innovative Business Practices in Technological Era, Erode Sengunthar Engineering College, Thudupathi, p.59.

dimensions of corporate social responsibility converted to the political donations and social causes.¹²

After Independence, the Industrial era began under the vision of the then Prime Minister Pt. Jawaharlal Nehru.¹³ India as a socialist state has several responsibilities towards the society and its citizens. On the other side, the corporate business houses were involved in profit making which led to fall in social responsibility. In 1965, the India International Centre and Gandhian Institute of Studies organised a first seminar on Social Responsibilities of Business.¹⁴ The term 'Corporate Social Responsibility' was first brought into implementation by Corporate Social Responsibility Voluntary Guidelines, 2009. These guidelines were issued by Ministry of Corporate Affairs and were voluntary in nature. The guidelines generally provided for integration of social, ethical and environmental into governance of business. The voluntary guidelines provides for Care of stakeholders, ethical functioning, worker's rights and welfare, respect for human rights, environment, social and inclusive development activities.¹⁵ It acted as a foundation stone for laying the base of CSR activities in India.

In 2011, National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business were issued by the Ministry of Corporate Affairs. These guidelines were refinement of CSR Voluntary Guidelines, 2009. It provides for the following principles¹⁶:

- (a) The businesses must conduct and govern themselves with ethics, accountability and transparency.
- (b) The business must provide safe goods and services. It must also contribute to the sustainability throughout the life of business.
- (c) The business must promote the wellbeing of all the employees by providing equal opportunities to workers, prohibition of child labour, harassment free workplace etc.

¹² Atul Sood, Arora Bimal, *The Political Economy of Corporate Responsibility in India*, United Nations Research Institute for Social Development, Technology, Business and Society Programme, Paper Number 18, November 2006, p.6.

¹³ Suranjan Das, *Nehru's Vision of a new India*, The Hindu, July 26, 2011.

¹⁴ C. Gopala Krishna, *Corporate Social Responsibility in India: A Study of Management Attitudes*, Mittal Publication, New Delhi, 1992, p. 1.

¹⁵ The Corporate Social Responsibility Voluntary Guidelines, 2009 were published by Ministry of Corporate Affairs, Government of India. The same were issued during Indian Corporate Week held from December 14-21, 2009. The guidelines were voluntary in nature and there was no compulsion for implementation of the same. General good principles were provided by the guidelines.

¹⁶ As per Chapter 2 entitled Principles and Core Elements of National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business as issued by Ministry of Corporate Affairs, Government of India, July 2011 p. 7-26.

- (d) The business must respect the interest of stakeholder. It must also take special care to the interest of stakeholders who are disadvantaged, marginalised and vulnerable.
- (e) The business must respect and promote the human rights. It provides the corporate responsibility for respecting the human rights. The constitutional provisions and other statutes providing for the dignity of human being must be ensured in true spirit.
- (f) Business must protect, respect and make its best efforts to restore environment. The environmental responsibility is essence of sustainable economic growth.
- (g) When the businesses are involved in influencing the public policy, it must act in responsible manner.
- (h) Inclusive growth and equitable development must be supported by the businesses.
- (i) Businesses must provide value to their customers in responsible manner.

Further the Securities and Exchange Board of India explained that the corporates are responsible to the society at large. The SEBI make it compulsory for top 100 listed companies based on market capitalisation at NSE and BSE to include business responsibility reports as a part of annual report.¹⁷ This was compulsory for the prescribed companies but discretionary for the other companies. The big companies provided more show of figures than actual incurred expenditure. It was done to allure the stakeholders and to build a good repute of the company. Gradually the provision was included in Companies Bill, 2009 which never matured as an enactment. Finally, the provision was included in Companies Act, 2013 which made it compulsory for the companies falling in threshold limit to form CSR committee and spend atleast 2 percent of their net profits as CSR. SEBI(Listing Obligations and Disclosure Requirements) Regulations, 2015 replaced the earlier notification of SEBI.¹⁸ The new provision make it compulsory for all the companies to describe initiatives taken by them for an environmental, social and governance practice.¹⁹

4. Corporate Social Responsibility and Companies Act, 2013

The Companies Act, 2013 makes it compulsory for the certain companies to spent atleast two percent of the average net profit made during three immediate financial years towards corporate social responsibility. The provisions of corporate social responsibility includes in its ambit the holding, subsidiary and the foreign company having branch office or project

¹⁷ SEBI circular no. CIR/CFD/DIL/8/2012 dated August 13, 2012.

¹⁸ SEBI circular no. CIR/CFD/CMD/10/2015 dated November 04, 2015.

¹⁹ clause (f)of sub regulation (2) of regulation 34 of Listing Regulations.

office in India.²⁰ These companies are required to form a corporate social responsibility committee.²¹ The companies covered under this category are²²:

- (a) The companies having net worth of rupees five hundred crores or more;
- (b) The companies having a turnover of rupees one thousand crores or more;
- (c) The companies having net profit of rupees five crore or more.

There shall be corporate social responsibility committee of listed companies which shall consist of atleast one independent director. The committee is responsible for the following activities²³:

- (a) formulating and recommending to the board, corporate social responsibility policy of the company. The activities so recommended must be covered by the activities prescribed in schedule VII of the Companies Act, 2013;
- (b) recommending the amount of expenditure to be incurred by the company on corporate social responsibility activities;
- (c) monitoring the corporate social responsibility of the company from time to time.

The report on corporate social responsibility shall form a part of board report. Further the company is bound to publish the information regarding CSR on its official website. In case any company is not able to spent the money is current year, the clarification in regard to same must be provided. So, it is a concept where the company have to spend for CSR activity or to provide reason for not performing CSR activity. This provision makes CSR as soft law.

The activities covered in Schedule VII of the Companies Act, 2013 includes eradication of extreme hunger and poverty, malnutrition, promotion of preventive health care and sanitation and making availability of safe drinking water, promotion of education, providing special skills, employment enhancing vocational skills specially for the women, children, and differently abled, promotion of gender equality and gender equality, setting up of the homes and hostels for women and orphans, setting up of old age home, day care centre, reduction of child mortality and improvement of maternal health, combating the immune deficiency virus, acquired immune deficiency syndrome, malaria and other diseases, environmental

²⁰ sub-rule (1) of rule (3) of Companies (Corporate Social Responsibility Policy) Rules, 2014.

²¹ sub-section(5) of Section 135 of Companies Act, 2013.

²² sub-section (1) of Section 135 of Companies Act, 2013.

²³ sub-section (3) of section 135 of Companies Act, 2013.

sustainability, protection of flora and fauna, animal welfare, agro-forestry, conservation of natural resources, maintaining the quality of air and water, measures for the benefits of veterans of armed forces, promotion of the rural sports, paralympic sports and Olympic sports, contribution to the prime minister national relief fund or any other fund set-up by the central government or the state government for socio-economic development and relief and any other funds set up for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women and rural development projects.²⁴

5. Environmental Pollution and Corporatisation

In the present scenario of development, the dispute in corporate responsibility and environmental pollution is an issue of major concern. The issue of developed economies and under-developed economies is another concern. The development in the country necessitates the construction of huge infrastructure including corporate offices, industrial units, markets, malls, hotels, houses, roads and flats etc. All these constructions need land and eventually the demolition of the natural habitat including flora and fauna.²⁵ As per the proved fact destruction of forests, natural flora, mountains, covering of wells, lakes, ponds and rivers etc gives rise to increase in temperature of the earth. The environment gifted to the human being by the nature was originally degraded in the wade of globalisation, commercialisation and industrialisation. There are increasing evidences in India that for capturing the greener pastures, corporate houses have been involved in unethical dealings in collusion with the power structures of the state.²⁶

The increase in development of the economy has given rise to increase in number of man- made resources which have caused pollution. It includes various vehicles, big industrial plants where machinery runs with the help of coal, diesel or other natural resources which resultantly causes pollution. There are several other problems that emerge by industrialisation which relates to water supply, sewage and waste disposal, vehicle congestion and the pollution of water sources by uncontrolled industries which discharge noxious effluents.²⁷ The conflict in social and private differences between the societies and corporations across the globe is always

²⁴ schedule VII of The Companies Act, 2013 as updated by notification no. G.S.R. 130(E) dated February 27, 2014.

²⁵ Ramchandra Guha, *The Past and Present of Indian Environmentalism*, The Hindu, March 27, 2013.

²⁶ Seema Sharma, *Indian Journal of Industrial Relations*, Vol. 46, No. 4, Beyond GDP (April 2011) p 639.

²⁷ Jayasree De, *Development, Environment and Urban Health in India*, Geography, Vol. 92, No. 2 (Summer 2007), pp. 158-160.

present. Global warming, acid rain and pollution in the cities are the example of social cost exceeding the private.²⁸

There are several cases of industrial pollution which are decided by the Courts. Some of them includes (Delhi Stone Crushers case) M. C. Mehta v. Union of India,²⁹ (Coastal zone case) Indian Council for Enviro-Legal Action v. Union of India,³⁰ (Tamil Nadu Tanneries Case) Vellore Citizens Welfare Forum v. Union of India,³¹ (Beas River pollution case) M.C. Mehta v. Union of India,³² (Ganga River pollution case) M.C. Mehta v Union of India.³³ In addition to this, the industrialisation and corporatisation has also caused serious problems in environmental imbalance. The recent incident of Uttarakhand where the natural calamity has resulted into death of more than hundreds of people is a glaring example of effect of excessive commercialisation. The main reason was the deforestation, over construction on hills, blast use for tunnelling etc.³⁴

It has also been found that the Multinational Companies (MNCs) in India have polluted the rivers and environment of land.³⁵ In addition to the industrial pollution on land and water, toxic pollutants are also found in air due to uncontrolled emission from industry and traffic.³⁶ The Constitution of India also provides for protection of the environment. Article 21 of Constitution of India is a mandate to pollution free environment. Right to live in clean and healthy environment is a basic fundamental right. There are several laws in India for the protection of environment like Forest Act, 1927, Forest Conservation Act, 1980, Wild Life Protection Act, 1972, Water (Protection and Control of Pollution) Act, 1974, Air (Protection and Control of Pollution) Act, 1981, Environment Protection Act, 1986, etc. All these enactments are required to be followed by the industrial units at the time of establishing the plant and continuously throughout their life time.

²⁸ Saumitra N. Bhaduri & Selarka Ekta, *Corporate Governance and Corporate Social Responsibility of Indian Companies, Corporate Governance and Corporate Social Responsibility*, P.3 Springer, Singapore (2016).

²⁹ 1991 SCR (1) 866.

³⁰ (1996) 5 SCC 281.

³¹ AIR 1996 SC 2715.

³² AIR 2002 SC 1515.

³³ AIR 1988 SC 1115.

³⁴ KP Narayana Kumar, *Uttarakhand's path to devastation a natural calamity or a result of industrialisation?*, The Economic Times, June 30, 2013.

³⁵ Aditya Singh Patel, *The Environmental Management of Multinational Corporations in India*, IPCBEE vol.64 (2014), IACSIT Press, Singapore,10.7763/PCBEE 2014, V64 12.

³⁶ David J. Davidar, *India: Every river polluted, and few effective controls*, Ambio, Vol. 11, No. 1 (1982), p. 63.

6. Corporate Social Responsibility and Corporate Environmental Responsibility

As we have already discussed that the Companies Act, 2013 makes it compulsory for the companies falling within the prescribed threshold limits to make compulsory contribution towards corporate social responsibility through several mechanism. In the context of modern economy where the corporate are taking from natural resources, it becomes important for them to do something for the environment. In present context the corporate social responsibility can be termed as corporate environmental responsibility.³⁷ Schedule VII of the Companies Act, 2013 provides that amount spent for activities including environmental sustainability, ecological balance, animal welfare, agro-forestry, conservation of the natural resources, maintaining quality of air, water and soil shall be eligible to qualify as CSR expenditure. It also provides for good quality of water for drinking and healthy sanitation. The inclusion of all these items in schedule VII shows the intention of legislature to make the corporate more responsible towards the society and the environment. As per the study it has been found that in 2014-15, fourteen percent of total CSR expenditure amounting to Rs. 1213 crores were spent by companies on environment conservation.³⁸ It is positive sign of corporate for protection and conservation of the environmental resources. The government of centre and states are inviting various companies for protection of environment. The innovations by the India Inc. is by the means of making recycling, waste management along with sustainable development.³⁹

Majorly all the listed Companies in India have spent money for the conservation of the environment which is one of the activities qualifying for corporate social responsibility. Some of the glaring examples are Hero Motor cop planted 1.2 lakh trees in Delhi as a part of green drive,⁴⁰ Tata Power set up a breeding centre for endangered species as eco-restoration,⁴¹

³⁷ Shishir Tiwari & Ghosh Gitanjali, *Governance of Corporate Environmental and Social Responsibilities in India: Sketching the Contour of Legislative Evolution and Reforms*, IMJ, Volume 6 Issue 1, January-June 2014, p.36.

³⁸ Goodera, *CSR and sustainable development: Do Indian companies care about the environment?*, Forbes India, January 05, 2017 retrieved on December 02, 2017 from <http://www.forbesindia.com/blog/business-strategy/csr-and-sustainable-development-do-indian-companies-care-about-the-environment/>.

³⁹ Roles and responsibilities of India Inc. and civil society in tackling pollution, Hawa Badlo, The Economic Times, retrieved on 06, December 2017 from https://economictimes.indiatimes.com/-roles-and-responsibilities-of-india-inc-and-civil-society-in-tackling-pollution/changetheair_show/56370606.cms.

⁴⁰ N. Naina and U. Majumdar, Hero Motorcop's CSR and sustainable vision: a greener, safer and equitable world, The Economic Times, February 24, 2016.

⁴¹ The information has been retrieved on December 06, 2017 from <https://www.tatapower.com/pdf/press-release-28jul15.pdf>. It is press release issued by

Gail (India) Limited took Environment conservation initiatives which include a Gas based Crematorium at New Delhi, Bio Gas Plants and development of Environment Parks for thousands of poor labourers living in slums,⁴² Reliance Industries Limited has worked for enhanced livelihood, environmental sustainability, ecological sustainability, maintaining quality of air, soil and water, promotion of renewable energy and developing gardens and river fronts etc.⁴³ Srei Infrastructure and Finance Companies group has taken the initiative for cleaning the lakes and water bodies and also planted the trees.⁴⁴ These all activities are done as the part of corporate social responsibility initiative.

The companies are spending more and more money for the environment balance like the companies are taking several wild life sanctuaries, parks, constructing water purification plants, providing sanitary facilities by building public toilets, conserving lakes, rivers, contributing to swachh bharat mission, harvesting the rain water, maintaining the healthy quality of air, water and soil, ecologic balance, making eco-friendly products, sponsoring various environmental projects of the government. The government has established more than forty lakh toilets under swachh bharat mission which includes the help received from corporate sector.⁴⁵ Recently, the central government has written to the public sector undertaking banks and the insurance companies to built the toilets near their branches.⁴⁶

The main aim of corporate is to perform economical-cum-social responsibility. The nature must not be spoiled on cost of development. This can be done by making sustainable development with respecting the future requirements. The need of time is making corporate more responsible not towards shareholders but also towards the society, environment and humanity. The mechanism of corporate social responsibility can be used to make corporate responsible and converting it to corporate environmental

the Tata Power entitled Tata Power boosts its efforts towards saving the mighty Mahseer.

⁴² The information has been retrieved on December 06, 2017 from <http://www.gailonline.com/finalsite/pdf/CSR/GAIL-CSR-brochure.pdf>. It is the report on CSR initiative of the company from the official website of the Gail (India) Limited

⁴³ The information has been retrieved on December 06, 2017 from <http://www.ril.com/getattachment/d5fd70ef-e019-47e5-bb83-de2077874505/Corporate-Social-Responsibility-Policy.aspx>.

⁴⁴ The information has been retrieved on January 08, 2018 from <https://www.srei.com/csr/what-do-we-do/environment>. It is the report on CSR activities as published by the company on its official website.

⁴⁵ The information has been retrieved on December 06, 2017 from <http://www.swachhbharaturban.in/sbm/home/#/SBM>. The official website of Swachh Bharat Urban welcomes specially to the corporate under this mission of the Government of India.

⁴⁶ Manojit Saha, *Make a swachh investment, PSU banks told*, The Hindu, January 06, 2018.

responsibility. In India, the corporate are becoming more responsible towards the society it can be concluded from the study conducted by the NGO box. It is concluded in the research that 2017 has witnessed twenty percent hike in CSR expenditure by the companies.⁴⁷

7. Conclusion and Suggestions

The CSR is an effort to perform the welfare and social responsibility. It also acts as an instrument to protect and preserve the environmental balance. In country like India where the government is having limited funds and enormous social functions, it becomes extremely important for the companies to take up social responsibilities. An old empirical research comes to conclusion that most of the Indian companies form an opinion that the CSR is essence of sustainable business.⁴⁸ The environmental sustainability is ability to maintain the qualities that are valued in physical environment.⁴⁹ The environment and business are both essential for an economy. But there is need of balance between two. In earlier times, the corporate were socially responsible but the responsibility was inclined towards religious sentiments. In present scenario, the social responsibility of the corporate has become compulsory, without the inbounds of religion.

The multinational companies are also doing business activities beyond the borders of their own nation. This results into use of natural resources of the territory where they operate the plants and businesses. The manufacturing activities by use of machinery and industrial operations generate pollution and finally affect the environment. In light of it, these Multi- National companies are also duty bound to make some efforts for environmental preservation. The preservation of environment can be done by judicious use of the limited resources of a country.

In the existing scenario of Indian Companies Act, 2013 providing for compulsory corporate social responsibility there are several shortcomings. The provision of law provides for the development of the local area where the plant of company is established. This may cause regional development disparities.⁵⁰ As several states are economically more

⁴⁷ The research was conducted by NGO box wherein the data for financial year 2016-17 of 100 BSE listed companies was analysed. The research has made the comparison of 2015-16 and 2016-17 for the same set of companies. All of these companies have prescribed CSR of rupees one crore or more. The information have been retrieved on January 08, 2018 from <http://indiacr.in/20-increase-in-actual-csr-spend-in-fy-2017/>.

⁴⁸ Tatjana Chahoud et., *Corporate Social and Environmental Responsibility in India – Assessing the UN Global Compact's Role*, German Development Institute, February 2007, P.30.

⁴⁹ R.S. Singh, *Environmental Sustainability through Corporate Social Responsibility in India*, 2nd International Seminar and Exhibition, DTEX 2014, P.407

⁵⁰ Tulsi Jayakumar, A flaw in the CSR design, The Hindu, June 18, 2014.

developed than the others. If the companies working in those economically developed states are investing in CSR activities in those particular states, it will become more prosperous than the economically backward states. The Companies Act, 2013 provides a list of activities which qualifies for the expenditure under CSR. But the list is exhaustive and there are several other issues which are not provided in the list.

It has also been observed that several companies are misusing the public trust to show CSR spending. Many companies are transferring the amount to be spent for CSR and the same amount is refunded in cash to the promoters.⁵¹ These kinds of practices must be controlled by the means of proper check on the amount spent on CSR by the companies. There must be corporate will to do the social work for the benefit of society.

Section 135 provides the criteria for the companies which are bound to spend the amount for the corporate social responsibility. The limit has also been fixed to two percent of the average net profits of the company for last three years. It is important that in case the company is not qualifying any of the above conditions in any of the preceding three years consecutively, it is exempted from the provisions of the section. There may be misleading presentation of accounts by the companies to save themselves from the applicability of the provisions. Further, the information provided by the company is not verified by any mechanism. It is required that there shall be proper CSR audit of company.

The present Companies Act, 2013 provides that the companies are bound to spend the prescribed amount or to mention the reason for not spending the same in their annual report. But there is punishment only for not mentioning the reason for not disclosure of the information. It is also required that there shall be inclusion of proper penal provision for the companies violating the provision of Section 135 of the Companies Act, 2013.

The Environment management occupies an important place for companies having objective of environment protection in various ways like reduction in waste generation, energy consumption and efficient use of resources.⁵² The companies are an important part of economy and the sustainable economic development can be achieved by the protection of the planet. It is right that people, planet and profit are main aim of the business and one cannot sustain without the other. The law relating to the corporate social responsibility must be implemented in true spirit.

⁵¹ Dinesh Narayanan, *How Indian companies are misusing public trusts to launder their CSR spending*, The Economic Times, October 21, 2015.

⁵² C. V. Baxi & Sinha Ray Rupamanjari, *Indian Journal of Industrial Relations*, Vol. 44, No. 3, Corporate Social Responsibility (January 2009) p.356.

Climate change, Agricultural Practices and Food Security: An analysis of the Indian Scenario with Special Reference to the Food Security Act, 2013

Dr. Sangeeta Roy (Maitra)¹

Abstract

The undesirable effects of climate change are anticipated to affect the populations with the least capacity to adjust, but with the highest need for improved agricultural performance to achieve food security and decrease poverty. Food security is a condition related to the supply of food, and individuals' access to it. Concerns over food security have existed throughout antiquity. The necessity to challenge climate change while producing more food to feed the world's growing population means that "climate-smart agriculture" (CSA) is one of the advocated ways forward. This method principally defends an agriculture that sustainably increases productivity, resilience. This will concurrently help meet the goals of food security and overall development. This also envisages transformation of agriculture to feed a growing population in the face of a changing climate without destroying the natural resource base pointedly and alleviate the negative effects of climate change. However, more productive and resilient agriculture will require improved management of natural resources, such as land, water, soil and genetic resources through practices such as conservation agriculture, integrated pest management, agro-forestry and sustainable diets. Climate change hovers production's stability and productivity. In several areas of the world where agricultural productivity is already low and the means of coping with adverse events are limited, climate change is expected to reduce productivity to even lower levels and make production more irregular. Long term changes in the outlines of temperature and precipitation, that are part of climate change, are expected to move production seasons, pest and disease patterns, and modify the set of viable crops affecting production, prices, incomes and eventually, livings and lives. India is no exception to the changing climate patterns and global warming. With its ever-rising population the need for food security is a greater burden. India's population and the enactment of Food Security Act, 2013 imposes obligation on the government to improve agricultural practices to feed billions of people. Unfortunately, the Act does not mention the concept of climate smart agriculture nor the ways to deal with food security in the light of climate change, to deal with the challenges which it must meet successfully.

The purpose of this paper is to examine the concept and relationship between climate change and agricultural practices related to climate smart agriculture; to evaluate the concept of climate smart agriculture in the international context; to analyse the Food Security Act, 2013 critically from the perspective of climate change and productivity development; and finally, to put forth suggestions to deal with the challenge in the present day context. The study is purely doctrinal with material collected from primary and secondary sources.

¹ W.B.E.S., Assistant Professor in Law, Hooghly Mohsin College, Law Section, Chinsurah, Hooghly-712101, West Bengal

Keywords: Climate change, agricultural practices, climate smart agriculture, food security

1. Introduction

Food security is a condition related to the supply of food, and individuals' access to it. Concerns over food security have existed throughout history. There is evidence of granaries being in use over 10,000 years ago, with central authorities in civilizations including Ancient China and Ancient Egypt being known to release food from storage in times of famine. At the 1974 World Food Conference the term "food security" was defined with an emphasis on supply. Food security, they said, is the "availability at all times of adequate world food supplies of basic foodstuffs to sustain a steady expansion of food consumption and to offset fluctuations in production and prices". Later definitions added demand and access issues to the definition. The final report of the 1996 World Food Summit states that food security "exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."²

In this context, many researchers, decision-makers, land use planners and civil society actors increasingly believe that the interaction between climate change and food security will be one of the biggest challenges for the coming decades. By the year 2025, 83% of the expected global population of 8.5 billion will be living in developing countries, where most of the poor are living, and the resources are vulnerable to climate change. Yet the capacity of available resources and technologies to meet the demands of growing population remains uncertain. Presently, close to one billion people are already suffering from hunger worldwide and the future is daunting too food needs are projected to increase by 70 % by 2050 when the global population reaches nine billion, while climate change is projected to reduce global average yields, among other severe consequences. Within this perspective, many believe that agriculture must become central to future climate-change and food security governance.

This is on account of at least three important interrelated aspects:

Firstly, agriculture is the sector most vulnerable to climate change and many threats, including the reduction of agricultural productivity, production stability and incomes in many areas of the world already characterized by high levels of food insecurity and limited means of coping with adverse climate impacts. Moreover, climate change will affect

² Ashish Sharma, A Geographical Study of Food Security and Agriculture in India, *International Journal of Science, Engineering and Technology*, 324, (2016, Volume 4 Issue 1)

agriculture through higher temperatures, greater crop water demand, more variable rainfall and extreme climate events such as heat waves, floods and droughts. Many impact studies point to severe crop yield reductions in the next decades without strong adaptation measures, especially in areas where rural households are highly dependent on agriculture and farming systems are highly sensitive to inclement climate;

Secondly, agriculture contributes a “significant” proportion of global carbon dioxide and nitrous oxide emissions (about 14 % of emissions according to current estimations; and

Thirdly, agriculture can be a major part of the solution: helping people to feed themselves and adapt to changing conditions while mitigating impacts of climate change (carbon sequestration). This mitigation potential can be largely achieved in developing countries such as conservation agriculture, integrated pest management, agro-forestry and sustainable diets.³

The purpose of this paper is to examine the concept and relationship between climate change and agricultural practices related to climate smart agriculture; to evaluate the concept of climate smart agriculture in the international context; to analyse the Food Security Act, 2013 critically from the perspective of climate change and productivity development; and finally, to put forth suggestions to deal with the challenge in the present-day context.

2. Concept of Climate Change, Climate Smart Agriculture and Food Security and Their Inter-Relationship

The poor population in developing countries will be particularly impacted by this delicate environmental problem, of which developed – and currently emergent – countries are the major drivers. In addition, food security, poverty and climate change are closely linked challenges and should not be considered separately. In countries where the economic and human development strategies are heavily based on agriculture, the development of agricultural sector, with a clearer distribution potential, remains an efficient poverty reduction policy. Yet agricultural expansion for food production and economic development which comes at the expense of soil, water, biodiversity or forests, environment, conflicts with other global and national goals, often compromises production and sound development in the longer term. It is true that over the past six decades, in world agriculture, climate change fundamentally alters the constraints and opportunities for transforming agricultural systems. The increased frequency and intensity of

³ Mohamed Behnassi, Mohamed Boussaid et.al., Achieving Food Security in a Changing Climate: The Potential of Climate-Smart Agriculture, 27. *Full paper available at www.springer.com/cda/content/document/cda.../9783319057675-c2.pdf?SGWID*. Last visited on 30.11.2017.

climate shocks is already mandating greater attention to resilience in production and social systems and better means of risk management. Uncertainty about the scale and nature of changes that climate change will impose affects the way we approach planning and investment. The green revolution in India was considerably, more efficient, especially in the 1960s. Improvements in production systems and crop and livestock breeding programs have resulted in a doubling of food production while increasing the amount of agricultural land by 10 %. However, projections based on population growth and food consumption indicate that agricultural production will need to increase substantially to meet future demands. Most estimates also indicate that climate change is likely to reduce the significant agricultural productivity, production stability and incomes in some areas already suffering from food insecurity, high rates of poverty, and feeble adaptive capacities to cope with adverse climate impacts. Increases in emissions that could be expected under conventional agricultural growth strategies associated with efficiency losses, mandate a major shift in focus to increasing resource-use efficiency as a basis for achieving needed growth. The following sections of this paper provide evidence on the projected impacts of climate change on agricultural systems and the implications they have for the way we develop and implement strategies of sustainable agricultural growth for food security.⁴

2.1. Climate Change

Climate change is no more an environmental concern. It has emerged as the biggest developmental challenge for the planet. Its economic impacts, particularly on the poor, make it a major governance issue as well. The Framework for this just and effective global climate deal is as follows:

Industrialised countries have managed to de-link sulphur dioxide emissions from economic growth. In other words, emissions have fallen even as national income has risen. But they have failed to do the same with carbon dioxide (CO₂) emissions. Per capita CO₂ emissions remain closely related to a country's level of economic development, and thus standard of living. It is evident that as long as the world economy is carbon-based – driven by energy from coal, oil, and natural gas – growth cannot be de-linked substantially from CO₂ emissions.⁵

The only way to avert climate change is to reduce emissions dramatically. But things are never quite this simple. The use of fossil fuels (the major reason for CO₂ emissions) is closely linked to economic growth

⁴ Philip Thornton, Leslie Lipper, How does Climate Change Alter Agricultural Promises, 1(2014). Read full paper at <https://papers.ssrn.com/sol3/papers>, last visited on 03.12.2019

⁵ Supra n. 2 at 28, 29

and lifestyle. Every human being contributes to the CO₂ concentrations in the atmosphere. However, the person's lifestyle decides the amount that is emitted. The more prosperous a country's economy is, higher is its fossil fuel consumption, resulting in higher greenhouse gas emissions.⁶

Industrialised countries owe their current prosperity to years of 'historical' emissions, which have accumulated in the atmosphere since the start of the industrial revolution. They still emit more to sustain this growth. Developing countries have only recently set out on the path of industrialization. That is the reason why their per capita emissions are still comparatively low. Under these circumstances any limit on CO₂ emissions amounts to a limit on economic growth. This has turned climate change mitigation into an intensely political issue. International negotiations under the UN Framework Convention on Climate Change (UNFCCC, popularly referred to as the Kyoto Protocol) – aimed at limiting greenhouse gas emissions into the atmosphere – have turned into a tug of war with rich countries unwilling to 'compromise their lifestyles' and poor countries unwilling to accept a premature cap on their right to basic development.⁷

2.2. Climate Smart Agriculture

It is also true that human societies, over the centuries, have developed the capacity to adapt farming practices to environmental change and climate variability. These adaptations include, among others, practicing shifting cultivation, adopting high yielding, and new crop varieties tolerant to salts and drought and modifying grazing patterns. But today the speed and intensity of climate change are outpacing autonomous actions and threaten the ability of poor smallholders and rural societies to cope. For most of the one billion extremely poor and hungry people who live in the rural areas of major developing countries, agriculture remains the principal income source. These people are already vulnerable, and climate change will in most cases deepen their vulnerability. More specifically, and in countries most reliant on rain-fed agriculture and natural resources, poor rural women, who are often the primary food producers, have fewer assets and less decision-making power, are even more exposed than men. Therefore, ensuring food security under a changing climate should be considered as one of the major challenges of our era, especially that many countries' agriculture. It is highly vulnerable to negative impacts of climate change. Even using optimistic lower-end projections of temperature rise, climate change may reduce crop yields by 10–20 % by the 2050s, with more severe losses in some regions. World food prices for some of the main grain crops are likely to rise sharply in the first half of the twenty-first century, unlike the price declines witnessed in the twentieth century. Under a pessimistic high-end projection

⁶ *Id.* at 28,29,30

⁷ *Id.*

of temperature rise, the impacts on productivity and prices are even greater. Moreover, increasing frequencies of heat stress, drought and flooding events, not factored into the projections mentioned above, will result in further deleterious effects on productivity. It is likely that price and yield volatility will continue to rise as extreme weather continues. Climate change will also impact agriculture through effects on pests and disease. These interactions are complex and the full implications in terms of productivity are still uncertain). Climate-smart agriculture (CSA) includes proven practical techniques – such as mulching, intercropping, conservation agriculture, crop rotation, integrated crop-livestock management, agro-forestry, improved grazing, and improved water management – but also innovative practices such as better weather forecasting, early warning systems and risk insurance. It is about getting existing technologies off the shelf and into the hands of farmers and developing new technologies such as drought or flood tolerant crops to meet the demands of the changing climate. It is also about creating and enabling policy environment for adaptation.⁸

CSA endures to ensure that despite change in climate and its adverse impact on crops/animals, income to farmers should not decrease. It provides opportunities to have multiple sources of income from agriculture and animal husbandry - milch cattle and poultry, fisheries, when one fails, other supports.

It provides opportunity to young members of family to acquire multiple skills, support for setting up microenterprise locally, based on demand and supply situation. It provides safety net at the time of natural calamities – by way of insurance – for crops & animal husbandry along with employment in community projects. Climate smart agriculture involves:

- Crop pattern based on soil health & moisture analysis to support crops which can be sustained.
- Agro – advisory
 - a) On predicted weather pattern long term, medium term and week to week basis given by Meteorology Department – this prior to kharif and rabi season
 - b) After unexpected weather that changes have occurred for corrective action to prevent crop loss and livestock management.
- Crop production that contributes to food security by addressing current and projected climate change impacts through adaptation and mitigation and provides an opportunity to win-win situation despite adverse changes.

⁸ *Id.* at 29.30,31

- It provides institutional arrangement for mass communication and a way to bridge productivity gaps at local level between farmers by reaching out farmers at their door step.⁹

2.3. Food Security

Food security exists when all people, at all times, have physical and economic access to sufficient safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. Food security means ensuring a sustainable supply of food at affordable prices that meets existing dietary preferences. Food security has three components, *viz.*, availability, access and absorption (nutrition). These three are interconnected. Performance in availability of food related to food production, per capita availability of food grains and other edibles and policies for improving availability. There is an urgent need of food security to provide food to each and every person and to improve nutritional status because a complex issue with both global and local dimensions that are intimately linked together. There is no quick fix to the food security crisis that continues to afflict the world's poorest nations. However, action can be taken through government policies to lay the necessary foundations for a lasting solution to enhance the sustainability of food production and agriculture while simultaneously improving the quality and safety of the food available for consumption.¹⁰

Food security is a condition related to the supply of food, and individuals' access to it. Concerns over food security have existed throughout antiquity. The necessity to challenge climate change while producing more food to feed the world's growing population means that "climate-smart agriculture" (CSA) is one of the advocated ways forward. This method principally defends an agriculture that sustainably increases productivity, resilience. This will concurrently help meet the goals of food security and overall development.

Climate change is expected to have generally negative effects on developing-country agriculture, with concomitant implications for food security. Projections indicate that the impacts will increase over time, with socioeconomic development and trade much more important drivers of food security in the short run, but with climate change playing an increasingly important role after 2030. In the intervening years, however, climate shocks

⁹ Dr. Kirit N Shelat, *Climate Smart Agriculture – The Way Forward the Indian Perspective*, 6,7 (2014) National Council for Climate Change, Sustainable Development and Public Leadership (NCCSD), Ahmedabad and Central Research Institute for Dryland Agriculture (CRIDA), Hyderabad

¹⁰ Tanu Jain, Shikha Bathla, Role of Agriculture in Enhancing Food Security, *International Journal of Science and Nature*, 34 (2016)

such as drought, flooding, and extreme temperatures are expected to increase in frequency and intensity, and that is already occurring. In the absence of measures to reduce the vulnerability to, and impacts of, such extreme events, they can be expected to generate significant and negative impacts on food security.¹¹

3. Climate Smart Agriculture- International Developments

One of FAO's 14 themes in support of sustainable development is climate change. CSA was developed by FAO as a unified approach to address climate change challenges. The concept of Climate-smart agriculture was first launched by FAO in 2010 in a background paper prepared for the Hague Conference on Agriculture, Food Security and Climate Change (FAO, "Climate-Smart" Agriculture Policies, Practices and Financing for Food Security, Adaptation and Mitigation. 2010), in the context of national food security and development goals, to tackle three main objectives:

- Sustainably increase food security by increasing agricultural productivity and incomes
- Build resilience and adapt to climate change
- Reduce and/or remove greenhouse gas emissions where possible.¹²

Ongoing FAO projects support work on CSA, for example, FAO's Economics and Policy Innovations for Climate-Smart Agriculture (EPIC) programme and the Mitigation of Climate Change in Agriculture (MICCA) programme. The technical research and field work of FAO's MICCA programme have provided evidence that climate-smart agricultural practices can reduce GHGs, improve livelihoods and make local communities better able to adapt to climate change. The evidence supports international climate negotiation processes undertaken through the UN Framework Convention on Climate Change (UNFCCC).¹³

Also linked to CSA is FAO's Ecosystem Approach to Fisheries. It is becoming the main reference framework for managing fisheries and implementing the principles of sustainable development. The main aim is to ensure that despite natural changes in the ecosystem, the capacity of the aquatic ecosystems to produce fish food, revenues and livelihoods is maintained indefinitely for the benefit of the present and future generations.¹⁴

¹¹ Philip Thornton, Leslie Lipper, *How Does Climate Change Alter Agricultural Strategies to Support Food Security?* 1, IFPRI Discussion Paper, April 2014, CGIAR Research Program on Policies, Institutions and Markets

¹² Climate-Smart Agriculture. Read full article at <http://www.fao.org/climate-smart-agriculture/overview/faqs/history/en/>, last visited on 03.12.2019.

¹³ *Id.*

¹⁴ *Id.*

Livestock can make a large contribution to climate-misery food supply systems. FAO facilitates and is actively involved in two multi-stakeholder partnerships, the Global Agenda for Sustainable Livestock and the Livestock Environmental and Assessment Partnership (LEAP).¹⁵

4. The Indian Scenario – The Food Security Act, 2013 and the Climate Smart Agriculture

This definition of food security has evolved over a period of time. As a concept, food security originated in the mid-1970s, in the wake of global food crisis. The initial focus of attention was assuring the availability and to some degree the price stability of basic foodstuffs at the international and national level. This was then broadened to incorporate the demand side of food security in early eighties. During the nineties issues such food safety, nutrition, dietary needs and food preferences were also considered important ingredients of food security. In FAO report on ‘The State of Food Insecurity, 2001’, food security is defined as a “ --- situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life”.¹⁶ In the Indian context, the underpinnings for food security of the people can be found in the Constitution, though there is no explicit provision on right to food. The fundamental right to life enshrined in Article 21 of the Constitution has been interpreted by the Supreme Court and National Human Rights Commission to include right to live with human dignity, which includes the right to food and other basic necessities. Under Directive Principles of State Policy, it is provided under Article 47 that that the State shall regard raising the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.¹⁷

Providing food security has been focus of the Government's planning and policy. Food security means availability of sufficient food grains to meet the domestic demand as well as access, at the individual level, to adequate quantities of food at affordable prices. Attainment of self-sufficiency in food grains production at the national level has been one of the major achievements of the country. In order to address the issue of food security at the household level, Government is implementing the Targeted Public Distribution System under which subsidised food grains is provided to eligible households.¹⁸

¹⁵ *Id.*

¹⁶ Food Security in India - issues and challenges. Read full article at <http://dfpd.gov.in/writereaddata/images/NFSA-article-edited.pdf>, last visited on 03.12.2019.

¹⁷ *Id.*

¹⁸ *Id.*

To further strengthen the efforts to address the food security of the people, the Government has enacted the *National Food Security Act, 2013*. It marks a paradigm shift in approach to food security – from welfare to rights based approach. The Act legally entitles upto 75% of the rural population and 50% of the urban population to receive subsidised foodgrains under Targeted Public Distribution System. About two thirds of the population therefore will be covered under the Act to receive highly subsidised foodgrains. There is a special focus in the Act on nutritional support to pregnant women and lactating mothers and children upto 14 years of age by entitling them to nutritious meals. Pregnant women will also be entitled to receive cash maternity benefit of Rs. 6,000 in order to partly compensate her for the wage loss during the period of pregnancy and also to supplement nutrition. Keeping in view the important role that women play in ensuring food security of the family, the Act contains an important provision for women empowerment by giving status of head of the household to the eldest woman of the household, for the purpose of issuing of ration cards.¹⁹

3.1. Salient features of the Act

- (i) *Coverage and entitlement under Targeted Public Distribution System (TPDS)*: Upto 75% of the rural population and 50% of the urban population will be covered under TPDS, with uniform entitlement of 5 kg per person per month. However, since *Antyodaya Anna Yojana* (AAY) households constitute poorest of the poor, and are presently entitled to 35 kg per household per month, entitlement of existing AAY households will be protected at 35 kg per household per month.
- (ii) *State-wise coverage*: Corresponding to the all India coverage of 75% and 50% in the rural and urban areas respectively, State-wise coverage will be determined by the Central Government. State-wise coverage has been determined by the Planning Commission on the basis of 2011-12 NSSO Household Consumption Expenditure Survey data.
- (iii) *Subsidised prices under TPDS and their revision*: Foodgrains under TPDS will be made available at subsidised prices of Rs. 3/2/1 per kg for rice, wheat and coarse grains for a period of three years from the date of commencement of the Act. Thereafter prices will be suitably linked to Minimum Support Price (MSP).
- (iv) In case, any *State's allocation* under the proposed legislation is lower than their current allocation, it *will be protected* upto the level of average offtake during last three years under normal TPDS, at prices to be determined by the Central Government.

¹⁹ *Id.*

Existing prices for APL households i.e. Rs. 6.10 per kg for wheat and Rs 8.30 per kg for rice has been determined as issue prices for the additional allocation to protect the average offtake.

- (v) *Identification of Households*: Within the coverage under TPDS determined for each State, the work of identification of eligible households is to be done by States/UTs.
- (vi) *Nutritional Support to women and children*: Pregnant women and lactating mothers and children in the age group of 6 months to 14 years will be entitled to meals as per prescribed nutritional norms under Integrated Child Development Services (ICDS) and Mid-Day Meal (MDM) schemes. Higher nutritional norms have been prescribed for malnourished children up to 6 years of age.
- (vii) *Maternity Benefit*: Pregnant women and lactating mothers will also be entitled receive maternity benefit of not less than Rs. 6,000 as per scheme to be formulated by the Central Government.
- (viii) *Women Empowerment*: Eldest woman of the household of age 18 years or above will be the head of the household for the purpose of issuing of ration cards.
- (ix) *Grievance Redressal Mechanism*: Grievance redressal mechanism at the District and State levels. States will have the flexibility to use the existing machinery or set up separate mechanism.
- (x) *Cost of intra-State transportation & handling of food grains and FPS Dealers' margin*: Central Government will provide assistance to States in meeting the expenditure incurred by them on transportation of food grains within the State, its handling and FPS dealers' margin as per norms to be devised for this purpose.
- (xi) *Transparency and Accountability*: Provisions have been made for disclosure of records relating to PDS, social audits and setting up of Vigilance Committees in order to ensure transparency and accountability.
- (xii) *Food Security Allowance*: Provision for food security allowance to entitled beneficiaries in case of non-supply of entitled food grains or meals.
- (xiii) *Penalty*: Provision for penalty on public servant or authority, to be imposed by the State Food Commission, in case of failure to comply with the relief recommended by the District Grievance Redressal Officer.²⁰

²⁰ *Id.*

In 2014, India began the implementation of its National Food Security Act. The law aims to provide, as seen above, subsidised food grains to more than 800 million people in the country. While this law will have obvious implications to the food security of the Indian population, the law goes further in also promoting climate resilience. It embraces a diverse range of foodgrains, including millets, sorghum and maize, a group of coarse grains in its text.²¹

This is a first, as prior to this law, food distribution systems only sourced “fine grains” i.e. rice and wheat. Coarse grains are highly resistant to climate-induced stresses. Their inclusion in the law is likely to promote cultivation, especially in the more marginal areas of India, where these crops are very important for local food security and cultural identity. It is estimated that over 31 million Indian farmers grow these crops, stimulating their production therefore contributes to climate adaptation and food security.²²

5. The Grey Areas

Huge growth in population and continuously changing diet are the two major factors behind changing food needs of world. Production is regularly suffering due to reduced yields from farm lands. Marine resources, bio-diversity, water and soil health are all suffering in chase of higher yields. The challenge is intensified by agriculture’s extreme vulnerability to climate change. Hotter and shorter growing seasons, reduced rainfall and more frequent extreme weather events are affecting crops and livestock.

Climate Smart Agriculture (CSA) is an integrated approach to managing landscapes- cropland, livestock, forests and fisheries, that address the interlinked challenges of food security and climate change. Let us see what all CSA seeks to achieve and how far the Food Security Act has been able to fulfil these objectives:

1. **Increased Productivity:** Produce more food to improve food and nutrition security and boost the incomes of 65 per cent of poor working adults employed in agriculture. The Food Security Act nowhere mentions ways to increase productivity.
2. **Enhanced Resilience:** Reduce vulnerability to drought, pests, disease and other shocks; and improve capacity to adapt and grow in the face of longer-term stresses like shortened seasons and erratic weather patterns. The Food Security Act is silent with respect to enhanced resilience.

²¹ India promotes climate resilience through its Food Security Bill. Read full article at <https://cgspace.cgiar.org/handle> last visited on 03.12.2019

²² *Id.*

3. Reduced emissions: Pursue lower emissions for each calorie or kilo of food produced, avoid deforestation from agriculture and identify ways to suck carbon out of the atmosphere. The Act is silent in this regard too.

Thus, what can be seen is that the Food Security Act, 2013 stresses on targeted public distribution system and analogous matters. It does not directly refer to climate smart agriculture or climate change and its impact on food security. The growing of climate friendly food grains is only a part of meeting the targets of the Act but not directly relatable to climate smart agriculture.

6. Suggestions and Conclusion

From the above lines it is amply clear that the Food Security Act, 2013 does not amply satisfy the requirements of climate smart agriculture. Its prime focus is targeted public distribution system and it assures food for all but does not remedy the need to address the issue of climate change and its analogous climate smart agriculture. Therefore, the need is to amend the Act in such a manner that the Act itself imbibes the principle of climate change and food security. If not the Act the Rules should be framed regarding the kind of food grains to be grown which assure food security and also address the issue of climate smart agriculture. Unless done in a legislative framework climate change, food security and climate smart agriculture cannot be achieved and the purpose of Right to Food Act, 2013 shall be defeated.

The present National Food Security Act proposed by the government is a narrow one. Right to Food in terms of providing food and nutritional security to all is a much broader concept than the proposed National Food Security Act of providing 25 kilograms of food grains at Rs.3. Many things have to be included in order to have genuine 'Right to Food. Food refers to availability, accessibility, adequacy, and sustainability. Food security is most emerging issue now days. During the Green Revolution era, large investments were made on research and development for the irrigated agriculture. The promotion of HYV seed - fertilizer - irrigation technology had a high pay-off and rapid strides of progress were made in food production. But, since couple of years agriculture productivity is adversely affected by several causes mainly climate change in India. Agriculture Productivity is a base factor for assuring food security. Government should make a strong action plan for proper implementation of food security act and government should also make a policy for increasing agricultural productivity.²³

²³ Supra n. 1 at 328

where possible, and enhances achievement of national food security and development goals identified as food security and development (FAO 2013a Lipper et al. 2014) while productivity, adaptation, and mitigation are identified as the three interlinked pillars necessary for achieving this goal.

Is it possible to create a Zero-Waste Environment in West Bengal?

Monalisa Saha¹

Abstract

The author in this paper has done a holistic study on the waste management system in urban locales in India, especially the one in place in the state of West Bengal. Her study is premised on her hypothesis that the existing environmental regulatory system in India is not keeping pace with rapid urbanisation which in turn has been negatively impacting the health of all living beings in the era of Climate Change.

She begins by defining urbanisation and explaining how there are many ill-impacts of this phenomenon, but that she would limit her scope to the study of Urban Waste Management System in the state of West Bengal, India. Her primary focus in this paper has been on the way waste is handled once it is generated in West Bengal, but she emphasises that the focus should ideally shift to reduction of waste or adapting to zero waste habits soon. For this purpose, she has studied elaborately contemporary practices employed by non-governmental entities who have worked in preventing and managing waste beyond their legal duties and outside the scope of supervision of the government. She offers in her conclusion that if appropriate modifications are made in the legal regulatory framework the face of waste management in the state of West Bengal can alter substantially.

Key Words: *Zero-waste, Waste management in West Bengal, Plastic, Climate Change, Carbon Footprint, Central Pollution Control Board, West Bengal Pollution Control Board*

1. Introduction

1.1 What is Urbanisation?

Urbanisation is often defined in terms of the proportion of population residing within a geographical limit. It is characterised by high density and is closely associated with modernisation and industrialisation². Unlike rural areas, where inhabitants are associated through common bloodlines, intimate relationship and communal behaviour, urban settlement of towns and cities are characterized by distant bloodlines (diversity), unfamiliar relations and competitive behaviour.

Urban areas are today identifiable as centres of innovation, culture and arts. It is distinguished from the rural areas by its improved opportunities of jobs; better education, housing, medical, transportation,

¹ Assistant Professor of Law, The Department of Law, The University of Burdwan, Burdwan, West Bengal, India

² The future of the City-Cities of the Future, Michael Pacione, Geography, Vol. 86, No. 4 (October, 2001), pp. 275-286 at p. 275

entertainment industries and distinguished lifestyle, amongst other things. There is seemingly no such kind of resource that is unavailable to the urban inhabitants.

But the picture isn't that rosy from all fronts. Rapid urbanisation has put a strain on the environment over the years leading to its degradation, which in turn has had a significant impact on the quality of human life and the overall ecology in the world³. Apart from the problem of implementation, the laws that have been formulated over the last few years have primarily focused on being anthropocentric, with very less regard for the millions of other beings we humans continue to share the planetary space with⁴.

Only 4% of the world's terrestrial surface comprises cities. This small area is home to nearly half of the world's population⁵. The United Nations has predicted that by 2025 around 65% of the world populace will live in urban settlements⁶. Therefore urbanisation seemingly is an unavoidable phenomenon in the near future and assessing its growth vis-à-vis sustainable development goals is the need of the hour.

There are many impacts of urbanization upon the environment, but the author will be limiting her research to only one aspect of it, namely, Urban Waste Management and more specifically Urban Waste Management in the State of West Bengal.

2. Understanding Urban Waste Management: It's Nature and Quantum

According to a 2016 study titled "Status and Challenges of municipal solid waste management in India: A review" (henceforth "2016 Study") there has been no concrete steps taken over the years to quantify and analyse regional and geographical-specific waste generation patterns at a pan India level. There have been some fragmented studies conducted by Central Pollution Control Board (CPCB), New Delhi; National Engineering and Environmental Research Institute (NEERI), Nagpur; Central Institute of Plastics Engineering and Technology (CIPET), Chennai; and Federation of Indian Chambers of Commerce and Industry (FICCI in 2009), New Delhi, but nothing at a pan-India level, that has holistically engaged in

³ Annual Report 2017-2018, West Bengal Pollution Control Board, at p. 40

⁴ Igniting Iconoclasts, Shamad Basheer, Audi Alteram Partem, NLU Delhi, October 2014, as available at <https://spicyip.com/wp-content/uploads/2014/11/The-Iconoclast.pdf> [Last visited: 1.8.19]

⁵ The Environmental, Social, and Health Dimensions of Urban Expansion, Charles L. Redman and Nancy S. Jones, Springer, Vo. 26, No. 6, (July., 2005), pp. 505-520 at p. 505

⁶ Supra Note 1, at p. 275

understanding the nature of waste generated in India, its segregation pattern, storage, transportation and disposal.⁷

However inspite of the lack of a detailed study, ‘waste’, has been understood as useless, unwanted or discarded material resulting from agricultural, commercial, communal and industrial activities. Waste includes solids, liquids and gases. Urban waste means the waste generated by any activity in urban or peri-urban areas. This implies that urban waste is not only generated in households, but also that from commercial establishments and services, street sweeping, green areas and industry.⁸ It can be broadly categorized into: Solid waste, hazardous waste, biomedical waste, plastic waste, e-waste, construction and demolition waste⁹.

Urbanization contributes to enhanced generation and unscientific handling of various types of wastes that degrades the urban environment and causes health hazards¹⁰. India has also not been able to escape this phenomenon. It is a vast country divided into 29 States and 7 Union Territories (UTs). There are three mega cities—Greater Mumbai, Delhi, and Kolkata—having population of more than 10 million, 53 cities have more than 1 million population, and 415 cities having population 100,000 or more. About 31.2% population is now living in urban areas. Over 377 million urban people are living in 7,935 towns/cities.¹¹

The cities having population more than 10 million are basically State capitals, Union Territories, and other business/industrial-oriented centers¹². It has been noticed that residents living in these zones have different consumption and waste generation patterns.¹³

From the little that is evident from the above studies, is that the rate of generation of waste has only increased over the years and has been predicted to increase at an unmanageable level if the pace of present waste generation continues. For instance NEERI carried out a study in 59 Indian cities (35 Metro cities and 24 State Capitals) in the year 2004-2005 and found out that 39,031 TPD of MSW was generated. Later, in 2009-2010, CIPET (for CPCB) did a similar the study for the same 59 cities/towns

⁷ *Ibid*

⁸ “Urban Waste Generation and Classification”, in Guidelines for Municipal Solid Waste Management in the Mediterranean Region, p.3-1, as available at <https://www.scribd.com/document/261216155/3-Urban-Waste-Generation-and-Classification> [Last visited: 1.8.19]

⁹ *Supra* note 2, p. 45

¹⁰ “Status and Challenges of municipal solid waste management in India: A review”, Rajkumar Joshi and Sirajuddin Ahmed, Cogent Environmental Science, 2016, as available at <http://dx.doi.org/10.1080/23311843.2016.1139434>

¹¹ *Ibid*

¹² *Ibid*

¹³ *Ibid*

during the year during 2009–2010 for CPCB and found out that 50,592 TPD of waste was being generated. According to CPCB, in year 2011, it only increased and was quantified at 1,27,486 TPD MSW, out of which only 89,334 TPD (i.e. 70%) was collected and 15,881 TPD (i.e. 12.45%) treated¹⁴. Apart from municipal waste, India generates about 12 million tons of inert waste annually from street sweeping and C&D waste¹⁵.

Planning Commission Report (in 2014) revealed that 377 million people residing in urban area generated 62 million tons of MSW per annum currently and it is projected that by 2031 these urban centers will generate 165 million tons of waste annually and by 2050 it could reach 436 million tons¹⁶. (Another study predicted that by 2051 the MSW generated would be 300 million tons per annum¹⁷). To accommodate this amount of waste generated by 2031, about 23.5×10^7 cubic meter of landfill space is required and in terms of area it would be 1,175 hectare of land per year. The area required from 2031 to 2050 would be 43,000 hectares for landfills piled in 20 meter height¹⁸.

Therefore all is not well and we need to urgently address the situation of how we manage urban waste if we are to avoid its ill effects on the health of humans and other species on this planet¹⁹.

2.1 Plastic: The Most Potent of All the Wastes Generated

Plastic takes anywhere between ‘450 years to forever²⁰’ to disintegrate, thereby contributing to the huge pile of waste burdening the earth. 79% of all plastics ever manufactured since 1950 is still in the environment²¹. Oceanographers have found large swathe in the oceans where plastic-garbage has built up, harming marine life tremendously. They call it the “great garbage patch”. The largest such patch is three times the size of France and we have eight such patches across the oceans of the world²².

So evidently plastic products, prove to be the biggest enemy of effective waste management efforts across the globe. It is as powerful as an enemy because of its tremendous utility and its versatility. The products that plastic has replaced over the years are glass, metal, cardboard, cotton (all of

¹⁴ *Ibid* at p. 4

¹⁵ *Ibid* at p.2

¹⁶ *Ibid* at p. 3

¹⁷ *Ibid*

¹⁸ *Ibid*

¹⁹ *Ibid* at p.4

²⁰ “Why world has declared a war against plastic”, p. 1, The Times of India, Kolkata, 23.08.19

²¹ *Ibid*

²² *Ibid*

which were biodegradable). There is an attempt to accentuate on recycling plastic, but it is believed that the plastic industry overstates the potential of recycling plastic: every time plastic is recycled it degrades and can't be reused as effectively as glass or metal, which therefore means that eventually we are looking at 450 plus years for the re-recycled plastic to disintegrate.

In the olden times the market was based on returnable container model which was as high as 96% in the 1950s. This returnable container model was replaced substantially by the 1970s when it fell to 5%. At the same time, plastic containers came in and created the throwaway container market. Plastic was originally used to make household items, like radios and was predominantly used in electrical wiring. Its use increased during world war II with the creation of enormous petrochemical industry by the US.²³ But this isn't the major cause of worry relating to plastic use. The real devil is the Single-Use Plastic (SUP). 40% of all plastic produced is used in packaging and in India, 80% of all plastic consumed is used in packaging. Globally, speaking, Indians are actually the world's lowest consumers of plastic; i.e., as against the global average use of plastic per person per year of 28kg, the national per person yearly average amounts to 11kg²⁴.

3. Waste Management: The Processes Followed Worldwide

There are four broad steps for effective waste management, anywhere in the world: collection and segregation and sorting (reuse/recycle), storage and treatment²⁵, transportation, disposal and treatment.

i. Segregation, Collection, Sorting

The most difficult step is perhaps ensuring segregation of waste which if managed well can ensure proper scientific disposal of waste. It is widely agreed that segregation is best done, both in terms of cost, time and effectiveness, when done at its source. Unfortunately, no city in India can claim 100% segregation of waste at dwelling unit and on an average only 70% waste collection is observed, while the remaining 30% is again mixed up and lost in the urban environment. Out of total waste collected, only 12.45% waste is scientifically processed and rest is disposed in open dumps²⁶.

At the present, sorting of waste, is mostly accomplished by the unorganized sector and is seldom practiced by waste producers. Waste producers, especially households, dump their waste in communal bins.

²³ *Ibid*

²⁴ *Ibid*

²⁵ *Supra* note 2, at p.45

²⁶ *Supra* note 10, at p. 5

Segregation and sorting takes place by Rag-pickers and municipal garbage collectors, under very unsafe and hazardous conditions. These persons concentrate on picking out from the discarded materials only those that can fetch them a return in the recycling market. The focus is not per se on segregating waste with an intention to protect aspects of health and hygiene²⁷. Rag-pickers can be useful and fully effective in sorting material for recycling, if only we employ them in large numbers, like it happens in Pondicherry²⁸. In this city, almost all recyclable material is sorted out by rag-pickers and absorbed in material stream through recycling. But this is not replicated in other cities and therefore from the unsegregated waste dumped in communal bins only materials like glasses and plastic find their way back into the system²⁹. Waste produced by commercial complexes and industrial units are also sometimes dumped in such communal bins. It is only sometimes when these entities arrange for separate garbage collection by the municipality at a certain price that these flooding communal bins are spared.³⁰

ii. Transportation

The second most challenging aspect of waste management is transporting it to the landfill sites. From the local dumping points, waste collection is done in vehicles maintained by Local Bodies. Municipal Solid waste can be transported in smaller towns, in trucks having 5–9 ton capacity which are usually used without adequate cover system. Stationary compactors, mobile compactors/closed tempos, and tarpaulin-covered vehicles are also used³¹.

iii. Disposal

If the transportation method adopted is effective, significant amount of waste should reach the intended place. There is however a strong possibility of losing some waste along the city periphery (drain, etc).³²

Once it reaches the intended site, the most difficult part of waste management commences: Disposal of waste and thereafter its treatment. There are five popular methods of waste disposal pattern: Open Dumping, land filling, land gas to energy plants, biological treatment of organic waste (aerobic composting, vermi-composting, anaerobic digestion), thermal treatment³³.

²⁷ *Ibid*, at p. 6

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ *Ibid*

³¹ *Supra* note 10, p. 6

³² *Ibid*

³³ *Ibid*

The most popular way of disposing waste is by dumping it in designated landfill sites, which is based on the presumption that “dilution is the solution of pollution”. But in reality it is found that leachate formation results in contamination of the soil and of ground water too.

Leachate, is a highly toxic liquid, which is terrible for the environment and is formed when it rains and water percolates through the waste in landfill sites, picking up pollutants on its way downwards. It has been estimated by environmentalists that a typical dump, 17 acres in size produces over 4.5 million gallons of leachate a year and will continue to do so for about 50 years, long after the dump has been closed. It contains heavy metal such as cadmium and lead, solvents, ammonia, phenols, cyanide and numerous other chemical compounds. Plus, the ambient environment provided by organic waste like food scraps, old newspapers produce a leachate so rich in nutrients that it can cause algae blooms if it leaks into streams or rivers. When algae die, their decomposition rapidly removes oxygen from the water, killing fish and other animals as well as plants. Discarded household chemicals and consumer goods add toxic chemicals to the already dangerous mixtures.³⁴ There has been a belief that attenuation (the process whereby the ‘pollutant within the leachate will be rendered harmless, either by bacteria breaking them down or because they become attached to soil particles and thus immobilized’) happens and the toxicity of leachate gets rendered negative. But the capacity of the soil to attenuate pollutants has been greatly overestimated which has resulted in large-scale contamination of groundwater with highly toxic chemicals.³⁵

4. Implementation of Various Waste Management Rules in West Bengal?

The first legislation that was enacted concerning the environment was *The Air (Prevention and Control of Pollution) Act, 1981*. It was only in the year 1986 that a holistic law concerning all aspects of the environment was promulgated (*The Environment (Protection) Act, 1986*). Under this 1986 Act, specific rules relating to various types of waste was subsequently brought in over the years. For instance, *The Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989*, *The Biomedical Waste Management Rules, 2016*, *The Plastic Waste Management Rules, 2016*; *The Solid Waste Management Rules, 2016*; *The Hazardous and other Wastes (Management and Transboundary Movement) Rules, 2016*; *The E-waste (Management) Rules, 2016*; *The Construction and Demolition Waste Management Rules, 2016*

³⁴ Environmental & Pollution Laws in India; Justice T.S. Doabia, I.P.S Doabia, M.S Doabia; 2nd Edition 2015, Volume 1, Lexisnexis Butterworths Wadhwa Nagpur, Haryana, p. 1102

³⁵ *Ibid*

The first legal body that was entrusted with the responsibility of implementation of the Air Act, was the Central Pollution Control Board along with its various State Pollution Control Boards. The authority remained the same, even with the passage of newer environment laws.

CPCB is a statutory board under the Ministry of Environment, Forest and Climate Change, under the govt. of India. Each state in turn have their own respective State Pollution Control Boards (SPCB).

The WBPC Board³⁶, was constituted in 1974 under the Department of the Environment, Government of West Bengal and is a diverse Board, comprising a variety of stakeholders. Dr. Kalyan Rudra, a geographer by academic training having specialisation in river and water management³⁷ heads the Board as its Chairman. There are 5 representatives (Principal Secretary and Additional Chief Secretary) of the state government from various departments such as Dept. of Environment, Dept. of Commerce and Industries, Dept. of Urban Development, Dept. of Transport, Dept. of Science and Technology; representatives of the local authorities (mayor of Kolkata Municipal Corporation, Chairman of Barasat Municipality, CEO of Asansol Durgapur Development Authority, CEO of Kolkata Durgapur Development Authority). Then there are three representatives from the Technical & Scientific Community, a Member Secretary and two representatives of the State Controlled Corporations (Directorate of Forests, Govt. of West Bengal, West Bengal Power Development Corporation Ltd.).

The WBPCB has its main office in Paribesh Bhawan, Salt Lake Kolkata and has 11 Regional offices and 5 Regional Laboratories spread over different locations the state.

There are six rules that are primarily concerned with various types of waste management in the country. The WBPCB has taken efforts to implement the following six rules. A recent detailed update on its compliance has been laid out in the Annual Report 2017-2018 of the WBPCB.

These are:

1. *The Biomedical Waste Management Rules, 2016*

Coordinating with related departments is critical to the effective protection of the environment and therefore the WBPCB has taken steps towards it and has associated itself with the Department of Health and

³⁶ *Supra* note 2, p. 1

³⁷ Nalanda University Faculty Profile, available at <http://www.nalandauniv.edu.in/news-and-events/lectures/distinguished-lecture-pollution-management-for-ganga/> [Last visited: 7.08.19]

Family Welfare to achieve the objective of management of Bio-Medical Waste.

In compliance with the requirement of R. 11(1) the WBPCB has already constituted a State Level Advisory Committee on Bio-Medical Waste and under R. 12(4) a District Level Monitoring Committees on Bio-Medical Waste.

Collection and segregation of various types of waste is, as has been emphasized before a critical to the management of waste. The Board has been trying to ensure health care units engage in proper disposal of Bio-Medical waste. To ensure this, an online application portal for receiving application for Bio-Medical Waste Authorisation has been set up. This will help in ensuring proper collection and in ensuring that bio-medical wastes do not get disposed in an unhealthy manner.

The other issue is in ensuring separate place for disposal of variety types of waste. The same landfill that is used for the disposal of municipal waste cannot be used for the purpose of bio-medical waste. There is a need for separate BMW Treatment Facility. The Board has been coordinating with the District Magistrates of a few districts along with the Department of health and Family Welfare of the West Bengal Government to develop more such facilities³⁸.

2. *The Plastic Waste Management Rules, 2016 and The Solid Waste Management Rules, 2016.*

The Board has been coordinating with the Urban Development and Municipal Affairs Department of the Government of West Bengal to achieve the implementation of these rules. The UD & MA Department has formulated and notified State Policy and Strategy for both Solid Waste Management and Plastic Waste Management in the State of West Bengal.

Apart from this, it seems that the Board has been focusing on proper use of waste that is generated. It has been working on using solid waste for energy generation. In fulfilling this objective it has provided financial assistance to Swami Vivekananda State Police Academy, Barrackpore for setting up a kitchen waste based biomethanation plant. The said plant has been successfully installed and is in operation. The biogas generated is used for cooking³⁹.

3. *The E-waste (Management) Rules, 2016.*

There are two e-waste dismantlers in the state at the moment and another unit which has applied for authorization might be coming up in the

³⁸ *Supra* note 2, p. 45

³⁹ *Supra* note 2, p. 45

coming days. But before that a study was conducted by the WBPCB to understand the quantum of e-waste produced in the state. The WBPCB has with the help of Ministry of Electronics and Information Technology conducted such inventory study and has found out that in the state 5842.43 MT of e-waste was generated in the state. This is projected to increase to 7125.15 MT in the year 2021⁴⁰.

The WBPCB itself and by funding District Authorities, have taken efforts in spreading awareness regarding e-waste and its management through various workshops in the state. A total of 14 such awareness programmes have been conducted in 2017-2018, across 10 towns/cities in West Bengal.⁴¹

4. *The Hazardous and other Wastes (Management and Transboundary Movement) Rules, 2016 and The Construction and Demolition Waste Management Rules, 2016*

There is a Common Hazardous Waste Incinerator at Haldia which has been treating hazardous waste. In fact the Incinerator at Haldia also treats the hazardous waste that is brought in from Sikkim in accordance with an agreement that was drawn up between the two Pollution Boards⁴².

5. Lessons from Non Governmental Entities' Innovative Ways of Managing Waste

5.1. Removing Single Use Plastic from our Habitual Consumption List

As has been already highlighted in the previous section, of all the things that comprise waste, plastic is perhaps the most potent and lethal. Therefore, we will look at how various entities have attempted to deal with the spread of plastic use.

An average Indian consumes per year only 11kg of plastic per year, as against the global average of 28kg, but the Central government has not let this figure deter it from taking effort to further bring down the number.

i. The Environment Ministry Advisory 2019⁴³

Environment ministry had issued an advisory (keeping in mind PM Modi's call to eliminate single-use plastics by 2022) to all states and UTs to discourage use of plastic items in government offices like, artificial flowers, banners, flags, flower pots, plastic stationary (folders)⁴⁴, (Styrofoam)

⁴⁰ *Ibid*

⁴¹ *Ibid*, p. 46-47

⁴² *Ibid*, p. 45

⁴³ 'Curb mfg of single-use plastic items by October 2, states told', p. 1, The Times of India, Kolkata, 08.09.19

⁴⁴ *Ibid*

thermocool plates and PET bottles⁴⁵ etc. The focus is to locate and use biodegradable alternatives that already exist in the market. For instances bagasse/cornstarch⁴⁶/cloth bags are already available as a replacement for plastic bags.

ii. The Courageous Collector fining a Govt. School Principal in an Open Event

On 18th October, 2019 the District Collector of Bhindh District, Bhopal, took the courageous albeit unpopular decision of fining a government school principal for using single use plastic in an open event. The school was hosting a function on BioDiversity in collaboration with the forest department and to welcome its chief guests (which included the District Collector), the principal, P.S Chauhan, was carrying garlands in a plastic bag. The Collector of Bhindh District, Chotte Singh, on noticing the same fined the principal on the spot for flouting the plastic ban. He reportedly wanted to send a strong message to the students who were participating in the biodiversity function, who came from 57 schools⁴⁷.

iii. Kolkata Airport's efforts to Eliminate SUP

The Airport Director of Kolkata Airport, Kaushik Bhattacharjee, has availed the services of two green activists, Lata Bhatia and Abhinav Bajpai, for promoting sustainability in the airport by reducing single use plastic⁴⁸. The identified plastic products that are sought to be eliminated, replaced or reduced are: plastic spoons, fork, knife, plastic crockery (plates, bowls, glass), plastic bottles⁴⁹, and PET bottles⁵⁰.

iv. Plastic Straws and Restaurants/Eateries in Kolkata

Various eateries in Kolkata, like The Daily Café, Restopubs Bakstage, Motor Works & brewing Company, KFC, Subway, Seinna Café have taken their waste management responsibility incredibly well. The usual culprits in the forms of plastic straws, stirrers, and cutlery have been replaced with paper straws which are certified for use in food items. Apart from the humble paper straw, there are straws and stirrers⁵¹ made of metal, lemongrass, ice and pasta too! An ice straw last about 20-25 minutes and is served with high end liquor in Bakstage.

The non-plastic straws, like the paper straw doesn't allow the drink to move as smoothly as plastic straws, gets soggy if left for too long in the

⁴⁵ *Ibid*

⁴⁶ "Green revolution from Sweden to Kol", p. 6, The Times of India, Kolkata, 13.09.19

⁴⁷ "Principal fined for plastic use", p. 8, The Times of India, Kolkata, 21.10.19

⁴⁸ *Supra* note 46

⁴⁹ *Supra* note 47

⁵⁰ *Supra* note 43

⁵¹ "While Kolkata's popular restos say no to plastic straws...For street vendors, bearing the cost of paper straws is not an option", p. 4, The Calcutta Times, Kolkata, 30.08.19

drink and are costly. For instance a plastic straw costs around 40-50 paise as against Rs. 2-4 for a paper straw⁵². The costs is an impediment for the street vendors who additionally complain the biodegradable straws are not available at wholesale markets from where they buy their plastic straws.

It would be perhaps better, if people customers like Ishita Gupta, refuse to use a straw altogether to have their drink⁵³; we should try sipping from the glass directly or ensure that the coconut is cut in a manner that allows one to drink directly from it.

5.2. Food ATMs⁵⁴

Life on the earth is that of contrasts: a stark demarcation between those who have plenty and those who have nothing. Food wastage is as common a phenomenon as wastage of excess food is. To arrest this problems a few good souls have come up with the concept of Food ATMs.⁵⁵ Food ATM is a public fridge installed by the road-side or on a footpath, where excess food and left overs are deposited for collection by anyone in need”⁵⁶. What is interesting is that the eligibility to open the fridge and to take out food from it is not dependent on one’s economic status; i.e., “it is not for the rich or the poor but for everyone who needs something”⁵⁷. Through the 4 fridges installed in Kolkata, about 100 people are fed daily⁵⁸.

They have been globally set up in various countries- U.K, Canada, Singapore. In India we have food ATMs in Kolkata (four fridges; inside Mahadevi Birla School in Park Circus, Ram Leela Ground in Moulali); in Bengaluru (15 fridges; at Dinnur Road, Kranti Veera Sangolli Rayanna Station); Chennai (Anna Nagar, Basant Nagar Tennis Club); Guragon (Suncity), Bhubaneshwar and Dehradun. There is a preliminary installation cost of around Rs. 70,000 to 80,000 per fridge. Thereafter there is a monthly maintenance and supervision cost of Rs. 10,000/-.

Those who order excess food in a restaurant or generally have extra food that they don’t intend to eat, they can go to these community fridges and leave it there for a hungry passerby to feed on. This way the amount of food items reaching the waste bins is also substantially reduced.

⁵² *Ibid*

⁵³ *Ibid*

⁵⁴ “ ‘Fridging’ the hunger gap: How Food ATMs are feeding the poor”, (find the link), The Times of India, Kolkata, 28.10.19

⁵⁵ *Ibid*

⁵⁶ *Ibid*

⁵⁷ *Ibid*

⁵⁸ *Ibid*

i. Restarting the ‘Returnable Container Model’, Upcycling Kitchen Waste

Lata Bhatia, operates Kolkata’s first and the country’s fifth zero-waste shop in New Alipore in Kolkata. She has been personally living a zero-waste life for nearly 20 years and encourages others to adopt to such lifestyle. She sells an array of recycled and upcycled products including reusable clinical safe diapers and sanitary napkins, bags of biodegradable materials, upcycled clothes, food grains etc. She doesn’t sell food grains to a customer who doesn’t bring a container with her and is working on getting back the returnable container model of the 1950s which we nearly lost by the 1970s.

She also upcycles her Kitchen waste to make manure which she uses to nourish her terrace garden. There is nothing in her shop that is packaged in plastic; she insists that packaging was never meant to be, since “nature doesn’t give us things packaged”⁵⁹.

ii. Harvesting Trees to Grow Directly into Furniture

Trees are grown for a long duration of time, and thereafter felled using carbon heavy methods to make furniture. In an attempt to reduce wastage and reduce carbon footprint generally, a UK couple, Gavin and Alice set up their company Full Grown, in 2012. Here they harvest trees and ensure that these trees are trained to directly grow into the desired furniture. At present, in their Derbyshire furniture farm they are nurturing 250 chairs, 100 lamps and 50 tables.⁶⁰

iii. Changing the Consumption in Weddings

Tremendous waste is generated in weddings or large social events in the form of excess food, plastic decorations, return gifts/gifts and packaging of return gifts/gifts. There are a few environmentally conscious persons who are taking the lead in correcting this. For instance⁶¹, a couple, Ajay Jatav and Babita in Karoli Village, 20 km from Alwar city in Rajasthan in their wedding didn’t accept gifts at all. They infact contributed to setting up a community library and gifted saplings as return gifts to their guests. Their wedding was also plastic free.

iv. KSWMI Project, funded by Japan International Corporation Agency (JICA)⁶²

In 2016, The Kolkata Solid Waste Management Improvement Project (KSWMI) was launched in six municipalities of the Hooghly district

⁵⁹ “city’s first zero-waste shop promotes eco-friendly living”, p. 3, The Times of India, Kolkata, 28.10.19

⁶⁰ “This UK farm grows furniture”, p. 13, The Times of India, Kolkata, 24.09.19

⁶¹ “couple takes wedding vows on the constitution”, p. 1, The Times of India, Kolkata, 17.10.19

⁶² *Ibid*

in the state of West Bengal:- Uttarpara- Kotrung, Konnagar, Rishra, Serampore, Champdani, Baidyabati. It was a Rs. 170 crore project funded by Japan International Corporation Agency (JICA)⁶³ which ended in 2017 after which it has become the prerogative of the state government⁶⁴. The project ran so well that in the year 2016 in the C40 Mayor's Summit held in Mexico City, Uttarpara won the award in Urban Solid Waste Management Category defeating strong contenders in Auckland and Milan.

Households in Uttarpara segregate bio-degradable and non-degradable solid waste, which is collected by municipal workers who carry them in vans having separate chambers and dump them separately at the transfer centres. There is this process of temporarily storing the non-degradable waste before it is put in compactor machines to be compressed and dumped at the sanitary landfill. It was the only municipality from the six mentioned above in being able to complete all the procedures involved in waste management, right from segregation at source to production and sale of bio manure. Segregation at source had also started in Konnagar and Baidyabati but production of bio-manure wasn't substantial after the trial. The civic bodies were awaiting quality test report from Jadavpur University to improve the production of bio-manure⁶⁵.

At the landfill sites, in Uttarpara, rag pickers were seen collecting garbage for selling to waste dealers. There were more than two dozen rag pickers who have been hired by civic authorities to give Uttarpara the urban clean look. These rag-pickers, unlike the ones we see elsewhere in the country, are provided with proper equipment to prevent them from falling sick and to ensure that they work in hygienic environment. They were provided with masks, gloves, gumboots and uniform by the municipality and are required to mandatorily wear them while scavenging through the garbage.

While collecting things, they further segregate whatever bio-degradable waste had remained in the non-degradable lot. The bio-degradable waste goes to the adjacent compost plant. The municipality sells the bio-manure produced at the plant from its counter and through marketing agents. The municipality has been collecting approximately 12-14 tonnes of waste every day and produces about 3-4 tonnes of manure daily. They, however, have the capacity of producing up to 10 tonnes of manure per day.

Uttarpara municipality also collects waste from the sewerage system with suction cum jetting machines and the Civic chief highlighted that the goal of the municipality was to cover all drains across the town. According

⁶³ *Ibid*

⁶⁴ *Ibid*

⁶⁵ *Ibid*

to the latest data, Uttarpara-Kotrung and Baidyabati civic areas are mostly free of open dumping, while the former is also earning from sales of bio-manure. Leachate treatment facilities at the common sanitary landfill prevent ground water contamination, while garbage dumping on Bhagirathi has reduced.

v. Campaigns to Make Presidency University and Jadavpur University Plastic Free

Aryan Agrahari, a 3rd year economics student of Presidency University, has been trying to raise awareness of the 2018 guidelines issued by UGC that recommends educational campuses to segregate garbage disposals. As a part of his campaign of raising awareness amongst his batchmates and others, he has been distributing corn starch made bags as an alternative to plastic bags⁶⁶.

Swarup Kumar Das, a mathematics student of Jadavpur University, has also been trying to spread environmental awareness in his university. However, he has not roped in the University authorities yet and is doing so predominantly alone.⁶⁷

6. Conclusion: Can We Create a Zero-Waste Environment?

The answer to the first question posed in this article in the form of the title of this paper is, “*Yes, if we involve all stakeholders and consistently work towards the goal*”. It has been made evident in the foregoing sections that even if we do not generate any further waste as on 2019, we already have eight “great garbage patch” in the various oceans of the world to take care of⁶⁸. Therefore, along with attempting to manage the existing waste, we should generate a robust mechanism to encourage living in zero-waste situation. Replacing the plastic straws with biodegradable options (lemongrass and paper) is unequivocally better, but attempting to drink the coconut water directly from the coconut, or the sugarcane juice from the earthen pot, or the tea from the glass cup is better.

We, also saw how harmful even organic waste (like food scraps, old newspapers) can be when dumped along with other non-biodegradable products in the landfill sites. Leachate, which is formed when rainwater percolates through the waste in landfill sites, picks up pollutants on its way downwards. Leachate contains heavy metal such as cadmium and lead, solvents, ammonia, phenols, cyanide and numerous other chemical compounds, which is known to contaminate the soil and ground water. The presence of kitchen waste and other organic waste in such landfill sites

⁶⁶ *Supra* note 46

⁶⁷ *Ibid*

⁶⁸ *Supra* note 20

produce a leachate so rich in nutrients that it can cause algae blooms if it leaks into streams or rivers.; and when algae die, their decomposition rapidly removes oxygen from the water, killing fish and other animals as well as plants. This is why we should work on composting kitchen waste in our homes, like Lata Bhatia and other green activists.

Consumerism is perhaps to be blamed for the tremendous amount of waste generated in the 21st Century. Gifting has become a mandatory code of behavior in various social events, which only adds to further materials being discarded in the trash can. Gifting of non-essential things should be eliminated. Affection can be expressed through various other means, gifting of natural flowers, plants or towards a social cause dedicated to the intended recipient of the gift.

The Food ATMs, have been able to attain two objectives through its installation across the world and the few cities in India; that it was possible to feed the poor and also eliminate a substantial amount of food wastage that land up in the garbage bins.

We must try and return to the returnable container market, where a customer needs to return the container in which a product was purchased or she needs to bring her own container to carry the product in, like it is practiced by Ms. Lata Bhatia in her store. It is ofcourse, easier to bring one's own container to get solid stuff like rice and wheat; but it is more realistic to encourage a subsidy to those who return containers like shampoo bottles, cold drink bottles, when they go to purchase their next product.

Lastly, the author would like to conclude by stating that legislation can be one of the weapons in the armory, but it cannot be the only weapon to tackle the problem of waste management in the country. While punitive measures is believed to have a deterrent factor, as was hoped by the District Collect of Bhindh District, Bhopal, it would be a fallacy to consider it to be the only way to effectively deal with the menace of waste burdening our earth. Conducting awareness programme for the adults and inculcating knowledge regarding waste management in the educational system is the biggest need of the hour. We need to acquaint our family members friends and colleagues that it is possible to live a zero-waste life. And to spread such awareness, there is no better entity positioned at a vantage point like the government. Replacing the plastic straw might not be possible for the poor street vendor in Kolkata who complained about the substantial price difference between the plastic and the other biodegradable straws; but it is possible for government offices to replace the thermocol/plastic plates used in offices with bagasse/cornstarch plates in its government events.

We definitely have a long way to go, but if all of us together take a step forward we would have traversed a vast distance towards our desired objective of living in zero-waste environment.

Transformative Constitution and the Horizontality Approach: An Exploratory Study

Dr. Shameek Sen¹

Abstract

The Constitution of India, especially the Fundamental Rights chapter, has played a massive transformative role in the Indian society. To quote Ananth Padmanabhan, Fundamental Rights mark “a tectonic shift in constitutional philosophy”, a fact that is universally recognised. However, the enforcement of Fundamental Rights has been predominantly vertical, owing to a tacit acknowledgement of the centrality of the State, largely because of our adherence to westernised notions of unitary sovereignty. Apart from obvious scopes for direct horizontality like in Articles 15(2), 17 and 23, the Indian judiciary has been quite reluctant to effectuate the real layered nature of the Indian sovereign model and make Fundamental Rights horizontally enforceable in general. This paper seeks to acknowledge the inherent limitations of the peremptory vision of Fundamental Rights as a negative right imposing constraints on the state; and aims to advocate a positive duty-based approach in order to fulfil the constitutional visions of a transformed society.

Developing on recent works by scholars like Gautam Bhatia who have primarily tried to analyse the foundations of horizontality in the areas of non-discrimination etc., this paper seeks to also explore the possibility of such horizontality in areas like free speech, spaces where the private non-state players play a significant role in imposing regulations, which are, more often than not, extra-legal in nature. The concomitant challenges to the centrality of the State in a vertical vision of Fundamental Rights forms the centrepiece of this paper, which seeks to put forward an alternative vision of Fundamental Rights enforcement through an explicit recognition of the horizontality approach in constitutional adjudication.

Keywords: Horizontal Application, Fundamental Rights, Transformative Constitution, Comparative Law, Free Speech

1. Introduction

The Constitution of India, apart from being a sentinel of the fundamental democratic ethos of the Indian nation state, plays a hugely significant transformative role. Over the course of the last sixty nine years of our constitutional existence, the Indian society has undergone substantial socio-political and economic transformations. However, the strong constitutional foundations have ensured that the fundamental values that underline the Indian society have remained intact, and our basic rights and constitutional guarantees have not been withered away in the face of rampant modernisation.

¹ Assistant Professor (Law), The WB National University of Juridical Studies, Kolkata

One of the more defining features of the societal evolution in the last sixty nine years has been the increasing importance of non-state actors, not just in the socio-economic sphere, but in the political sphere as well. Sometimes, their subterranean presence is felt in the spheres of governance as well. Moreover, different aspects of inter-personal relations between private actors also necessitate engagement with Constitutional principles, especially when they involve elements of discrimination and abridgement of fundamental freedoms. This ever-burgeoning importance of the *private* often poses regulatory challenges for the *public*, especially when doctrinaire adherence to traditional notions of constitutional interpretation is found deficient and unsustainable.

One such area where the conventional constitutional precincts need some serious reconsideration is in the area of enforcement of Fundamental Rights. Traditionally, Fundamental Rights have been largely applied vertically, that is to say, against the state.² There have been very limited scopes for horizontal application of Fundamental Rights against non-state entities, while enforcing provisions of the Constitution that do not specifically mention the State, for example, Articles 15(2), 17, 23 and 24. The idea of indirect horizontal application is yet to find firm grounding through a consistent trend of juristic interpretations, predominantly owing to a tacit acknowledgement of the centrality of the State largely because of our adherence to westernised notions of unitary sovereignty.³ This paper seeks to acknowledge the inherent limitations of the peremptory vision of Fundamental Rights as a negative right imposing constraints on the state; and aims to advocate a positive duty-based approach in order to fulfil the constitutional visions of a transformed society.⁴

² See e.g. *P.D. Shamsadani v. Union of India*, AIR 1952 SC 59, *Vidya Verma v. Shiv Narayan Verma*, AIR 1956 SC 108.

³ For example, Martin Laughlin writes: “*the modern system of government exists to protect the interests of the right-bearing individuals...through the constitutional arrangements of the modern state.*”(emphasis added). See Martin Laughlin, *Foundations of Public Law*, (Oxford University Press, Oxford, 2010), pp. 342-343. See also, Carl Schmitt, *Constitutional Theory*, Transl. and Ed. by Jeffrey Seitzer (Duke University Press, Durham & London, 2008) pp. 197-219.

⁴ See Stephen Gardbaum, ‘Horizontal Effects’, in Sujit Choudhury, Madhav Khosla, and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of The Indian Constitution* (OUP, New Delhi, 2016), p. 600. See also, Sudhir Krishnaswamy, “Horizontal Application of Fundamental Rights and State Action in India”, in C. Rajkumar and K. Chockalingam (eds.), *Human Rights, Justice, & Constitutional Empowerment* (Oxford University Press, New Delhi, 2007); Ashish Chugh, “Fundamental Rights - Vertical or Horizontal?” (2005) 7 SCC (J) 9.

Developing on recent works by scholars like Gautam Bhatia⁵ who have primarily sought to analyse the foundations of horizontality in the areas of non-discrimination etc., this paper also seeks to explore the possibility of such horizontality in areas like free speech, spaces where the private non-state players play a significant role in imposing regulations, which are, more often than not, extra-legal in nature. The concomitant challenges to the centrality of the State in a vertical vision of Fundamental Rights forms the centrepiece of this paper, which seeks to put forward an alternative vision of Fundamental Rights enforcement through an explicit recognition of the horizontality approach in constitutional adjudication. After the Introduction in Part I and Part II, it seeks to trace the concept of Horizontality as it exists in the Indian Constitutional scheme of things right now. Part III deals with how the issue of Horizontality is dealt with by Constitutions around the world. Part IV seeks to look at what holds in future for India, and whether the global practices can be of any assistance for building a template for the future. Part V summarises and concludes the discussion.

2. Tracing Horizontality in the Indian Constitution

This part seeks to locate the seeds of horizontality within the framework of Part III of the Constitution. It looks at the issue from three different perspectives. First, it looks at how the clear mention of ‘State’ in Article 12, ostensibly acting as a deterrent towards making Fundamental Rights enforceable against private players, has been jurisprudentially surpassed by reading many non-state bodies performing functions of public importance into the ambit of Article 12 by making use of the flexible “other authorities” category. Subsequently, it seeks to look into the Direct and Indirect Horizontal Application of Fundamental Rights, and explore means and mechanisms by which the Court has been making more and more private infractions of Fundamental Rights constitutionally actionable.

2.1 Expanding the Scope of “Other Authorities” in Article 12

Part III of the Constitution that deals with Fundamental Rights starts with Article 12, which gives an open-ended, inclusive definition of the term ‘State’. In a way, this clear positioning of Article 12, and the clear enunciation of the centrality of the ‘State’ often serves as the basis of the argument that denies any claim for horizontality. Even though there may be some merit in this argument, a deeper look into the provision unerringly points towards an alternative narrative.

⁵ See generally, Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins, Noida, 2019). See also Gautam Bhatia, “Horizontality under the Indian Constitution: A Schema”, *Indian Constitutional Law and Philosophy*, available at < <https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/>> (last visited on 10.10.2019).

Article 12 defines State as “*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*” (emphasis added). While there is a virtual certainty about the interpretation of the other phrases in the Article, one cannot state with an absolute certainty that the interpretational position with respect to the phrase “other authorities” is absolutely settled.

In *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*⁶ the Court by a majority of 5:2 held that a body would be considered as “the State” only if it is *financially, functionally and administratively* dominated by or under the control of the Government, and such control must be pervasive. In *Zee Telefilms v. Union of India*,⁷ the Court held that the Board of Control for Cricket in India (BCCI), a society registered under the Tamil Nadu Societies Registration Act, 1975 and enjoying extensive powers in relation to the sport of cricket in India was not “the State” under Article 12. Deciding on the lines of *Pradeep Kumar Biswas*,⁸ the majority concluded that the BCCI did not fulfil the criteria of being ‘*financially, functionally and administratively*’ under the governmental control. However, Sinha, J., in his dissenting opinion stressed on the functions performed by the BCCI and pointed that meaning of “the State” under Article 12 was not confined to entities controlled by the government.⁹

This approach adopted by Sinha, J., found partial resonance with the Supreme Court in the case of *BCCI vs. Cricket Assn. of Bihar*¹⁰ where the Court, although staying firm with the *Zee Telefilms*¹¹ dictum, acknowledged in no uncertain terms that Sports Federations, although private bodies, can violate sportspersons’ Fundamental Rights, and therefore, can be amenable to the writ jurisdiction of the High Courts under Article 226 of the Constitution.

In clear reference to the functions performed by the BCCI, the Court observed:

“The rationale underlying the view [that decision of BCCI is amenable to writ jurisdiction of the High Courts under Article 226 even when it is not “the State” within the

⁶ (2002) 5 SCC 111, paras 27 & 40.

⁷ (2005) 4 SCC 649.

⁸ Supra note 5.

⁹ Supra note 6. See also, M.P. Singh, "Fundamental Rights, State Action and Cricket in India" 13 *Asia Pacific Law Review* 203 (2005).

¹⁰ (2015) 3 SCC 251, paras 22, 33, 34, 35, 74, and 84.

¹¹ Supra note 6.

*meaning of Article 12] lies in the nature of duties and functions which BCCI performs”.*¹²

The court went on to say:

*“Any organization or entity that has such pervasive control over the game and its affairs and such powers... cannot be said to be undertaking private functions...if the Government not only allows an autonomous/private body to discharge functions which it could in law take over or regulate but even lends its assistance to such non-government body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that entity discharging the same is not answerable on the standards generally applicable to judicial review of State action.”*¹³ (emphasis added).

Even if one may argue that this judgement does not bring the BCCI (or for that matter, private bodies as such) within the definition of ‘State’ under Article 12, it cannot be denied that it significantly paves the way for enforcing Fundamental Rights horizontally against mighty and powerful non-state actors. One hopes that this is just the first step towards revisiting the narrow, structuralist formulation of the definition of ‘State’ that was laid down in *Pradeep Kumar Biswas*.¹⁴

2.2 Direct Horizontality

In the direct horizontality model, an act by a non-state actor can be scrutinised directly on the touchstone of Fundamental Rights, without there being any necessity to build a bridge between such non-state actor and the State, either by bringing it within the definition of ‘other authorities’ under Article 12, or by making the State responsible in any other manner.¹⁵ Taking this approach is especially plausible in case of Fundamental Rights that do not mention the requirement of the State in its body. For example, Under Article 15(2), no citizen may be restricted from access to shops, public restaurants, hotels, places of public entertainment and public resort dedicated to the use of the general public, on grounds only of religion, race, caste, sex, place of birth, or any of them. Similarly, Article 17 prohibits the practice of untouchability and Article 23 prohibits traffic in human beings,

¹² Supra note 9, para 33.

¹³ *Ibid*, paras 33, 34 & 35.

¹⁴ Supra note 5.

¹⁵ See generally, M.P. Singh, “Protection of Human Rights against State and Non-State Action” in Dawn Oliver and Jörg Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, UK, 2007). See also, Gardbaum, supra note 3.

as well as bonded labour. In all these cases, it can be noticed that the wordings of the Articles in question do not mention the fact that the deprivation has to be necessarily attributable to the State, or any State agency.

At this point, it is pertinent to mention that although the said Rights do not express the requirement of the State as a violator of the Fundamental Rights, they do not absolve the State of its positive obligations to ensure that such violations do not take place. For example, in the case of *People's Union of Democratic Rights v. Union of India*,¹⁶ the Supreme Court observed:

*"...whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. Of course, the person whose fundamental right has been violated can always approach the court for the purpose of the enforcement of his fundamental right, but that cannot absolve the State from its constitutional obligation to see that there is no violation of fundamental right..."*¹⁷

Similarly, the Supreme Court has been immensely effective in giving expansive and purposive interpretations to the provisions that provide for horizontal application. For example, in the case of *Indian Medical Association v. Union of India*,¹⁸ the Supreme Court gave a plenary interpretation of the word 'shops' in Article 15(2) and brought within its ambit all kinds of establishments that provide goods or services.¹⁹ Thus, the constitutional mandate of providing non-discriminatory treatment was extended to private schools as well.

¹⁶ (1982) 3 SCC 235.

¹⁷ *Ibid*, para 15.

¹⁸ (2011) 7 SCC 179.

¹⁹ In doing so, the Court majorly relied on the following statement by Dr. B.R. Ambedkar in the Constituent Assembly: "*To define the word 'shop' in the most generic term one can think of is to state that 'shop' is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. Certainly it will include anybody who offers his services. I am using it in a generic sense. I should like to point out therefore that the word 'shop' used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to.*" See Constituent Assembly Debates on November 29, 1948, available at: <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> (last visited on 10.10.2019).

The reach of Direct Horizontal Application has been occasionally extended also to provisions like Article 21 which, in addition to constitutionalising a positive duty to safeguard an individual's life and personal liberty, has made private bodies equally amenable as the State. In *Parmanand Katara v. Union of India*²⁰ the Court after holding that preservation of life by providing emergency healthcare facilities is protected by Article 21 said:

“Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life.” (emphasis added)

Similarly, in *Consumer Education and Research Centre v. Union of India*,²¹ while expanding the scope of right to life and including within its expanded ambit the right to health and environment, the Court observed:

“The State, be it Union or State government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness”.

Thus, it can be noticed that the Supreme Court has not only confined the ambit of Direct Horizontal Application to the more obvious provisions. It has in fact gone one step ahead and has made sure that private bodies, just like the State, are made accountable to take positive steps in the direction of safeguarding certain basic rights.

2.3 Indirect Horizontality

Unlike Direct Horizontality, the Indirect Horizontality approach has necessarily required juristic innovations whereby the State was held responsible for an individual's deprivation of Fundamental Rights resulting from the acts of a non-state player. This approach also encompasses situations where the Court has underlined a positive mandate upon the State to ensure that no instance of violation, either owing to its own functionaries and agencies, or to private players, arises. In doing so, it has often read private covenants and arrangements in light of constitutional principles.

The initial trend of Indirect Horizontality can be noticed in cases where the Court has held the State accountable for an individual's acts of malfeasance resulting in the violation of Fundamental Rights of individuals

²⁰ AIR 1989 SC 2039.

²¹ (1995) 3 SCC 42.

or groups. For example, in *Bodhisattwa Gautam v. Subhra Chakraborty*,²² the Court ordered for the payment of compensation to a rape victim, without requiring for the construction of a causal link with the State. Again, in environmental cases, the Court did not hesitate to award compensations against polluting industries and establishments, also enjoining them the task of environmental restitution, while regarding Right to Clean Environment as an integral component of Right to Life under Article 21.²³

Though Indirect Horizontality had strenuous beginnings, the trend gradually stepped up. In *Vishaka v. State of Rajasthan*,²⁴ the Court looked at the State's failure to enact a Sexual Harassment law to regulate both private and public workplaces as an instance of a violation of an individual's Articles 14, 19(1)(g) and 21 rights. Similarly, in *Medha Kotwal Lele v. Union of India*,²⁵ the Court directed those states which had till then not enacted a workplace sexual harassment law, to positively do so within a period of two months. It can be noted here that in both the cases, although the respondent was the State, obligation was cast upon it to regulate both public and private workplaces.

In *R. Rajagopal v. State of Tamil Nadu*,²⁶ the Court, while bringing the Common Law on Defamation at par with the standards of expressional freedoms as required by Article 19(1)(a), also referred to Article 21 in making possible as enforcement of a privacy breach claim against another individual. The landmark case of *Justice K.S. Puttuswamy (Retd.) v. Union of India*²⁷ only takes this imprimatur to its logical extension, when two of the nine Judges categorically recognised the threats to privacy posed by non-state actors and therefore enjoined State to safeguard this Fundamental Right not only against itself, but also against transgressions by non-state players.

D.Y. Chandrachud, J., acknowledging the threat to privacy posed by both State and non-state actors, enjoined upon the State to put together an

²² (1996) 1 SCC 490. One can observe similar observations in the case of *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, where the Court, in a writ petition filed under Article 32 challenging an act of disability-based discrimination meted out to the petitioner by Spicejet, a Private Airlines, directed that the Private Airlines should pay damages to the petitioner.

²³ See *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388. See also, *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

²⁴ (1997) 6 SCC 241.

²⁵ (2013) 1 SCC 297.

²⁶ (1994) 6 SCC 632. The Court largely relied on the landmark U.S. Supreme Court decision in the case of *New York Times v. Sullivan*, 376 U.S. 274 (1964), where the Court brought the common law on defamation, as applied by the State of Alabama against the New York Times, in line with the First Amendment Right to Free Speech, in a private defamation proceeding between the two parties.

²⁷ (2017) 10 SCC 1.

effective Data Protection regime to ward off such onslaughts.²⁸ Kaul, J., made a more specific argument in support of horizontal application of the Right to Privacy. He opined:

*“The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.”*²⁹ (emphasis added)

The other way through which the SC has engaged with Indirect Horizontal Application of Fundamental Rights is by applying them to interpret provisions of private law in accordance with Constitutional principles. In *Githa Hariharan v. Reserve Bank of India*,³⁰ the Court held that Section 6 of the Hindu Minority and Guardianship Act 1956, which states that “the natural guardians of a Hindu minor... are - (a) in the case of a boy or unmarried girl- the father, and after him, the mother...”, could be interpreted to mean that the mother could become the guardian not only after the death of the father, but also in his absence or because he was indifferent towards the child, or due to lack of understanding between the mother and father. Therefore, rather than invalidating the relevant section on the basis of sexual discrimination prohibited under Article 15(1), the Court interpreted the Hindu Minority and Guardianship Act, 1956 - a private law statute - consistently with the right to equality. In doing so, it applied Article 15 (1) to a private law case, thereby not only impacting and regulating the action of private individuals but also recognizing the Indirect Horizontality of Fundamental Rights.³¹ Similarly, in *Central Inland Water Transport Corporation v. Brojo Nath Ganguly*,³² the Court used the concept of arbitrariness to interpret Rule 9(i) of the Service Rules of the Corporation and strike it down on finding it to be arbitrary and discriminatory, and thus violative of Article 14. Although the appellant in this case, the Central Inland Water Transport Corporation, is a Government Company and hence, ‘State’ within the meaning of Article 12, the point to be noted in this context is that the Court showed no reluctance in interpreting a private employer-employee service contract in consonance with the Constitution. Hence, in the larger picture, one can easily posit a proposition that in similar disputes involving non-state employers also, the Court’s line of interpretation would not be very different.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ (1999) 2 SCC 228.

³¹ See, Gardbaum, *supra* note 3, pp. 608-9.

³² (1986) 3 SCC 156.

However, one cannot overlook to glaringly inconsistent position taken by the Supreme Court in the case of *Zoroastrian Cooperative Housing Society Limited v. District Registrar Cooperative Societies (Urban)*,³³ where the Court adopted a strict verticalist approach in refusing to read a restrictive covenant of a co-operative society in consonance with the Constitutional requirement of public policy in religious non-discrimination, with an argument arduously premised on the voluntary nature of the compact and the need to locate public policy within the four corners of the local act and the bye-laws, rather than looking for an engagement with the Constitution.

In *Charu Khurana v. Union of India*,³⁴ the Court struck down a blatantly discriminatory provision of the Cine Costume Make-up Artists and Hair Dressers Association bye-laws, not on the basis of a Fundamental Rights scrutiny, but for being violative of Section 21 of the Trade Unions Act, 1926. Although the Court goes on to make certain perfunctory observations about the requirement of Trade Unions and Associations which are accepted by the statutory authorities to not violate the mandates of Article 21, it is argued that this decision can be looked at a golden opportunity of firmly reinforcing the Horizontality discourse in the Indian constitutional paradigm which was squandered by the Supreme Court.³⁵

Inconsistencies aside, one can clearly discern a pattern in the Court's interplay with Horizontality. It has tried to locate Horizontality primarily in provisions which allow for direct enforcement against private players, or has tried to conjure up an interpretation premised on the paternalistic role of the State and its deficiencies in safeguarding individual interests, largely stemming out of Article 21. In the process, Fundamental Rights have been looked at not just negative rights – imposing restrictions upon the State from unjustifiably encroaching individual rights, but also as positive ones – imposing obligations upon the State to safeguard them, and in the process, make private players also conform to similar requirements.

3. Horizontality in Other Jurisdictions : A Comparative Critique

In this part, the issue of horizontal application of Constitutional Rights in five other jurisdictions – namely United States, Canada, Germany, United Kingdom and South Africa have been looked at. This comparative

³³ (2005) 5 SCC 632.

³⁴ (2015) 1 SCC 192.

³⁵ *Ibid.* One can look at a similar instance of glorious opportunity missed where the Supreme Court, instead of making a decisive observation about the horizontal application of Right to Education, sought to justify certain restrictions imposed by the Right to Education Act, 2012 on the non-minority Unaided Private Educational Institutions as reasonable restrictions on their Article 19(1)(g) Rights primarily under Article 19(6). See *Society for Unaided Private Schools, Rajasthan v. Union of India*, (2012) 6 SCC 1.

critique not only provides a perspective into the schemes of Rights enforcement in the respective jurisdictions, they also provide models for India to follow in future.

3.1 United States

The United States of America, in its Constitutional text, makes it absolutely certain that except in case of the Thirteenth Amendment,³⁶ the individual rights only bind the State and not individuals. Even the much-talked about Doctrine of State Action³⁷ seeks to derive its legitimacy from the second clause of the Fourteenth Amendment, which starts with "No state shall..."³⁸

However, when it comes to regulating the *inter-se* relationship between individuals, the American Courts have not hesitated to take resort to constitutional precincts to resolve the disputes.³⁹ For example, in the famous case of *Shelley v. Kraemer*,⁴⁰ the Supreme Court had the occasion to look into a racially exclusionary covenant. Although the Court refused to look into the validity of the covenant *per se* insofar as it regulated the relations between parties, it made sure that it would render the covenant judicially unenforceable, since doing so would violate the equal protections clause.⁴¹

Thus, it can be clearly seen that although private players are themselves not bound by constitutional rights themselves, they are definitely indirectly subject to them, since the laws they would like to implement against one another are subject to the constitutional rights themselves, and the judiciary would do nothing by way of enforcement of an unconstitutional rule, even if it would govern the relations between parties.

³⁶ The Constitution of the United States of America, 1789. Amendment XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

³⁷ For a more detailed description and analysis of the State Action Doctrine, *See generally* Lawrence H. Tribe, *Constitutional Choices* (Harvard University Press, Cambridge, 1986). *See also*, Stephen Gardbaum, The "Horizontal Effect" of Constitutional Rights, *102 Michigan Law Review* 387 (2003).

³⁸ *See also*, *Civil Rights Cases*, 109 U.S. 3 (1883), *DeShaney v. Winnebago*, 489 U.S. 189 (1989).

³⁹ *See* Harold W. Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, *30 South California Law Review* 208, 210 (1957). The author argues: "[T]here is no inconsistency between the 'private'-'state' action distinction of the Civil Rights Cases and the often-applied principle that the Fourteenth Amendment imposes limits on the way in which a state can balance legal relations between private persons."

⁴⁰ 334 U.S. 1 (1948). *See also*, *New York Times v. Sullivan*, supra 25.

⁴¹ *Ibid.*

3.2 Canada

The Canadian Supreme Court got an opportunity to engage with the issue of Horizontality in the *Dolphin Delivery Case*.⁴² The Court clearly pointed out that although an action by any of the branches of the State should act as a prerequisite for invoking the Charter provisions, “[t]he Charter is far from irrelevant to the private litigants whose disputes fall to be decided at common law”. Similarly, the Court has subjected private relationships and common law to the enshrined Charter Values,⁴³ with the necessary caveat that the distinction between the ‘Charter Rights’ and the ‘Charter Values’ is not completely obliterated.⁴⁴

3.3 Germany

According to the German Basic Law, there can be no direct application of the Fundamental Rights in settling private law disputes.⁴⁵ However, it is recognised that “*basic right norms contain not only defensive subjective rights for the individual*” but also embody “*an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary*”.⁴⁶ This ‘radiating effect’ of the Basic Law over private law can be best articulated by the *Luth case*⁴⁷ where the Court firmly embedded indirect horizontality in the German constitutional context thus:⁴⁸

“...the Basic Law is not a value-neutral document...Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights...Thus it is clear that basic rights also influence the development of private law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit.”

⁴² *Retail, Wholesale & Department Store Union v. Dolphin Delivery Ltd.* (1986) 2 SCR 573.

⁴³ *R. v. Salituro*, (1991) 3 SCR 654; *Dagenais v. Canadian Broadcasting Co.*, (1994) 3 SCR 835; *Hill v. Church of Scientology*, (1995) 2 SCR 1130.

⁴⁴ See *Hill*, supra note 42. In this case, it was pointed out that even though Charter Rights impose obligations on the government, Charter Values are relevant for the entire legal system. See also, *M (A) v. Ryan*, (1997) 1 SCR 157.

⁴⁵ See P.E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 *Maryland Law Review* 247-346 (1989).

⁴⁶ See Chugh, supra note 3.

⁴⁷ Liith, BVerfGE 7, 198 (205). See also, Bhatia, supra note 4, Ralf Brinktrine, *The Horizontal Effect of Human Rights in German Constitutional Law*, 6 *European Human Rights Law Review* 421, 423 (2001).

⁴⁸ *Ibid.*

The German Federal Constitutional Court has, through a series of decisions, developed the horizontality jurisprudence, broadly referred to as *'Drittwirkung'*⁴⁹ whereby although the Constitution directly applies only to the public functionaries, they are, much like Canada, used to resolve disputes involving private law. Moreover, a private law norm that is not in conformity with the higher Basic Law is declared to be invalid for such inconsistency.

3.4 United Kingdom

The United Kingdom Human Rights Act, 1998 that was enacted to incorporate the European Convention on Human Rights (ECHR) into the domestic legal system,⁵⁰ categorically rules out the possibility of any direct horizontal application.⁵¹ However, it makes sure that if any parliamentary legislation is found to be in violation of the provisions of the ECHR, then the Courts can make a declaration of incompatibility, which can fast track a parliamentary amendment or repeal exercise to bring the said law in conformity with the Convention.⁵² This may be looked at as a harbinger of indirect horizontality, as the State is thus enjoined to apply the Convention Rights even in the context of private law. Moreover, the definition of 'public authorities' that includes courts and tribunals⁵³ as well as persons whose functions are of a public nature are necessarily obligated to act in accordance with the Convention Rights, thus reaffirming the case in support of an indirect horizontal application.

3.5 South Africa

The South African Constitution, arguably the most advanced of the modern Constitutions, has witnessed a very chequered and interesting journey of the horizontality discourse, both in the constitutional text and in its juristic interpretations.

In the landmark *Du Plessis v. De Clarke*⁵⁴ case, the majority held that although the Interim Constitution of 1994 did not provide for "general direct horizontal application" nor applied to private disputes revolving around interpretations of common law, it should still be kept in mind that the "*values embodied in Chapter 3 (fundamental rights) will permeate the common law in all its aspects, including private litigation*".⁵⁵ In saying so,

⁴⁹ See Brinktrine, supra note 46.

⁵⁰ The United Kingdom Human Rights Act, Section 1.

⁵¹ For example, Section 3(1) requires that Convention Rights be made applicable only to legislations, and thus leaves out Common Law from its ambit.

⁵² *Ibid*, Section 4(2).

⁵³ *Ibid*, Section 6(3).

⁵⁴ 1996 (3) SA 850 (CC).

⁵⁵ *Ibid*.

the majority placed reliance on Article 7 of the Interim Constitution which stated that:

“7 (1) This Chapter shall bind all legislative and executive organs of state at all levels of government; (2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution”.

The dissenting Judge, Justice Kriegler, took a more radical approach to the issue. He opined:⁵⁶

“Unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned. As far as the chapter is concerned, a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may blackball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuse to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry.”

This position, seemingly taking the position of the *Shelley v. Kraemer*⁵⁷ position to its logical extension, suggests that whenever one individual invokes a provision of law against another, it automatically triggers the application of constitutional rights to the law in question. This is because all law – irrespective of whether it is statutory or common law, no matter whether it regulates relationship between individuals and the State or between individuals *inter se* – is directly subject to the Constitution.⁵⁸

Quite fascinatingly, the final South African Constitution, in Section 8(2), does provide the scope for Horizontal Application within the constitutional framework. It states:⁵⁹

⁵⁶ Supra note 53.

⁵⁷ Supra note 39.

⁵⁸ See Gardbaum, supra note 3.

⁵⁹ The Constitution of the Republic of South Africa, Section 8. Similarly, there are other provisions also that seek to make certain socio-cultural rights horizontally enforceable. For example, right not to be evicted [Section 26(3)]; not to be refused emergency medical treatment [Section 27(3)]; the rights of prisoners to adequate nutrition and medical treatment [Section 35(2)] and rights of Children (defined as those under 18 years) to basic nutrition, shelter, basic health care and social services [Section 28].

“8. Application

1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

2. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

3. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

4. A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person”. (emphasis added).

Thus, apart from juristic interpretations that are noticed across jurisdictions, the South African Constitution contains specific provisions which binds the conduct of natural and juristic persons by the constitutional standards. This is an interesting breakthrough which, if looked at with ample seriousness, can go a long way in making rights, both civil-political and socio-economic, enforceable against deprivations by individuals.

4. Implications for India and the Way Ahead: A Case of Free Speech

It is clear from the discussion in the previous part that in different jurisdictions, the Courts are making positive, definitive efforts to bring private arrangements between individual in consonance with Constitutional principles and values, albeit in different forms. If we turn our eyes towards India, we find that although such efforts have been initiated, they have been sporadic and still lack a degree of tangible certainty. Moreover, unless we bring more bodies within the definition of ‘State’ under Article 12 by paying more importance to the functional aspect, most Fundamental Rights will naturally leave out acts of private deprivations from their enforceability ambit. For example, if one looks at the Free Speech jurisprudence, the constitutional challenges have always been against unreasonable restrictions imposed on an individual’s Article 19(1)(a) rights by the State by means of

law. Of course, the language of Article 19(2)⁶⁰ which necessarily requires a law to be the means by which such deprivation occurs can be considered to be primarily responsible for this course of action. Thus, a lot of deprivations of Free Speech which result out of individuals or groups creating an atmosphere of threat and coercion get completely left out of the scope of the operation of Fundamental Rights enforcement.

It is often seen that a person is made wilfully shrink his territories of expression, consciously or unconsciously, owing to the fear of exclusion and repression. This can lead to creating a *chilling effect*⁶¹ where one gets psychologically traumatised into not expressing himself to the extent he would have wished to. This kind of psychological self-censorship poses a significant regulatory challenge because such withdrawal from expression without a formal State authority ordering such withdrawal cannot even be made subject to any formal judicial scrutiny.⁶²

In this backdrop, the obvious question that demands an answer is whether the Courts can remain mute spectators to such blatant acts of coercive disfiguration of individual liberties, staying firm to the demands of verticality of Article 19(2)? Or, should they proactively interpret Article 19(1)(a) to import a positive duty on the State to preserve an individual's Free Speech against such unwarranted onslaughts by private individuals and groups?

One finds few attempts made by the Courts in the last ten years where some degree of Indirect Horizontality has been sought to be infused

⁶⁰ “Article 19(2): *Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence*”. (emphasis added)

⁶¹ The term ‘Chilling Effect’ was first referred to in the case of *Wieman v. Updegraff* 342 US 183 (1952). It became the primary basis of Brennan, J.’s concurring opinion in *Lamont v. Postmaster General*, 381 US 301 (1965). For further analysis of this doctrine, See Frederick Schauer, *Fear, Risk and the First Amendment: Unravelling the Chilling Effect*, 58 *Boston University Law Review* 685 (1978), Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 *Vanderbilt Law Review* 1473 (2013).

⁶² One can refer to the controversy surrounding the book ‘The Hindus: An Alternative History’ written by Wendy Doniger where pressure upon the publishers, Penguin India Ltd. from certain right wing groups forced the withdrawal of all copies from India. The book allegedly distorted facts and portrayed Hindu gods and goddesses in a negative light. See generally, Anonymous, “Penguin to withdraw Wendy Doniger's controversial book, The Hindus”, *Firstpost*, available at <<http://www.firstpost.com/living/penguin-to-withdraw-wendy-donigers-controversial-book-the-hindus-1383581.html>> (last visited 10.10.2019).

into the domain of Free Speech. In *Maqbool Fida Hussain v. Raj Kumar Pandey*,⁶³ the Court opined:

*“Democracy has wider moral implications than mere majoritarianism. A crude view of democracy gives a distorted picture. A real democracy is one in which the exercise of the power of the many is conditional on respect for the rights of the few. Pluralism is the soul of democracy. The right to dissent is the hallmark of a democracy. In real democracy the dissenter must feel at home and ought not to be nervously looking over his shoulder fearing captivity or bodily harm or economic and social sanctions for his unconventional or critical views. Freedom of speech has no meaning if there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends. There should be freedom for the thought we hate.”*⁶⁴
(emphasis added)⁶⁵

The Court unambiguously criticised the practice of harassment and innumerable legal and extra-legal challenges that any counter-majoritarian expressional form has to face, and observed:

*“There are very few people with a gift to think out of the box and seize opportunities, and therefore such people’s thoughts should not be curtailed by the age-old moral sanctions of a particular section of society having oblique or collateral motives who express their dissent at every drop of a hat.”*⁶⁶
(emphasis added)

Thus, even though the case arose out of obscenity charges brought against Hussain, the Court implored upon the State the need to preserve the expressional liberties against unwarranted private onslaughts as well.

In the infamous case involving controversial Tamil author Perumal Murugan whose novel “*Mathorubagan*” (One-part Woman) dealt with travails of a childless couple and the wife’s consensual sexual promiscuousness with a young man to get pregnant during the historical temple chariot festival at Tiruchengode, an ancient Hindu temple, where rules of sexual conduct are relaxed for a night, he was pressurised to render an unconditional apology and proscribe the circulation of the book by the local authorities. Riled by the turn of events, Murugan decided to commit a

⁶³ (2008) CrLJ 4107 (Del).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

‘literary suicide’, by refusing to take up his pen again.⁶⁷ He also filed a Writ Petition in the Madras High Court challenging the terms of the settlement.⁶⁸

In a path breaking judgement, Sanjay Kishan Kaul, C.J., (coincidentally, he had also delivered the judgement in the *Hussain* case in the Delhi High Court) declared that the agreement entered into under duress from hypersensitive caste groups was totally invalid in law. The Court also exhorted upon the State to take “*positive measures of protection...against sufferance as a consequence of holding that view*”.⁶⁹ The Court went on to say:⁷⁰

“We do believe that a clear distinction has to be carved out between situations involving the right to expression of an individual or a body of individuals as opposed to a routine law and order tension. Even in matters of this nature, the State may endeavour to diffuse the situation, but not permit proponents of free speech, authors and artistes, as the case may be, to be put under pressure by surrounding circumstances. On the other hand, the endeavour should be to preserve the rights of expression through other modes. There is thus a requirement of mixing care with caution so that such endeavours do not result in malicious proceedings merely based on a perspective of another set of people, who may have different mores”. (emphasis added)

The Court issued guidelines to the State, requiring the State to take proactive steps towards diffusing situations which involve such hecklers’ veto is imposed by fringe groups upon authors’ creative liberties. The concluding paragraph of the judgement is poignant and instructive, where the Court observes:

“The author Prof. Perumal Murugan should not be under fear. He should be able to write and advance the canvass of his writings. His writings would be a literary contribution, even if there were others who may differ with the material and style of his expression. The answer cannot be that it was his own decision to call himself dead as a writer. If was not a free decision, but a result of a situation which was created. Time is a great healer and we are sure, that would hold true for Perumal Murugan as well as his opponents; both would

⁶⁷ See B. Kolappan, Perumal Murugan gives up writing, *The Hindu*, 13.01.2015, available at < <https://www.thehindu.com/news/national/tamil-nadu/perumal-murugan-gives-up-writing/article10625555.ece1?ref=relatedNews>> (last visited 10.10.2019)

⁶⁸ *S. Tamilselvan v. Government of Tamil Nadu*, (2016) SCC OnLine Mad 5960.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

have learnt to get along with their lives, we hope by now, in their own fields, and bury this issue in the hatchet as citizens of an advancing and vibrant democracy. We hope our judgement gives a quietus to the issue with introspection on all sides. Time also teaches us to forget and forgive and see beyond the damage. If we give time its space to work itself out, it would take us to beautiful avenues. We conclude by observing this: Let the author be resurrected to what he is best at. Write.”(emphasis added)

This judgement, it is submitted, is a very important step towards the direction of bringing in Indirect Horizontality to the realm of Free Speech because it brings in a positive mandate for the State to ensure that the fundamental individual freedoms are to be given protection against onslaught by fringe groups.

Similarly, in a case involving the Bengali Film ‘*Bhobishyoter Bhoot*’ which was quite dubiously taken off the theatres, presumably upon instructions from senior Police officials, even after it was certified for public viewing, the Supreme Court pulled up the State for use of “*extra constitutional means to prevent the lawful screening*” of the film, and ordered the State to pay compensation and costs to the producers. D.Y. Chandrachud, J., emphatically observed.⁷¹

“The wielding of extra constitutional authority is destructive of legitimate expectations. Under the constitutional scheme, restrictions can only be imposed by or under a law which is made by the State. [...] In the present case, the West Bengal police have overreached their statutory powers and have become instruments in a concerted attempt to silence speech, suborn views critical of prevailing cultures and threaten law abiding citizens into submission”.

Clearly outlining the need for a positive mandate upon the State to protect Free Speech, the Court asserted.⁷²

“Political freedoms impose a restraining influence on the state by carving out an area in which the state shall not interfere. Hence, these freedoms are perceived to impose obligations of restraint on the state. But, apart from imposing ‘negative’ restraints on the state these freedoms impose a

⁷¹ *Indibly Creative Pvt. Ltd. v. Govt. Of West Bengal*, WP (C) 306/2019. On similar lines, See also, *Prakash Jha Productions v. Union of India*, (2011) 8 SCC 372, *Manohar Lal Sharma v. Sanjay Leela Bhansali*, (2018) 1 SCC 770, *Viacom 18 Media Pvt. Ltd. v. Union of India*, (2018) 1 SCC 761.

⁷² *Ibid.*

positive mandate as well. In its capacity as a public authority enforcing the rule of law, the state must ensure that conditions in which these freedoms flourish are maintained. In the space reserved for the free exercise of speech and expression, the state cannot look askance when organized interests threaten the existence of freedom. The state is duty bound to ensure the prevalence of conditions in which of those freedoms can be exercised. The instruments of the state must be utilized to effectuate the exercise of freedom. When organized interests threaten the properties of theatre owners or the viewing audience with reprisals, it is the plain duty of the state to ensure that speech is not silenced by the fear of the mob. Unless we were to read a positive obligation on the state to create and maintain conditions in which the freedoms guaranteed by the Constitution can be exercised, there is a real danger that art and literature would become victims of intolerance.” (emphasis added)

In the *Index of Censorship*, Ronald Dworkin had remarked:⁷³

“...freedom of speech, along with the allied freedoms of conscience and religion, are fundamental human rights that the world community has a responsibility to guard. But that strong conviction is suddenly challenged not only by freedom’s oldest enemies — the despots and ruling thieves who fear it — but also by new enemies who claim to speak for justice not tyranny, and who point to other values we respect, including self-determination, equality, and freedom from racial hatred and prejudice, as reasons why the right of free speech should now be demoted to a much lower grade of urgency and importance.”

He went on to articulate his views thus:⁷⁴

“The temptation may be near overwhelming to make exceptions to that principle — to declare that people have no right to pour the filth of pornography or race-hatred into the culture in which we all must live. But we cannot do that without forfeiting our moral title to force such people to bow to the collective judgements that do make their way into the statute books. We may and must protect women and homosexuals and members of minority groups from specific

⁷³ See Ronald Dworkin, A New Map of Censorship, *Index of Censorship*, Vol. 23, 1994, available at <<https://www.indexoncensorship.org/2013/02/ronal-dworkin-free-speech-censorship/>> (last visited on 10.10.2019).

⁷⁴ *Ibid.*

and damaging consequences of sexism, intolerance, and racism. We must protect them against unfairness and inequality in employment or education or housing or the criminal process, for example, and we may adopt laws to achieve that protection. But we must not try to intervene further upstream, by forbidding any expression of the attitudes or prejudices that we think nourish such unfairness or inequality, because if we intervene too soon in the process through which collective opinion is formed, we spoil the only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them.”

It is axiomatic that in any liberal democratic society, the State has to appreciate the fact that the legitimacy of the legal machinery and judicial processes is also premised on that democratic justification which tolerates and respects dissident voices from all forms of encroachment and intimidation. And that would necessarily imply that the province of enforcement of the Fundamental Right to Freedom of Speech and Expression cannot be allowed to be confined to pedantic boundaries of protection against State-authorised deprivations alone. Instead, the legal system should endeavour to ensure horizontal enforceability against acts of deprivation attributable to non-state actors.

5. Conclusion

In conclusion of the discussion, it can be said that in the liberalised world where private players play a much more critical role than ever before, the Indian legal system has to show enough progressiveness and innovation to ensure that the doctrinaire adherence to the premise of Verticality does not lead to gross miscarriage of justice. We need to understand that just as the incorporation of the Chapter on Fundamental Rights represented “*a tectonic shift in constitutional philosophy*,”⁷⁵ time has come to take the interpretation of Fundamental Rights to their next logical destination – making them enforceable against acts of gross injustice by private players, without trying to establish a strenuous connecting link with the State, or any State agency. Similarly, time has come to ensure that private law and arrangements made in the private domain are read in consonance with the Constitutional standards. Finally, it is an absolute imperative that the approach of looking at Fundamental Rights as negative rights be revisited, with positive mandates being cast on the State to ensure that the constitutional promises are truly and certainly fructified.

⁷⁵ See Bhatia, supra 4.

An Analysis of Transformative Constitutionalism with Special Reference to Sexual Minorities in India

Dr. M. P. Chengappa¹
Vineeta Tekwani²

Abstract

The philosophy of transformative constitutionalism is not a new one. The sources of these values can be traced back to the South African constitutional model. In reality, the philosophy that underpins this ideal of Transformative Constitutionalism can hardly be ascribed to or affiliated with anyone's constitutional document. It seeks to utilise constitutional guarantees as well as the constitutional machinery to transform the society it governs into a more progressive one – to make it more inclusive in every regard, and egalitarian in its outlook. This is sought to be done largely through the pursuit of what scholar's term as "substantive equality," which pursuit practically manifests itself through the enforcement of socio-economic rights – especially those protecting the interests of the minorities – as well as through affirmative action measures.

This paper seeks to establish a deep understanding of how the concept of Transformative Constitutionalism has evolved. Further, this paper aims at is not merely a general understanding of Transformative Constitutionalism and the roles it would set out for the Legislature as well as the Judiciary if truly inculcated in Indian Constitutionalism, but also a specific study at how this ideal is currently being used, as well as how it might be used in the future, to shape the debate on gender-identity and gender-equality issues in India especially with reference to sexual minorities in India.

Key Words: *Transformative Constitutionalism, Sexual Minorities and Gender Justice*

1. Introduction

The aim of this research paper is to study the social injustice caused by the discrimination towards sexual minorities, which is deep-rooted in the very fabric of Indian culture. The authors seek to analyse this in the backdrop of the aspiration of the Indian Constitution to achieve equality and to transform India into an egalitarian society. Further, the authors will try to discuss how far the Indian Constitution has such transformative capabilities, as well as the possible ways it can seek to reform the way the construct of gender is viewed and interpreted by the people of India at large.

¹ Assistant Professor of Law, West Bengal National University of Juridical Sciences (WBNUJS)

² LLM (Corporate and Commercial Law), West Bengal National University of Juridical Sciences (WBNUJS)

Post the adoption of the Indian Constitution, it has several times been referred to as a “charter for social revolution”, thereby suggesting how it was not merely an attempt to govern the new age Indian polity, but also how it was a reflection of the desire of the Indian people, through the Constituent Assembly, to transform the Indian society from what it had been during its colonial struggles to the kind of modern, egalitarian society that is aimed to become.

In this journey of transformation, there exist several focal points for a political society, one of the most important of which is gender equality and equal rights for sexual minorities. While India has seen several women play important roles in not only attaining freedom but also in areas of governance, science, and technology, art, culture, etc., it cannot be denied that gender inequality has always been one of the issues most deeply plaguing Indian society. Further, the struggle for emancipation on part of sexual minorities including Transgender people and the LGBT community at large can also no longer be ignored in this day and age. Therefore, it becomes imperative to discuss how far, if at all, the aims of transformation inherent in the Indian Constitution have resulted into attaining substantive equality for such sexual minorities, which term encompasses, here, both women and the LGBT Community, and how it may further be used to achieve for them the position of dignity and respect that they deserve as members of the Indian society.

2. Transformative Constitutionalism in the Indian Context

“The authentic voice of our culture, voiced by all the great builders of modern India, stood for the abolition of the hardships of the pariah, the mleccha, the bonded labor, the hungry, hard-working half-slave, whose liberation was integral to our independence. To interpret the Constitution rightly we must understand the people for whom it is made — the finer ethos, the frustrations, the aspirations, the parameters set by the Constitution for the principled solution of social disabilities.”³ – Justice V R Krishna Iyer

In order to fully understand the ideology of Transformative Constitutionalism, it is imperative to first understand what the principles of Constitutionalism mean. Upendra Baxi makes a distinction between the three interactive meanings of constitutions as texts, constitutional law, and theory/ideology (“constitutionalism”).⁴ He further states that “the imagery of constitution/ constitutionalism varies from the perspective of those who rule and those who are ruled and of the epistemic communities which develop

³ Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India(1981) 1 SCC 246 : 1981 SCC (L&S) 50 at page 264<<https://indiankanoon.org/doc/1111529/>>

⁴ Baxi, Upendra. ‘Outline of a “Theory of Practice” of Indian Constitutionalism’, <http://upendrabaxi.in/documents/Outline%20of%20a%20theory%20of%20practice%20of%20indian%20constitutionalism.pdf>

empirical and normative theories/ images of constitutions”.⁵ The constitutional text depicts not merely a document, but also a moral and a legal system which lays down the powers and limitations with respect to governance, where such a system should be able to reflect the will of the people themselves and should, thus, ideally be the product of popular consent. Constitutionalism, on the other hand, has largely to do with governance. However, it also provides for the site wherein ideologies and practices alike may flourish, encompassing discourses on rights, overall development, equal rights as well as the autonomy of the individual. It, thus, serves to provide the narratives for both, rule as well as resistance.⁶ It depicts the notion of a limited government, i.e. limitations imposed on the exercise of arbitrary powers of the government. It essentially recognizes the necessity of a powerful government while also emphasizing on reasonable restrictions so as to avoid the misuse of such power.

However, the philosophy underlying the Indian Constitution is not simply to control the power in the hands of the state – rather it is to channelize the empowerment of the state in the right direction so as to enable social transformation.

The American academic Karl Klare coined the term “transformative constitutionalism” which signified “a long term project of constitutional enactment, interpretations, and enforcement committed to... transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction.”⁷ Thus, at its core, the ideology of Transformative Constitutionalism holds a promise and an aspiration to transform, here the Indian society, so as to embrace, in letter as well as in spirit, the constitutional ideals of justice, liberty, equality and fraternity as set out in the Preamble. This expression is, thus, best understood through a pragmatic lens and staying in touch with current day realities.

This notion of transformative constitutionalism is typically traced back to South African Constitutional Law. In the words of the former Deputy Chief Justice of South Africa, Dikgang Moseneke, “it is perhaps in keeping with the spirit of transformation that there is no single

⁵ Zoya Hasan (Upendra Baxi Pg. 31-63), *India's Living Constitution* (Permanent Black 2006)

⁶ Baxi, Upendra. “Postcolonial Legality: A Postscript from India.” *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, vol. 45, no. 2, 2012, pp. 178–194. *JSTOR*, www.jstor.org/stable/43256851.

⁷ Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights*.

understanding of transformative constitutionalism”⁸. Broadly speaking, however, a Constitution may be said to be of a transformative character if one of the primary goals driving it is the transformation of its society. As Justice Pius Langa further points out⁹, such transformation would have a strong societal and cultural basis, and offers the following words from the Epilogue to the Interim Constitution of South Africa as being that basis for the South African brand of Transformative Constitutionalism – “*a historic bridge between the past of a deeply divided society, characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence, and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.*”¹⁰ Here, it is essential to understand that the transformation that is aimed at is not merely meant to secure basic social, economic and political rights, but seeks to ensure the holistic and larger aim of elimination of grassroots inequalities in terms of access to means, opportunities, education, livelihood, justice, etc. As the former Chief Justice of South Africa, Chaskalson, commented, “so long as these conditions continue to exist, the aspiration (of substantive equality) will have a hollow ring”¹¹.

In pursuit of the ideal of transformative constitutionalism, aside from the legal and economic transformation sought to be achieved, a different conception of the process of transformation that has been offered is that this process should not be seen as having any definite end – meaning thereby that if transformation is viewed as a “temporary event”, then what is envisaged is that there will come a point when the transformation shall be achieved, whereby the process would end. However, the alternative conception would suggest viewing this process of transformation as a continuing one – not envisioning the other side as a concrete destination to be reached, otherwise, “in this vision of transformation, there is no longer room for imagining that things could be different, that there might be further options and more complex alternatives to the two places between which we have chosen to choose.”¹²

A close comparison between this concept of transformative constitutionalism developed under the aegis of the South African Constitution, and the Indian Constitution and its underlying philosophy tells us that in a manner very similar to the South African effort, through their

⁸ Justice Pius Langa, “Transformative Constitutionalism”, <https://www.sun.ac.za/english/learning-teaching/ctl/Documents/Transformative%20constitutionalism.pdf>

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

Constitution, to reform and repair a society that had suffered the long ordeal of apartheid and colonial rule, the Indian Constitution represents a similar struggle on part of the framers to create a bulwark against the kind of oppression and exploitation that the Indian people had suffered on account of not just colonial rule but also a society deeply divided on the grounds of caste and class.

Broadly speaking, Constitutions of most states are enacted during a revolutionary movement, and in the backdrop of constraints. It is for this reason that the enactment of a country's constitution is generally looked at as the beginning of a new era for that country, and thus, to that extent, as having a transformative aspiration. Postcolonial constitutionalism, especially, democratises a country's Constitution, ensuring a ground-up understanding of the Constitution not just as "a history of power but a future of social justice, which includes in its transformative praxes the struggle of disempowered groups; and one that recognises that constitutionalism is a constant work in progress."¹³ The Indian Constitution, however, is especially known for being a transformative moment in India's history, since it was the culmination of a long, hard struggle for social and political self-determination, and as a marker of transition from a colonially-ruled society to a modern, democratic nation. The Indian Constitution has, thus, been characterized as a manifesto for social revolution with an explicit transformative agenda¹⁴ - drafted at a time when the ideals and aspirations of human rights were compelling to the leaders of the newly independent nation.¹⁵

This post-colonial Indian state was, thus, highly conscious of the necessity to address several looming issues, such as poverty, illiteracy, as well as historical wrongs such as untouchability and gender inequality.¹⁶ As in other postcolonial societies, law was understood to be the primary agent of social change. Recognising the importance of law reform as a catalyst for social change and the significance of rights in remedying the harsh inequities of colonial India—with its divisions of class, caste, gender, and religion—the Constitution emphasised the importance of universal human rights, principles of equality, and non-discrimination.¹⁷ It is because of this very reason that a number of historically exploitative practices, rituals, taboos as well as gender-based inequalities have been brought down by

¹³ Baxi, *Postcolonial Legality*, *Supra*: 4.

¹⁴ Austin, Granville. (1972). *The Indian Constitution: Cornerstone of a Nation*. New Delhi: Oxford University Press.

¹⁵ B. K. Pavitra & Ors Vs Union of India & Ors, CA No. 2368 of 2011 <https://indiankanoon.org/doc/18096795/>

¹⁶ Baxi, Upendra, (2008), *Outline of a 'Theory of Practice' of Indian Constitutionalism in Raj*

¹⁷ Austin, *Supra*: 12.

progressive social reform movements, legislative developments and, more importantly, through bold and innovative judicial interpretations.

Throughout the length and breadth of the extensive documentation that is the Indian Constitution is reflected in a philosophy aimed at creating a strong, united yet diversified nation, grounded firmly in the ideals of freedom, equality, and fraternity. In keeping with this philosophy, the framers of the Indian Constitution set out to elaborate and elucidate these principles in Part III and Part IV of the Constitution, dealing with Fundamental Rights and Directive Principles of State Policy respectively. These deal extensively with not just the rights of citizens and the corresponding duty that befalls the State, but also the considerations that the State must keep in mind while framing legislations. Thus, it only makes sense to turn towards these to become the bulwark against the issue of gender injustice. Guaranteeing core civil and political rights such as the right to freedom of speech and expression, life and personal liberty, and equality before law, Part III of the Constitution appears to place the autonomous, self-determining individual at the heart of the Constitutional order. Nonetheless, the rights guaranteed by Part III are not absolute. They are subject, in many cases, to “reasonable restrictions”.

Article 14 of the Constitution, aims clearly at achieving the dual goals of equality and equity, by guaranteeing to all persons not just “equality before the law” but also “equal protection of the laws”. While the former is a negative concept, implying that all persons shall be equal in the eyes of the law in that the State shall not accord to any person any special privileges before the law, the latter is a positive concept which implies that “all persons in similar circumstances shall be treated similarly both in terms of the privileges conferred as well as in terms of the liabilities imposed”¹⁸ and is aimed at achieving equity among people by protecting those situated similarly from discrimination. Article 14, thus, effectively implies that differential treatment for people differently situated is not only permissible but also required.

This fundamental right of equality is further strengthened by Article 15, which provides, in Clause (1) that “the state shall not discriminate against any citizen on the grounds of only religion, caste, sex, place of birth or any of them”. Thus, what Article 15(1) – just like Article 14 – prohibits is not discrimination based on a reasonable differentia, but such discrimination which is made *only* on the grounds mentioned therein, for no reasonable purpose or objective. Clause (2) of Article 15 further prohibits any discrimination or disability being imposed, with respect to access and enjoyment of public spaces and amenities, solely on the grounds mentioned

¹⁸ ‘Legal Aspect of Equality’, https://shodhganga.inflibnet.ac.in/bitstream/10603/130521/7/07_chapter%202.pdf

therein. However, a further reading of Article 15 brings us to Clause (3), which states, “Nothing in this Article shall prevent the State from making any special provision for women and children”. Thus, while 15(1) and 15(2) guarantee to all citizens protection against discrimination and disabilities which may be imposed by the State in the use of public spaces, 15(3) clearly states that if any such law, even if it is discriminatory on the face of it, is made in favor of women and children, then the same shall not be considered to be in violation of the fundamental right set out in 15(1) and 15(2). Kapur and Cossman¹⁹ have referred to this usual approach, of considering 15(3) an exception to the fundamental right enshrined in 15(1), as the “exceptional approach”, which is based on the concept of “formal equality” which considers equality in terms of individuals being similarly situated in the eyes of law, thereby regarding any differential treatment as being exceptional to the idea of equality. They have, however, evolved an alternative view of 15(3) – termed as the “holistic approach”²⁰ – basing it on the feminist notion of substantive equality. They state that, taking into account the substantive inequalities prevalent in the society, it is essential at times for even individuals similarly situated in the eyes of law to be treated differently, thereby rendering 15(3) not an exception to the ideal of equality, but rather an essential tool in eliminating the already existing substantive inequalities and ushering in the kind of equality envisaged by the Constitution.

A similar reading can be applied to Article 16 of the Constitution as well. Article 16(1) provides that “there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State”, with Article 16(2) further stating that “no citizen shall, on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the state”. Article 16(4), however, confers upon the state a wide discretionary power in terms of allowing progressive discrimination by stating that nothing in Clauses (1) and (2) “shall prevent the state from making any provision for the reservation of posts in favor of any backward classes of citizens which, in the opinion of the state, is not adequately represented in the services under the state”. Carrying forward the same “holistic approach” suggested by Kapur and Cossman²¹ for the interpretation of Article 15(3), Article 16(4) also appears to be not an exception to the rights enshrined under 16(1) and (2), rather a tool to achieve the bigger goal of equality, as broadly envisioned by Article 14.

¹⁹ Ratna Kapur and Brenda Cossman, “On Women, Equality, and the Constitution”

²⁰ Ibid.

²¹ Supra Note 19.

Along with Article 14, 15, and 16, other fundamental rights enshrined in Part III, such as Article 17 dealing with the prohibition of untouchability – as already pointed out in the Sabarimala judgment²² – and Article 21 guaranteeing the right to life, also aim at securing for all women in India the right to equality, formal as well as substantive, and protection from discrimination, at home and in society. Further, the Directive Principles of State Policy, in laying down the considerations to be weighed and kept in mind by the State while drafting laws, also puts the responsibility on the State to create a society based on the constitutional aspirations of freedom, equality, and fraternity. Article 38(1) confers a duty on the state to safeguard public welfare by creating a social order governed strongly by and in which “justice, social, economic and political, shall inform all the institutions of natural life”. Moreover, Article 38(2) specifically directs the State to focus its endeavors towards minimizing income inequalities as well as “inequalities in status, facilities, and opportunities”.

Article 39 lays down two specific areas where in the state must enact laws to ensure gender equality. Clause (a) of Article 39 states that the state must ensure that all citizens – “men and women alike” – have equal right to “adequate means of livelihood”. Further, Clause (d) directs the state to ensure that the right to “equal pay for equal work, for both men and women” is secured, and Clause (e) directs the state to ensure that the “health and strength” of male and female workers alike are not exploited on the account of them having to participate in vocations unsuitable to them for any reason because of economic necessity. Article 42 requires the state to draft provisions specifically aimed at “securing just and humane conditions of work” and aimed at guaranteeing maternity relief. One of the most important directive principles of state policy that has often been pushed for by feminists is Article 44, which directs the state to enact and provide for a Uniform Civil Code to all citizens throughout the territory of India. The reason the enactment of a Uniform Civil Code is of such special concern and importance to feminists all over the country is that the immense diversity in the Indian society, especially religious diversity, hinders women belonging to certain sects from enjoying several personal rights that might be enjoyed by women belonging to other religions and sects. Several examples of this can be given – for instance, Hindu women did not enjoy equal inheritance rights for the longest time, Muslim personal law still does not recognise any formal maintenance provisions, nor does it recognise adoption as valid, etc. All of these dissimilarities in personal law can be dealt with under a Uniform Civil Code. Of more importance is the way Article 46 has been

²² Indian Young Lawyers Association &Ors v The State of Kerala, 2018 SCC Online SC 1690<https://sci.gov.in/supremecourt/2006/18956/18956_2006_Judgement_28-Sep-2018.pdf>

framed, in so far as it states that it is the duty of the state to promote “the educational and economic interests of the weaker sections of the people, and, in particular, of Scheduled Castes and Scheduled Tribes” and to prevent “social injustice and all forms of exploitation”— the very fact that “weaker sections of people” are used as distinct and separate from “Scheduled Castes and Scheduled Tribes” is reflective of the fact that such weaker strata of the society do not include just the backward classes, and a comprehensive understanding of the Constitution would require us to understand as this expression being inclusive of women and sexual minorities as well.

As all the above instances point out – and what this paper does not seek to contend – is that it is not so that the Indian constitution does not envisage equality. It does push for substantive equality though, through the various provisions mentioned above, as well as the various statutory provisions enacted under the guidance and direction of the above-mentioned provisions. Instances of such statutory provisions include:

- (1) Provisions dealing with rape, outraging of a woman’s modesty, adultery (now scrapped), etc. under the Indian Penal Code.
- (2) Provisions under the Equal Remuneration Act 1976 and the Maternity Benefit Act 1961.
- (3) Provisions under the Criminal Procedure Code stating that while a woman may be arrested by a male officer, she can only be physically patted down and searched by a female officer, or that summons may only be served upon an adult male member of the family, and not upon an adult female member.
- (4) Reservations in educational institutions as well as in-state employment made in favour of women, etc.

3. Emancipation of Sexual Minorities: Role of the Judiciary

Despite the aspirations of the Constitution to transform Indian society into a more inclusive and egalitarian one, as discussed above, the harsh reality remains that substantive equality is still a distant dream for women as well as the LGBT Community in India.

This cruel reality is evidenced by the Justice Verma Committee Report which states the following²³:

“On the Gender Inequality Index—inequalities in reproductive health, empowerment, and economic activity—India has been ranked 132nd among the 148

²³ Justice Verma Committee on Amendments to Criminal Law, <<https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>>

countries for which data is available. Only 10.9 percent of the parliamentary seats are held by women, and 26.6 percent of adult women have reached a secondary or higher level of education, compared with 50.4 percent of their male counterparts. For every 100,000 live births, 200 women die of causes related to pregnancy, and female participation in the labor market is 29 percent, compared with 80.7 percent for men.”

According to the National Crime Records Bureau²⁴, India, 24,206 cases of rape were reported in 2011, which means that once in every 21 minutes a woman gets raped somewhere in India. Only 26% of these cases resulted in conviction, a 0.2% decline from 2010. Domestic abuse also remains a serious problem in India. The World Bank reports that in 2006, 47% of women were physically abused by their husbands, 21% of whom were beaten for simply “burning the food” and 31% for “arguing.” Indian women have higher illiteracy rates than men (26% versus 12%, respectively, among those ages 15 to 24 years) and dramatically lower levels of labor force participation (29% versus 81% for those 15 years and older in 2010). These statistics are startling, especially when one considers that India is the world’s largest democracy and has experienced considerable gains in economic prosperity. However, the irony is that while the legal existence of the transgender as well as the LGBT community at large has only been recognized in the past couple of years, the statistics bode much better for them than they do for women, as mentioned above.

While popular acceptance of the LGBT community is still a way off, data has shown that the opinions of Indians towards the LGBT Community have become less rigid over time. For instance, according to a periodical survey conducted by the World Values Survey (WVS) in over a 100 countries, the share of respondents from India who believed that “homosexuality is never justifiable” fell from 89% to 24% during the time period from 1990 to 2014, with the sharpest decline being registered during the 90s.²⁵

In this regard, thus, the feminists argue that equality, constitutionally speaking, can be classified into formal equality and substantive equality²⁶. While formal equality has been guaranteed to women in India under Article 14, the operation of this formal equality is inadequate in so far as substantive

²⁴ *National Crime Report Bureau, 2011* <<http://ncrb.gov.in/StatPublications/CII/CII2011/Statistics2011.pdf>>

²⁵ ‘Homosexuality in India: What data shows’, *Livemint.com* <<https://www.livemint.com/Politics/nLQiPp5UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html>>

²⁶ Rajeev Bhargava and Upendra Baxi, *Politics And Ethics Of The Indian Constitution* (Oxford University Press 2008).

inequalities between men and women – and especially with reference to the LGBT Community - continue to persist. These substantive inequalities can be understood using what feminists refer to as the Substantive Model of Equality²⁷.

According to the definition given by Paramanand Singh²⁸, this substantive model of equality takes into account, not just the formal equality as conferred upon women by law but also factors such as social, economic and political inequalities faced by them as well as the measures necessary to rectify these inequalities. Paramanand Singh further goes on to describe how this substantive model of equality, by looking into these above-mentioned factors, lays emphasis on not just the like or unlike manner that individuals are situated in, but also on the “disadvantage” suffered by certain individuals as compared to the advantages enjoyed by others, that would go on to become what creates differences between these two sets of individuals. This view has been substantiated by Kapur and Cossman²⁹ as well, who stated that while an insight into formal equality alone does not allow recognition of substantive inequalities, the substantive model of equality aims at “eliminating individual, institutional or systematic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society.” This same observation has also been reflected in the words of D.D. Basu when he states that while the Constitution, especially in Parts III and IV, aims at equality and “justice, social, economic and political”, it is also true that in the face of “glaring inequalities of income, social injustice, and exploitation, inequality of status and opportunity... there is no room for equality before the law”³⁰.

In this light, as well as keeping in touch with the feminist understanding of the term “equality”, a clear picture emerges of how “sex” as a concept has historically denoted “disadvantage”, having been the ground for ages worth of discrimination, subordination and social exclusion for women and other sexual minorities. In such a scenario, the need arises for a radical change in the way these social, economic, cultural and political factors are viewed as separate from the formal equal status granted to women and unrecognized LGBT people in society. This radical change must, then, come in the form of sexual minorities being recognized as a distinct unequal class. Unlike the people of scheduled and backward classes being treated as an unlike class of people, however, the unequal status should be conferred on sexual minorities specifically because of how, while they have formally been granted the status of equals, persistent substantive

²⁷ Ibid.

²⁸ Ibid.

²⁹ Supra:19; Ratna Kapur and Brenda Cossman, “On Women, Equality, and the Constitution”

³⁰ Supra: 43.

inequalities have kept them from enjoying the same social, economic, political and cultural advantages that have been enjoyed by their male, heterosexual counterparts.

The reason offered by the framers of the Constitution themselves for according a special status on people belonging to scheduled and backward classes is their historic struggle for social emancipation, as also pointed out by Justice D Y Chandrachud in his judgment in the Sabarimala case³¹. The framers of the Constitution, by conferring such status of being an unequal class of people, basically aimed at recognising the fact of the way these backward classes had been historically discriminated against, as well as the fact that such discrimination is deeply rooted in our society and would have continuing effects, which responsibility is on the State to rectify through affirmative action. This responsibility falling squarely on the State is also reflected in the words of Articles 14 and 17³² of the Indian Constitution. Following the analogy drawn by Justice Chandrachud, a marked similarity can be seen in the case of women and sexual minorities, in so far as the discrimination and social exclusion faced by them, and their struggle to break free from the same have existed in our society for ages, and are deep-rooted issues which can only be resolved through affirmative action on part of the State.

The judiciary has, thus, played a key role in bringing about the radical change required in terms of the status of socio-political rights in the country, and especially in how women and the LGBT community are viewed in the Indian society and legal community. In fact, several sobriquets such as “activism”, “over-activism”, “judicial overreach”, etc have been doled out by journalists and law-makers alike, on the role that the Indian judiciary has performed, especially in terms of changing non-justiciable social rights into Fundamental rights, checking government abnormalities by setting up investigative committees, and for supposedly interceding in the jurisdiction of parliament and the executive. The Judiciary has stepped in, not exclusively but to guide the assigned authority to play out their obligations and has additionally taken over the usage of the program through non-statutory advisory groups shaped by it. These accusations of over-activism have been countered by others who argue, and rightly so, that the Supreme Court has used the power of judicial review sparingly to challenge government policies, for failing to ensure the actual delivery of these rights, and for being ad hoc in its approach. At best, the Court’s judgments have had an indirect effect on public policy; the government has adopted the Court’s suggestions only when it was ready to do so.

³¹ Supra: 26.

³² Supra, <http://www.legislative.gov.in/sites/default/files/COI-updated-as-31072018.pdf>

Focus must be drawn on the milestone Vishakha's judgment³³ on harassment against women, which brought about the Indian Parliament's establishment of enactment tending to the Sexual Harassment Act in 2013. This case exhibits law's transformative potential, while at the same time underscoring the truth of relentless rights infringement in contemporary India. Vishakha's specific importance lies in its accentuation on connecting sacred assurances of gender balance with universal human rights to react to women's encounters of sexual harassment and sexual assault in the work environment. Because of the lacunae in local enactment on this issue, the Apex Court perceived its standardizing job to fulfil this felt and urgent social need, while also looking towards CEDAW to help bring the Indian regime in line with international standards.

The Preamble states the aims and aspirations of the Constitution, including to ensure "justice, social, economic and political" as is witnessed in the various provisions discussed above. This has been pointed out in several instances recently as well. For instance, the judgment in the Sabarimala case, with Justice Chandrachud drawing a link between untouchability and gender discrimination, a similar link has been drawn between Justice Chandrachud's rationale for the judgment and the historical dissenting opinion given by Justice Harlan in the US Supreme Court Case on the Civil Rights Act of 1875³⁴. In an 8:1 ratio, with the concurring judgment holding that the 13th Amendment to the USA Constitution did not give the Congress the right to "reshape the social rights" of men formerly enslaved, it was Justice Harlan who recognised that the institution of slavery intended to be abolished by the 13th Amendment cannot be viewed as merely slavery itself, or its necessary ingredients – what needs to be understood is how deeply rooted the institution is, and that merely by formally abolishing slavery, the emancipation of former slaves cannot be ensured – for that purpose, it is essential that the state, having set them free, actually ensures, through affirmative action, that they are not still being robbed of those essential freedoms – social and cultural – that are inevitably tied to the enjoyment of a dignified life. Justice Harlan, in opening the way he did, understood that while slavery was the worst form that racial discrimination could manifest itself in, there also existed other, although lesser, manifestations as well, and that unless these manifestations were also not struck down, a race that had been set free by the 13th Amendment would actually never enjoy freedom in the true sense of the word. Gautam Bhatia³⁵

³³ Vishakha & Ors. V State of Rajasthan, AIR 1997 SC 3011

³⁴ 'About the Civil Rights Cases of 1883', <https://www.thoughtco.com/1883-civil-rights-cases-4134310>

³⁵ Gautam Bhatia, "I send my soul through time and space/ To greet you. You will understand...": On Sabarimala and The Civil Rights Cases", <https://indconlawphil.wordpress.com/tag/transformative-constitution/>

links this to the philosophy reflected in Justice Chandrachud's judgment by noting how similar it is to Justice Harlan's understanding of slavery when he pointed out that "fundamental rights were framed in the backdrop of fundamental wrongs", in so far as 'in order to understand the scope of fundamental rights, therefore, you must first ask yourself: what were the fundamental *wrongs* that a Constitution intended to redress and to transform?'³⁶ This link drawn by Gautam Bhatia rings even more true in light of the fact that, as Justice Chandrachud pointed out, while caste-based discrimination and gender discrimination might be two different manifestations, they are both manifestations of the same notions of purity and pollution ingrained in our society – while some castes are seen as more pure and some are seen as inherently polluted, men denote purity and women and sexual minorities denote pollution, and – going a step further, to the actual discrimination spoken of in the Sabarimala case – even when women are seen as pure, menstruation in women is seen as a mark of pollution in them, thereby allowing for widespread discrimination on such grounds. Hence, Justice Chandrachud's judgment goes a long way in showing how, at the heart of our Constitution, lies the aim of transforming our society, and leading it away from the manifestations of these notions of purity and pollution and paving the way for substantive equality amongst people, the first step for which is to recognise that the law needs to transform and adapt so as to strike at not just the surface issue, but also the deep-set root cause of the same.

Recent trends show that India has finally begun its long-needed journey up the steep path of deconstructing rigid gender roles and identities, with the end goal being the attainment of gender equality. Latest judgments in the Navtej Singh Johar Case³⁷ on the decriminalisation of Section 377 and in the Joseph Shine (Adultery) case³⁸ have made references not just to the transformative aims and aspirations of the Indian constitution but also to the need for us to transform the way we, as a society, view the constructs of sex and gender. Important to note is the way the 5 judge bench has handled the judgment in the Navtej Singh Johar case, declaring Section 377 of the IPC, in so far as it applied to consensual sexual conduct between adults in private, unconstitutional, thereby overruling its decision in the *Suresh Koushal v. Naz Foundation*³⁹. *In doing so, it relied upon its judgment in the case of National Legal Services Authority v. Union of India*⁴⁰, reiterating that

³⁶ Ibid.

³⁷ Navtej Singh Johar & Ors v Union of India, AIR 2018 SC 4321 https://sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf

³⁸ Joseph Shine v Union of India, 2018 SCC Online SC 1676

³⁹ Suresh Koushal v Naz Foundation, (2014) 1 SCC 1

⁴⁰ (2014) 5 SCC 438

gender identity is intrinsic to one's personality and denying the same would be violative of one's dignity⁴¹. Further, it relied upon the decision in *K. S. Puttuswamy v Union of India*⁴², holding that denying the right to privacy to the LGBT Community on the ground that they only form a minority of the population would violate fundamental rights. It also held that Section 377 imposes an unreasonable restriction since consensual sexual conduct in private "does not in any way harm public decency or morality"⁴³, and the prevalence of Section 377 would cause a chilling effect, violating the right to privacy under Art 19(1)(a)⁴⁴. The Court also declared that "intimacy between consenting adults of the same sex is beyond the legitimate interests of the state"⁴⁵ and sodomy laws violate the right to equality under Art. 14 and Art. 15 of the Constitution by targeting a segment of the population for their sexual orientation. Further, the Court also relied upon its decisions in *Shafin Jahan v. Asokan K.M.*⁴⁶ and *Shakti Vahini v. Union of India*⁴⁷ to reaffirm that an adult's right to "choose a life partner of his/her choice"⁴⁸ is a facet of individual liberty. Chief Justice Misra and J. Khanwilkar relied on the principles of transformative constitutionalism to hold that the constitution must guide the society's transformation from an archaic to a pragmatic society where fundamental rights are fiercely guarded. He further stated, "constitutional morality would prevail over social morality"⁴⁹ to ensure that human rights of LGBT individuals are protected, regardless of whether such rights have the approval of a majoritarian government. J. Chandrachud stated that not only must the law not discriminate against same-sex relationships, it must take positive steps to achieve equal protection and to grant the community "equal citizenship in all its manifestations"⁵⁰. J. Malhotra concluded her opinion by stating that history owes an apology to members of the LGBT community and their families for the delay in providing redress for the ignominy and ostracism that they have suffered through the centuries.

However, progressive steps till now have been few and far between, and we still need to take a lot of inspiration from countries like South Africa and Sweden if we want to shape an informed debate about the role of women in the Indian society.

⁴¹ Supra: 35, [p. 156, para. 253(i)]

⁴² *K.S. Puttuswamy v UOI* (2017) 10 SCC 1

⁴³ Supra: 35, [p. 165, para. 253(xvi)]

⁴⁴ Supra: 35, [p. 224, para. 83]

⁴⁵ Supra: 35, [p. 142]

⁴⁶ *Shafin Jahan v Asokan K.M.* 2018 (5) SCALE 422

⁴⁷ *Shakti Vahini v UOI* (2018) 7 SCC 192

⁴⁸ Supra: 35, [p. 72, para. 107]

⁴⁹ Supra: 35, [p. 79, para. 121]

⁵⁰ Supra: 35, [p. 270, para. 7].

At the same time, it is important to admit and acknowledge that in a society like ours, there lie plenty of hurdles to stop us from achieving this goal of transformation. For instance, as Gautam Bhatia further points out⁵¹, it is not merely that the task of adjudicating a battle between cultures is much more difficult than a mere constitutional issue that pits individual interests against state interests, but also that “these conflicts often represent deep, long-standing and irreconcilable divisions in society, touching issues of personal belief and conviction”⁵². Owing to this, the legislature, the judiciary as well as the political parties at large, generally tend to adopt an approach that only deals with problems on the surface, without actually delving into the underlying cultural ramifications. This problem solving approach, coupled with the patriarchal outlook of the Indian society has rendered it so that even the few pro-women judgments that have been pronounced over the years have had a very sexist and condescendingly “protective” view of women, in nature as well as in language⁵³ – all belittling women to weak creatures in need of male protection, thereby only reinforcing the way women are treated.

4. Conclusion

At the very outset, the main aim of this research paper was to understand the transformative aspirations of the Indian Constitution, as well as how far these can practically be utilized for the emancipation of sexual minorities in India. This is having due regard to the long history of oppression, discrimination, and subjugation suffered by them at the hands of the deeply patriarchal Indian society.

However, this paper is not intended as a feminist or LGBT propaganda, nor does it contend that the Indian Constitution does not envisage equality. Rather, it has sought to discuss how several social and cultural peculiarities in the Indian context, such as severely ingrained caste-based discrimination alongside immense poverty and illiteracy, especially in women living in rural India, have only worsened the gender-inequality concerns for the Indian society. Through an understanding of how the situation has failed to progress in a manner that sexual minorities can be said to be substantively equal to their male, heterosexual counterparts in the Indian context, this paper contended that the Constitution of India, following the precedent of progressive discrimination for the benefit of unequal classes, should prescribe for more such laws to be made in favour of sexual minorities. That this aim is already envisaged in the Indian Constitution can

⁵¹ The Hindu, “The Narrow and The Transformative”, <<https://www.thehindu.com/opinion/lead/the-narrow-and-the-transformative/article24555861.ece>>

⁵² Ibid.

⁵³ Supra: 43.

already be seen in the way that, not only in the Fundamental Rights enshrined in Article 15, 16, 17 and 19, but especially the Directive Principles of State Policy, under Articles 38, 39, 42, 44, and 46, women have already been set out and talked of separately, reflecting the understanding of the framers of the Constitution that in a deeply divided society such as ours, there might come times when a mere grant of formal equality, as the feminist understanding points out, might not be enough in face of the prevailing substantive inequalities. Further, recent judgments dealing with the rights of sexual minorities reflect the progressive way the judiciary has approached this issue as a pivotal one, as well as the way Transformative Constitutionalism is finally being used as a tool in chiselling gender equality jurisprudence in the right direction in India.

Relevance of Medical Finding in Rape Cases Post 2013 Amendment of the Indian Penal Code

Faisal Fasih¹

Abstract

Although corroborative in nature, medical evidence plays a very crucial role in rape cases. The glaring inconsistency between direct evidence and medical evidence is considered as defect in the prosecution case. The paper studied the implications of medical findings in two phases – Prior to 2013 amendment and Post-Amendment. Prior to the amendment, rape was defined as an act of sexual intercourse between man and woman without the consent of latter. The law has been amended to include penetrative as well as non-penetrative rape, consisting of sixteen different types of acts. Therefore, the focus of medical examination was to determine penetration by mainly assessing the private organ of victim, tracking seminal fluid and injuries. However, with the broadening of the definition of rape, it is important to make necessary changes for tracing medico-legal aspects of certain findings. Certain medical factors which were important no longer carry the same weightage such as capacity of the accused to cohabit as penetration is not required for the commission of an offence. On the other hand, certain factors which were not very important may play decisive today such as saliva of the accused or traces of object found in the private part of victim. The paper highlights various medical findings relating to physical aspect of rape and its legal implications. It is divided into three sections. The first section analyses the medico-legal aspects of three important findings namely; condition of private part of victim, presence of certain fluid, and recording of injury mark. The second section discusses the impact of amendment on the evidentiary value of certain medical findings such as presence of seminal discharge, saliva, traces of object and evidence suggesting manipulation of body. Finally, the paper makes certain recommendations for better application of medical evidence.

Keywords: Rape Law in India, Medical Evidence, Evidence in Rape Cases, Amendment in Rape Law, Medico-legal aspects of rape, Evidentiary Value of Medical Opinion

1. Introduction

The findings of a medical professional, being an expert evidence, is advisory or recommendatory in nature². Therefore, it need not be adduced in every case if direct evidence like oral testimony of eye witness is sufficient to decide a matter. In other words, medical opinion cannot override the statement of eyewitness³. Nevertheless, medical evidence plays a very important role in cases like rape due to non-availability of witness among

¹ Assistant Professor, The WB National University of Juridical Sciences, Kolkata

² Indian Evidence Act (1872), s. 45

³ Nagindra Bala vs. Sunil Chandra, AIR 1960 SC 706; Solanki vs. State of Gujarat, AIR 1983 SC 484

other things. Moreover, even if a matter can be decided by non-medical substantive evidence, it is the general practice of court to corroborate it with medical opinion. The glaring inconsistency between direct evidence and medical evidence is considered as defect in the prosecution case⁴. In fact, it is difficult to imagine rape case without medical professional appearing in the trial. Some of the issues which are generally addressed by medical professionals are: Whether rape took place? Who committed the rape? How many accused persons were involved? What kind of injuries were present in body of the victim? Whether the rape was penetrative or non-penetrative? Whether victim was virgin or habituated to sexual intercourse? Whether it was single assault or continuous act? In the recent past, scholars and judges have even tried to explore the option of imposing conviction predominantly on the basis of medical evidence even if the victim⁵ or witness turns hostile⁶.

Prior to the 2013 amendment [Hereinafter the amendment] of the Indian Penal Code [IPC], rape was an act of sexual intercourse between man and woman without the consent of latter⁷. Thus, only penetration (penile-vaginal) was considered as rape⁸. Now, rape may be either penetrative or non-penetrative, and as many as sixteen types of conducts qualify for the commission of an offence⁹. Consequently, the primary objective of medical examination was to find out whether sexual intercourse took place as rape was only penile-vaginal but with the broadening of the definition, we have to ponder over the necessary changes to be made in the protocol of medical examination and its implications for tracing evidences suggesting rape.

This paper highlights various medical findings relating to physical aspect of rape and its legal implications. It doesn't cover other ingredients of the offence of rape including determination of consent. The paper has been

⁴ Piara Singh & Ors. vs. State of Punjab, AIR 1977 SC 2274

⁵ Hemudan Nanbha Gadhvi vs State of Gujarat, 2018 SCC OnLine SC 1688

⁶ Mohd. Iqbal and Anr. vs State of Jharkhand 2013 SCC OnLine SC 654

⁷ "A man is said to commit "rape" who, except case hereinafter excepted, has sexual intercourse with a woman in circumstances falling under any of the six following descriptions..."

⁸ Slightest penetration was sufficient [Explanation of Sec. 375]; Aman Kumar vs State of Haryana, 2004 Cri LJ 1399 (SC); Madan Gopal Kakkad vs Naval Dubey, 1992 (2) Crimes 168 (SC); Bheru Lal vs State of Rajasthan, 2004 Cri LJ 1677 (Raj)

⁹ Indian Penal Code (1860), s. 375 [after 2013 criminal law amendment]: The following conducts qualify for rape: i) penile-vaginal ii) penile-oral iii) penile-urethral iv) penile-anal v) insertion of object into vagina vi) insertion of object into urethra vii) insertion of object into anus viii) insertion of any part of body other than penis into vagina ix) insertion of any part of body other than penis into urethra x) insertion of any part of body other than penis into anus xi) manipulation of any part of the body so as to cause penetration into vagina xii) manipulation of any part of the body so as to cause penetration into urethra xiii) manipulation of any part of the body so as to cause penetration into anus xiv) application of mouth to vagina xv) application of mouth to anus and xvi) application of mouth to urethra.

divided into three sections. The first section analyses the medico-legal aspects of typical medical findings in rape cases. The second section proposes the evidentiary value of certain medical findings in the light of 2013 amendment. Finally, the paper makes certain recommendations.

2. Medical Findings and Their Implications Prior to 2013 Amendment

Apart from noting the general details such as medical history, height, weight, age of victim and condition of clothes, the medical examination was mainly about analysis of the condition of private part of victim, presence of certain fluid, and recording of injury mark.

i. Condition of Private Organ

A very important and corroborative medical factor which gives a strong evidence of rape is the condition of the hymen and vagina after the alleged act of forceful intercourse.

Hymen: Rupture or tearing of hymen gives a very reliable clue of intercourse. The fact that the woman was bleeding and hymen was torn gives a clear evidence of penetration¹⁰. Tearing hymen and laceration on the posterior vaginal wall speaks of partial penetration¹¹. In *Akash vs the State of Maharashtra*¹², the doctor having found that the hymen was ruptured having 0.5 x 0.5 fresh abrasion. (by fresh, it was meant to be within 24 hours), opined that the said injury is possible due to forcible intercourse. Special attention is required in case of minor victim. In cases of rape on very young children, the hymen is deeply situated and the vagina is less capacious. As a result, it is impossible for penetration of the penis to take place. However, in cases of great violence, the penis may be introduced thereby causing a rupture of the vaginal vault and associated visceral injuries¹³. Further penetration forces the penis backwards (symphysis pubis prevents its anterior movement) and the hymen is torn posteriorly¹⁴. The redness of hymen coupled with laceration and congestion is also indicative of rape. Where there is digital penetration of the infant vagina, there is frequently some scratching, laceration or bruising of the labia, hymen and fourchette and injury to the cervix¹⁵. In certain cases the status of hymen is not relevant as it may get ruptured due to various factors other than sexual

¹⁰ *Om Prakash vs State*, 1987 (1) Crimes 645 (Del)

¹¹ *Datta vs State of Maharashtra* (2013) 14 SCC 588

¹² 2018 SCC OnLine Bom 5424

¹³ D. K. Parikh, *Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology* (CBS Distributors, New Delhi, 6th edn., 1999).

¹⁴ G. Biswas, *Review of forensic medicine and toxicology including clinical and pathology aspects* (Jaypee Brother Medical (P), New Delhi, 4th edn., 2015). New Delhi:

¹⁵ K. Reddy and O. Murty, *Essentials of Forensic Medicine* (Jaypee Brother Medical (P), New Delhi, 34th ed., 2017).

intercourse such as cycling, exercise, riding, masturbation, victim habituated to intercourse or victim being a married woman.

Vagina: Next to hymen, the condition of vagina provides important clues. For the purpose of rape, vagina includes labia majora¹⁶. Labia majora is the first to be encountered by the male organ, which is subjected to blunt forceful blow, depending on the amount of force applied¹⁷. The medical examiner looks for redness and congestion which may be accompanied with inflammation and bruising of labia¹⁸. For example, in *Nirmal Kumar vs the State of Haryana*¹⁹, congestion and inflammation of labia majora and labia minora and redness on the inner side of the labia minora and vaginal mucosa suggested a clear case of penetration of penis. In *Ganesha vs State of Madhya Pradesh*²⁰, the doctor found swelling over the labia majora of the prosecutrix and pain between thighs on separation of legs was complained of. Also, a second degree perineal tear was found along with lacerated hymen. The doctor thus opined that all signs of vaginal penetration were present and that the accused had sexual intercourse with the victim without her consent. Similarly, torn vagina and hymen along with profuse bleeding from vagina was an obvious case of forceful intercourse on a minor victim²¹. Until 2013, the two-finger test was widely in practice amongst the doctors who examined the rape victims. This test was broadly conducted for two reasons. Firstly, to determine the virginity of the rape victim. If the hymen was found ruptured, the doctors would opine that the victim is not a virgin. However, we see that it is not so. Secondly, as per the practitioners of this test, if two fingers are easily admissible in the vagina of the victim, it was an indication that the victim was habitual to sexual intercourse. In *Lilu vs State of Haryana*²², the Supreme Court struck down this test on the grounds that it is unscientific²³, violates physical, mental integrity²⁴ and privacy of victim²⁵, and is humiliating and traumatising²⁶ for the victim.

¹⁶ Explanation 1 of Sec. 375, IPC

¹⁷ *Madan Gopal Kakkad vs Naval Dubey*, 1992 (2) Crimes 168 (SC); *Aman Kumar vs State of Haryana*, 2004 Cri LJ 1399 (SC).

¹⁸ *Das Bernard vs State*, 1974 Cri LJ 1098 (Goa)

¹⁹ 2002 Cri LJ 3352 (P&H)]

²⁰ 2006 Cri LJ 3604 (MP)

²¹ *Rakesh Kumar vs State of Punjab*, 2002 Cri LJ 2249 (P&H)

²² (2013) 14 SCC 643

²³ *Supra* Note 14 [Hymen is fleshy tissue situated just at the vaginal opening. Hymen may thin and stretchy or thick and rigid and in some cases it may even be absent. Moreover, some women are born without hymen or may get her hymen removed. Hymen can tear due to other factors (such as dancing, stretching, horse riding, running, jumping, masturbation etc.) as well apart from sexual intercourse. For all these reasons, the test is unscientific and unreliable as it presumes that in a case where a virgin has been raped, a one-time sexual intercourse will impart new tears to the hymen]

ii. Presence of Certain Fluid

Generally, where there is a forceful intercourse with the victim, traces of sperms are found in the vaginal swabs during medical examination. The nature of the discharge of woman is very important and such discharge must be other than that of menstruation or on account of abortion²⁷. The blood oozing out from the vagina of the victim and blood stains on her undergarments are taken as signs of forceful penetration²⁸. It is not necessary that in every rape case where there is a penetration, semen ought to be present in the vagina of victim²⁹. Further, if semen could not be detected in the vaginal swab or the clothes of the minor victim, it would not mean that there was no penetration from the male sex organ. It may be that before the accused ejaculated, the shrieks of the minor girl made him withdraw his penis from the vagina³⁰. Seminal stains may also be found on other parts of the body of the victim especially on the inner aspects of thighs or the labia³¹.

iii. Presence/Absence of Injury

Generally, injuries are found on the body of the victim including strangulation mark³², bite marks³³, injuries in private parts³⁴, abrasions on breast³⁵, scratches due to struggle³⁶, injuries on arms, thighs, face and neck³⁷,

²⁴ Id [It is argued that the test violates the victim's right to physical and mental integrity and that they are entitled to have the medical procedures conducted in a way that respects their consent]

²⁵ Two Finger Test – Unscientific, non-reliable, available at <http://mattersindia.com/2015/06/two-finger-test-unscientific-non-reliable/> (Visited on May 2, 2019) [It is argued by the opponents that a woman's past sexual experience should be irrelevant to the judiciary while deciding the case and probing into the sex life of a woman is a grave violation of her right to privacy]

²⁶ The incidence of rape is an attack on the honour and dignity of the victim. The test degrades and humiliates the victim (especially if the victim is a minor) by forcing her to undergo another penetrative act causing further trauma [Amit vs State of U.P.,(2012) 4 SCC 107]

²⁷ Siddharth Sawant vs State of Maharashtra, 2000 (3) Mah LJ 46 (Bom); Partap Mishra vs State of Orissa, AIR 1977 SC 1307; Manoj Giri vs State of Chhattisgarh, (2013) 5 SCC 798 [Five accused were convicted as the forensic reports of the clothes showed semen spots].

²⁸ (2014) 2 SCC 592

²⁹ Narayanamma vs State, 1994 (5) SCC 728

³⁰ Saleem Qureshi vs State [2014 SCC OnLine Del 1776]

³¹ Radhakrishna Nagesh Vs State of Andhra Pradesh, 2012 SCC Online SC 1048

³² State of U.P. Munesh, 2012 SCC Online SC 860

³³ Mukesh vs State; Krishan Vs State of Haryana, (2014) 13 SCC 574

³⁴ Kanhaiyalal Vs State of Rajasthan, 2001 Cri LJ 2325 (Raj)

³⁵ Balwant Singh Vs State of Punjab, AIR 1987 SC 1080

³⁶ Vikram Singh vs State of H.P., 2018 SCC OnLine HP 356

³⁷ R. Jhala, R and V. Raju, MEDICAL JURISPRUDENCE (Eastern Book Company, Lucknow, 6th edn. 1997).

tear of frenulum or nail scratches on the penis³⁸ etc. A huge weightage may be attached to these kinds of injuries in non-penetrative rape and rape of married woman or victim habituated to sexual intercourse. However, there may be cases of rape even without a single injury such as submission due to fear of injury³⁹; force used to resist is insufficient to cause injury (as in the case of a minor victim)⁴⁰; bruises may not be noticed after 48 hours following the assault (delay in conducting medical examination)⁴¹; delay in reporting the incident results in minor injuries being healed or fade away⁴². Moreover, special weightage may be given to absence of injury in rape cases of minor and passive submission⁴³. In case of a child victim, there may be no signs or very few signs of general violence as the child may not have any idea as to the nature of the act and is unable to offer any resistance. Passive submission takes place when the accused person/s overpower the victim or put her in some fear, thereby causing the victim to comply with the commands of the accused. Thus, absence of injury is a very crucial piece of evidence in gang rape as well.

While examining, special attention should be given to any complaint of body aches in the victim's body. For example, in the case of State of H.P. vs Sanjay Kumar⁴⁴, the minor victim complained of continuous stomach ache. On being taken to a gynaecologist for treatment, the doctor opined that the victim had been sexually assaulted forcibly about 2-3 years ago since her hymen was ruptured and her external and internal sphincters were also torn. Similarly, in Balwant Singh vs State of Punjab⁴⁵, where the victim complained of pain in both legs and back of neck, it was held that these are indications of first sexual intercourse of a female. In addition to this, the gait of the victim should be carefully observed⁴⁶.

These apart, presence of venereal disease such as syphilis and gonorrhoea may be indicative of sexual intercourse. However, the tests that are taken when the victim goes to the hospital (after getting raped) cannot tell if the victim got venereal disease from the rapist. It only tells whether the victim had the disease before she got raped. In order to know whether the disease was contracted after rape, the victim has to go to the hospital and

³⁸ Bantu vs State of M.P., (2001) 9 SCC 615

³⁹ Radhakrishna Nagesh vs State of Andhra Pradesh, (2013) 11 SCC 688

⁴⁰ Vinod Kumar Vs State of M.P., 1987 Cri LJ 1541.

⁴¹ Supra Note 14

⁴² id

⁴³ State of U.P. vs Chhotey Lal, (2011) 2 SCC 550 [Where circumstances compel the victim to submit, then such act would not discredit her evidence].

⁴⁴ (2017) 2 Supreme Court Cases 51 : 2016 SCC OnLine SC 1473

⁴⁵ AIR 1987 SC 1080

⁴⁶ D. Hicks, "Rape Sexual Assault. Obstetrics & Gynaecology" Annual New York, Appleton-Century Croft, 1978, 447-465.

get those tests repeated. A rapist is likely to have disease, so it's important to follow up on the lab tests.

3. Implications of 2013 Amendment on Certain Medical Findings

The medical findings relating to tracking penetration and presence of fluid and injury as discussed above are relevant after the amendment as well. These apart, certain factors which were not very important could be very crucial under the present law, which may be classified under the following five headings:

3.1. Seminal Discharge in Parts of Body other than Vagina or Urethra

As per the present law, apart from the private organs, examination of other parts of body including mouth and anus are equally important. In cases of sodomy, anal findings give strong proof of sexual assault. The detection of spermatozoa around the anus and rectum must be carefully evaluated as these areas may be contaminated with semen during the vaginal intercourse⁴⁷.

In the context, clause (c) of Section 375 are relevant. Clause (c) states "*A man is said to commit rape if he... manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her do so with him or any other person*".

The phrase "anus or any part of the body of such woman" is important. There are two implications of this clause. First, unlike the old law, anal sex and penetration in any other part of the body such as fellatio [penetration into mouth] is considered as rape under the Amendment. Second, certain types of manipulation which is not penetration may also qualify for rape. There may be two types of scenarios in this regard:

First Scenario: Seminal fluid found in thigh, stomach, face and back portion of victim may indicate manipulation of body so as to cause penetration. The principle of proximity may be applied. There must be a reasonable nexus between the manipulation in question and penetration. It should not be too remote. In other words, the situation would be such that if the act of manipulation would have continued, it would have ended in penetration into the vagina, urethra, anus or any other part of the body. The seminal fluid in the part of the body mentioned above seems to fulfil the requirement of the nature of manipulation required in Clause (c) as there

⁴⁷ W. F. Enos and J. C. Beyer, "Spermatozoa in the Anal Canal and Rectum and in the Oral Cavity of Female Rape Victims", *Journal of Forensic Sciences*, 1978, 23(1), 231-233; *Rajesh vs State of M.P.*, 2016 SCC OnLine SC 1135 [The findings recorded that there was reddish discolouration internally along with some yellowish white deposition along with faecal matter which was suggestive of repeated sexual assault]

appear to be a direct nexus between manipulation and penetration. Thus, the presence of seminal fluid in any of these parts of the body itself may be considered as commission of rape if other conditions⁴⁸ are fulfilled unlike the old law where it would have been considered as preparation or attempt to commit rape or merely outraging of modesty.

Second Scenario: Seminal fluid found in any other part of the body – In this scenario, it is difficult to suggest rape or any nexus between manipulation and penetration. However, still it would be very crucial piece of evidence for corroborating other evidences found in a case suggesting rape or may be considered for attempt to commit rape.

Consider the case of *Madan Lal v. State of Jammu and Kashmir*⁴⁹, where teacher was charged for committing rape of minor student. The entire case centred around the following statement given by the prosecutrix in the cross examination: “first time when the accused entered his penis into her vagina, it went inside about one inch. So much, the witness exhibited her finger which comes to quarter of inch. The accused continued thrusting his penis some time into her vagina and sometime pulled it out. When the accused after having stood up his penis again started rubbing it against her vagina, which he conducted about two minutes, even then the penis might have gone in quarter to inch”. Further, the victim also mentioned that “something like hot water oozed out from his penis”. As per the medical opinion, there was no mark of violence on private part or any other part of the body of victim. The doctor opined definite answer could not be given regarding the attempt to sexual intercourse as hymen was intact and there was absence of sperm in vagina. However, semen was found in the salwar [lower garment] of the victim. The defence argued that the statement of the prosecutrix is not reliable because penetration into the vagina to a depth of quarter of an inch or one inch would led to rupture of hymen given that she was only 13 years old. The Sessions Court acquitted but the High Court convicted the accused for attempt to commit rape⁵⁰. The Supreme upheld the judgement of the High Court. The statement of the prosecutrix was corroborated by the statement of her mother narrated to her by the victim after the incident and statements of her classmates suggesting absence of accused and victim during certain hours.

Applying the findings of the appellate courts, today the accused will be simply convicted for commission of rape u/s 376 rather than mere attempt. The argument of the medical examiner which suggested that the hymen was intact is not relevant any more if other facts stated in the case are proved. It will be a classic case of commission of rape for manipulation of

⁴⁸ E.g; Absence of consent

⁴⁹ 1998 Cr LJ 667 (SC)

⁵⁰ Sec. 376 was read with Sec. 511

body under Clause (c) of Section 375 even assuming that the accused didn't penetrate and merely rubbed his penis in the private part of the victim.

3.2. Saliva

It may be found in private part or region near the private part of victim. The medical examination should be conducted as soon as possible otherwise it would be difficult to trace saliva. It may be classified into the following two scenarios:

First Scenario: The presence of saliva in the private part of the victim itself is sufficient to consider commission of an offence. In this regard, Clause (d) of Section 375 is relevant. It provides "*A man is said to commit rape if he...applies his mouth to the vagina, anus, urethra of a woman or makes her do so with him or any other person*".

Second Scenario: The presence of saliva near the region of private part of the victim could be considered as corroborative factor. Clause (c) may be applied in this scenario.

3.3. Traces of object in the private part of victim

Clause (b) of Section 375 states "*A man is said to commit rape if he...inserts, to any extent, any object...into vagina, urethra or anus of a woman or makes her do so with him or any other person*". Special emphasis to be provided if the traces are related to the materials which are used in sex toys or any other thing which may be used for the purpose of sexual pleasure or inflicting pain.

3.4. Evidence suggesting non-penile penetration including penetration by any part of the body

Again, Clause (b) of Section 375 is relevant "*A man is said to commit rape if he...inserts, to any extent, ... any part of the body, not being the penis, into vagina, urethra or anus of a woman or makes her do so with him or any other person*". Thus, sex by fingering may be considered as rape. So, mark of finger nail in the private part may be sufficient for constituting rape.

3.5. Evidence suggesting manipulation of body

Injury marks such as abrasion or contusion in arm or back of the victim which may imply that some sort of force was used for groping etc. are relevant under Clause (c). It may not conclusively suggest rape but due weightage shall be given for corroboration.

4. Recommendation and Conclusion

The nature of evidence may be broadly classified into substantive and corroborative. Substantive evidence includes the statement of

prosecutrix or eye witness. Corroborative evidence may be further classified into medical findings and non-medical findings. In fact, some of the medical factors which were important no longer carry the same weightage such as capacity of the accused to cohabit as penetration is not required for the commission of an offence. On the other hand, certain factors which were not very important often play decisive role such as saliva of the accused or traces of object found in the private part of victim. The paper makes the following recommendations to remain in tune with the present law on rape:

1. Shifting of focus from mere examination of private organ to other evidence

The focus of the medical findings, as discussed above, has been mainly to assess the possibility of sexual intercourse by examining the private parts of the victim, exploring typical injuries such as abrasion in certain part of the body of victim, and looking for seminal fluid. There is no doubt that these are important findings in cases of penetrative rape and other cases even after the amendment, especially if the victim complains of penile-vaginal intercourse. However, since various other types of conducts are included in the definition, it becomes imperative to adopt necessary changes in the examination process for tracing new types of findings as mentioned above under the section of “Implication of 2013 Amendment on Certain Medical Findings”

2. Emphasis on Non-Medical Corroborative Factors

Medical proof of insertion of penis/part of body/object or manipulation of body for causing penetration does not serve as a legal proof of rape because rape is a legal definition and not a medical diagnosis. Therefore, it is necessary for us to take an inter-disciplinary approach wherein medical evidences and non-medical evidences and should be read in consonance. This approach is more important in non-penetrative rape cases. Some of the non-medical factors which may be considered are act of accused prior to rape⁵¹, place of incident⁵², items recovered from the person

⁵¹ Acts done by the accused in order to prepare for the ultimate act (i.e. rape) serves as corroborative evidence. In the case of Radhakrishna Nagesh vs State of Andhra Pradesh (2013) 11 SCC 6888, where the accused bought bangles for the victim and lured her up to the storeroom, the acts were held to be in preparation of the incident of rape and that on facts, there was a direct link of the accused with the crime

⁵² Site plan plays an important role in corroborating the evidence of the prosecutrix as it reveals some signs of the incident. For example, where the victim was gang-raped in a wheat field, it was found that the crop was crushed and the same was in conformation with the site plan [Ramesh Kumar and Others vs State of Himachal Pradesh, 2013 SCC OnLine SC 623]

of the accused/place of incident⁵³, last-seen together⁵⁴, prompt lodging of FIR⁵⁵, state of victim⁵⁶ and subsequent conduct of the accused⁵⁷.

3. Standard of Medical Evidence

Medical opinion must prove the case beyond reasonable doubt⁵⁸ and should be subjected to the logic and objectivity of the judge⁵⁹. Where there is a conflict between the opinions of two experts, the Court should normally accept the evidence of the expert whose evidence is corroborated by direct evidence of the case which according to the court is reliable⁶⁰.

4. Medical Examination at the Earliest Possible Opportunity

The medical examination should be conducted at the earliest possible opportunity. The delay in examination would be fatal to the case of prosecutrix⁶¹ given that traces of saliva or object can make a huge difference in the outcome of a case. The law provides for conducting the examination within twenty four hours from the time of receiving the information relating to the commission of an offence⁶². The consent must be obtained of the victim or her guardian if she is under 12 years or unsound. A case usually commences with the lodging of an FIR⁶³, followed by an investigation, recording of statement by police⁶⁴ and Magistrate⁶⁵, and medical

⁵³ If any item(s) has been used to inflict injury on the victim/any belonging of the victim and the same is recovered from the accused without any valid justification, it would be counted as a corroborating factor favouring the case of the prosecutrix.

⁵⁴ Mahadeo S/O Kerba Maske Vs State of Maharashtra and Another (2013) 14 SCC 637

⁵⁵ The prosecution is expected to lodge an FIR as soon as possible after the incident and get the victim medically examined. A prompt FIR is generally indicative of the truthfulness of the prosecutrix. On the other hand, an inadequate delay without proper explanation weakened the case of the prosecution [Gopal Mahato vs State of Jharkhand, 2007 Cri LJ 464 (Jhr)]. However, delay may be condoned by the court if proper explanation is provided [State of U.P. vs Chhotey Lal (2011) 2 SCC 550]

⁵⁶ Victim's outward appearance may also corroborate her case: Torn clothes, traumatised mental state of the victim, attracting witnesses by raising alarm and procurement of broken bangles from the crime scene corroborates the prosecution [Srivalla Srinivasa Rao vs State of Andhra Pradesh, (2011) 8 SCC 113]

⁵⁷ E.g; the culprit's act of coolness showed no remorse. His act of washing the clothes of the deceased rape victim on the tap and taking care to hide things were all important factors which corroborated the prosecution case [Vasanat Sampat Dupare vs State of Maharashtra, 2017 SCC OnLine SC 524]

⁵⁸ Baburam vs. State of M.P. AIR 2002 SC 758

⁵⁹ State of Haryana vs. Bhagirath, AIR 1999 SC 2005

⁶⁰ Piara Singh & Ors. vs. State of Punjab, AIR 1977 SC 2274

⁶¹ See E.g; Rashid vs State of J&K [1991 (1) Crimes 675 (J&K).

⁶² The Code of Criminal Procedure (1973) s. 164A

⁶³ The Code of Criminal Procedure Act (1973) s. 154

⁶⁴ The police officer conducting investigation may orally examine any person who is acquainted with the facts and circumstances of the case. The person examined is bound to answer all questions truthfully except where the questions have a tendency of

examination of the victim. However, it is not necessary to follow the procedural steps in the chronology as mentioned; rather steps depend on expediency and urgency. Therefore, it is proposed that the first act of the investigative authority including police should be to take the victim for medical examination as soon as oral or written information is received and later on formality of writing FIR, examination of witness etc may take place.

exposing him to a criminal charge or a penalty. Any statement made during the examination may be recorded in writing by the police officer and in case where there are multiple persons being examined, the officer would have maintain a separate and true record of all the statements made. The 2013 amendment further provides that where there are cases of offences against women, the statement of the woman victim must be recorded by a woman police officer or any woman officer.

⁶⁵ The Code of Criminal Procedure Act (1973) s. 164

Cyber Terrorism and International Humanitarian Law

*Sreoshi Sinha*¹

Abstract

Terrorism, the most violent form of perpetration has existed since the inception of human civilization. Though the conventional motives have remained the same, the traditional concepts and methods of terrorism have evolved into deadlier forms with the advancement of modern technology. Information technology is one such area which has increasingly allured the terrorists over the years due to the garb of anonymity it offers to the perpetrators of terror. The increased reliance on information technology by the terrorists has significantly given rise to security dangers and hence this new menace became a major challenge to world security and the phenomenon that evolved came to be known as cyber terrorism. The disastrous impacts associated with cyber terrorism made it all the more impossible to be control or prevented. The issues of safeguarding against the threatening of such operations still remain uncertain. Hence the Geneva Conventions or the current Law of War remains relevant to cyber terrorism, but yet the precise points of pertinence remain largely unclear. My central argument would dwell upon whether the International Humanitarian Law or the Law of War would be effective in preventing this newest form of terrorism or not.

Keywords: *Cyber Terrorism, Internet, Global Threat, Security.*

1. Introduction

In the absence of a universally accepted definition of terrorism, the general concept is that it has existed since the inception of human civilization and has been demonstrated as one of the greatest challenges to global security. In spite of endangering innocent lives and jeopardizing human rights and fundamental freedoms through ages, the international community has failed to frame an effective measure to prevent it. Rather with time the nature of terrorism has evolved. Though the old motives of terrorism have remained the same the conventional techniques and methods of terrorism have acquired newer disastrous forms. In the age of information technology, perpetrators of terror have attained an expertise to bring about the most destructive blend of weapons and technology, deadlier in nature. One such phenomenon that has evolved is cyber terrorism. This is a phenomenon where the cyber space is used to launch terror attacks². It is capable of doing indeterminable harm not only by paralysing computer infrastructures but also using the cyberspace to assist and arrange traditional forms of terrorism, such as bombings and suicide attacks. This increased

¹ PhD Research Scholar, Nelson Mandela Centre for Peace and Conflict Resolution Studies, Jamia Millia Islamia, New Delhi

² Z Yunos and S Sulaman. "Understanding Cyber Terrorism from Motivational Perspectives." *Journal of Information Warfare*, 2017: 1-13.

dependency on information technology by terrorists might pose immense security risks on all the nations unless timely security measures are adapted to enhance prevention in the years to come. Cyber threats - cybercrimes, cyber terrorism, cyber warfare have become major concern for governments across the world.

Apparently, due to the ambiguous nature of the term terrorism, a universal concord on the derived term “cyber terrorism” could not be achieved; hence this issue is left to the independent apprehensions of the states. Apart from that, the traditional domain of warfare also does not include the cyber space within its ambit, due to which there might be problems in applying legal mechanisms such as the fundamental principles of International Humanitarian Law (IHL) to prevent it. Therefore, to understand cyber terrorism in the context of International Law this paper addresses whether the current “**Law of War**” or “**International Humanitarian Law**” (IHL) applies to cyber terrorism or not.

To find out the answer, this paper shall make an attempt to discuss the evolution of the term cyber terrorism, the meaning and concept of the term and the rising incidents of cyber terrorism in terms of International Law, across the globe, the motives and methods behind an attack. It shall also discuss the regional and international mechanisms to prevent cyber terrorism, and recommend what more could be done.

2. Cyber Terrorism as a Legal Concept

So far, the international legal framework seemed to have provided several mechanisms on global terrorism until the world had witnessed the most violent form of this menace in September, 2001. Since 1963, till now there had been a set of eighteen international legal instruments (including the amendments) of which thirteen had already existed prior to the 9/11 terrorist attack. With the terrorist strike on the World Trade Centre in the United States, the focus on global security heightened and this gave an impetus for the establishment of significant international documents such as the “**2005 Convention for the Suppression of Acts of Nuclear Terrorism**” and the “**2006 United Nations Global Counter-Terrorism Strategy**”³, the documents which were structured upon the earlier existing legal premises. But even though various developments in the existing international legal principles pertaining to terrorism came to being, certain elements remained unchanged, such as the failure to adopt the “**UN Comprehensive Convention on International Terrorism**” due to major confusion over the definition of terrorism. Certain other components such as the “**recognition of self-defence**” in response to a **terrorist attack** by a **non-state actor** were

³ “‘India to garner support for anti-terror initiative CCIT at BRICS’. *The Economic Times*, 15 October 2016. Retrieved 17 November 2017”

expressed by the “**Security Council in Resolutions 1368 and 1373**”⁴ of the “**right to self-defence**” by the United Nations. Though some authors are of the opinion that the threat of cyber terrorism is just a presumed danger and not a fast approaching legitimate threat to quickly work upon, but yet it can be said that post the 9/11 along with a few other serious instances of non-state actors using cyber space for launching conventional attacks, there is a serious reason to start framing technology specific terrorism laws since with such a quick technological evolution, it might not be very far when the danger of this life-threatening cyber terrorism would explicitly start demonstrating itself.

It was not possible for the international legal community to arrive at an agreement on the definition of the term terrorism because of the disparities on the legality of the use of violence for political ambitions. Due to this ambiguous and indefinite characteristic, there is an absence of any legal or any academic definition of this term. So mostly, the definition of ‘terrorism’ is left to the individual explanation of the states. This lack of a legally accepted definition of conventional terrorism, often acts as major hindrance in describing the nature of cyber terrorism and hence, there is also no definite accord on a permanent definition of the derivative term “cyber terrorism” that was first propounded by Barry Collin in 1997. In the midst of this existing debate, academicians and experts have tried to give suggestions on how to define this concept of cyber terrorism depending on its targets, methods, motivation, and the importance of computer use in the act. Such suggestions include social aspects emphasizing that terrorism is mostly stimulated by “egoism, intolerance, lack of dialogue and inhumanity, greed and accountability”, psychological aspects stating “terrorism is a tactic to coerce behavioural change in an adversary” and lastly legal perspectives implying that the distinction must prevail between “attitude and methods” of terrorism.

2.1. Definition

Apart from the existing lack of a universally agreed definition of the term ‘terrorism’, defining cyber-terrorism becomes all the more complicated also because of the very fine line of distinction between any cyber-attack and cyber terrorism. Cyber terrorism may considerably overlap with cybercrime, cyber war or ordinary terrorism, depending on the context of the crime. Whether a particular cyber-attack would be termed as a cybercrime or a cyber-terrorism and whether the adversary would be referred to as a cyber-criminal or a cyber-terrorist would largely depend on the nature of the deployment, purpose and motive of such an attack. According to the founder of the Kaspersky Lab, Eugene Kaspersky, “**cyber terrorism**” is a more

⁴ Ibid.

precise term than "**cyber war**"⁵. This is because, according to him, "with today's attacks, we are clueless about who did it or when they will strike again. Hence, it is not cyber-war, but rather cyber terrorism." He also identifies the massive scale cyber weapons, such as the Flame Virus and Net Traveller Virus along with other biological weapons, stating that in an integrated world, they have the capacity to be equally destructive. Apparently, the narrow line of difference between cyber-crime and cyber terrorism also implies that the motivations and goals behind the two might not be the same. Hence, when an act is perpetuated for economic ambitions instead of ideological ones, it is usually termed as a cybercrime whereas the label of "cyber terrorism" can be assigned only to actions by lone actors or individuals, independent groups and organizations with an intention to create fear among the general population, and also to such acts resulting in casualties or severe destruction of nature and infrastructure.

Again, if similar legal treatment is provided to both conventional and cyber terrorism then attacks that create fear and intimidation amongst the general population, endangers lives and property having a political or ideological motive behind the act of spreading terror can fit into the definition of cyber terrorism. For example, modern terrorists are the ones who not only electronically break into the target's computers networks using the internet but also cause major disruption of infrastructure and immense physical harm endangering millions of lives and property and grossly affecting national security at large.

On the other hand, keeping in mind the conditions of the attack required to be referred to as a case of cyber terrorism, it can be said that any action that instils terror cannot necessarily be termed as terrorism unless there is an ideological motivation or a political purpose behind such an attack. So, in that case if a certain incident of attack backed by an ideological or a political goal, in the cyber space can create fear and terror within the civilian population then only it might be undisputedly referred to as cyber-terrorism in general. Hence, if death and physical harm is considered a compulsory part of a probable definition of cyber terrorism, then any conventional terrorist attack that took place till date and was planned and executed with the help of cyber space can be referred to as a case of cyber terrorism.

However, in absence of a concrete and agreeable definition of both terrorism and cyber terrorism, academics and organizations have suggested a wide range of some possible definitions of cyber-terrorism that comprises of

⁵ "Eugene Kaspersky quoted in News core, "Security expert warns of cyber world war," Fox News, 1 November 2011, accessed 28 June, 2015, <http://www.foxnews.com/tech/2011/11/01/expert-at-london-internet-security-conference-warns-cyber-war/>."

the idea that terrorists can cause untold destruction of human life, a global economic and financial chaos and a massive damage to the environment. Their acts can range from hacking and intruding essential government networks, money laundering from financial networks, stealing intelligence information, disrupting daily services to vandalising networks by deleting or altering information and hijacking and controlling major computer networks. However, any definition of cyber-terrorism would have the following components in common:

- i. An attack that is stimulated by a political, ideological or religious goal
- ii. When an act is perpetuated with an intention to intimidate a government of a state or a segment of civilians
- iii. When an act gravely disrupts infrastructure and state machinery

Keeping these common components of a probable definition of cyber terrorism intact the “**Federal Bureau of Investigations**” (FBI) has defined cyber terrorism as “Any premeditated, politically motivated attack against information, computer systems or computer programs, and data which results in violence against non-combatant targets by sub-national groups or clandestine agents whereas the **North Atlantic Treaty Organization (NATO)** characterises it as any cyber-attack using computer or/and communication networks to cause sufficient destruction or disruption to generate fear or to intimidate a society into an ideological goal”.⁶ The **United States National Infrastructure Protection Centre** defined cyber terrorism as: "A criminal act perpetrated by the use of computers and telecommunications capabilities resulting in violence, destruction, and/or disruption of services to create fear by causing confusion and uncertainty within a given population, with the goal of influencing a government or population to conform to a political, social, or ideological agenda." Again, the **Technolytics Institute** defines⁷ cyber terrorism as: -"[t]he premeditated use of disruptive activities, or the threat thereof, against computers and/or networks, with the intention to cause harm or further social, ideological, religious, political or similar objectives or to intimidate any person in furtherance of such objectives." After appearing in the defence literature of the in the US Army War College of 1998, the term ‘cyber-terrorism’ had been defined by the **National Conference of State Legislatures**, as:

“[T]he uses of information technology by terrorist groups and individuals to further their agenda. This can include use

⁶ "22 U.S. Code § 2656f - Annual country reports on terrorism LII / Legal Information Institute.”

⁷ The Technolytics Institute Cyber Warfare Centre: An independent think tank, working in the fields of cyber issues.

of information technology to organise and execute attacks against networks, computer systems and telecommunications infrastructures, or for exchanging information or making threats electronically. Some of the examples might be hacking into computer systems, introducing viruses to vulnerable networks, web site defacing, denial-of-service attacks, or terroristic threats made via electronic communication.”

However, from a legal perspective, an acceptable definition of cyber terrorism would state the notion of (conventional) cyber terrorism today as the use of electronic networks taking the form of a cyber-attack to commit such acts that are criminalised by the existing legal instruments prohibiting terrorism and international customary law, that results into instilling terror and death among the general population.

2.2 Evolution of Cyber Terrorism

Decades ago, Winston Churchill (the Prime Minister of United Kingdom from 1940 to 1955) termed World War II's emerging Electronic Warfare Technologies the “Wizard War.” Today, the Wizard War has evolved into the Internet! And we simply call it: info War, Cyber Espionage, Cyber Warfare, cyber fraud or simply Cyber Terrorism! Wars have been a part of human history since inception. Right from the cruel and biblical wars such as Cain and Abel to the most technologically advanced form of wars such as the Second Lebanon war and the Iraqi war of 2003, humanity has witnessed them all. There have been two major world wars and more than 250 conventional wars since 1914. Apart from the various common reasons for which they are fought, there is another common characteristic to all wars: that is, they bring in modernity and new weapons. Modernity, economic wealth and justice amongst all, had been a common characteristic in the development of nation states in the modern era and growing dependence on technology in turn had been an essential component of modernity. Among much technological advancement, the evolution of information technology is one of the most prominent.

With the increasing dependence on information technology, terrorists and anti-nationalists are fast adopting this newer and modern concept of warfare. This is because it is one of the easiest and cheapest ways for the terrorists to conduct low intensity warfare by a lone actor sitting at any part of the world, through cyber-terrorism. Besides this, the terrorist organizations also take recourse to the web to reach out to their audiences and sympathisers without having to use other media such as television, radio, or holding various press conferences. Such websites designed by these terrorist organizations often contain content and instructions on how to make

explosives and chemical weapons, that helps boost the enthusiasm of their lone sympathisers.

For example, in 1999, an individual named David Copeland, who perceived himself as a terrorist, had murdered 3 individuals and harmed 139 in London. He did this with the assistance of bombs set in three unique areas. During his trial it was found that he utilized Terrorists Manual (Terrorist Handbook - Forest, 2005) and How to Make a Bomb (How to Make Bombs - Bombs, 2004), which had been downloaded from the Internet.⁸ With the help of the web they can also plan their course of action, recruit, distribute propaganda and raise financial funds from their sympathisers across the world. Cyber-attacks are more attractive for the terrorists also because they offer a garb of anonymity to the perpetrators of terror and this execution requires more modest number of individuals and littler assets. Hence, these are all the advantages that the terrorists enjoy on using the cyber space to conduct to spread terror. But to know exactly, how it all had begun, we should take a look at the evolution of this phenomenon.

Cyber terrorism as a phenomenon emerged back in 1990s, when the sudden and rapid dependence on internet use gave rise to several studies that dealt with the potential risks faced by the highly technology dependent United States. In 1990, the National Academy of Sciences initiated a report on computer security with the words, “We are at risk. Increasingly, America depends on computers. Tomorrow’s terrorist may be able to do more damage with a keyboard than with a bomb.” At the same time, the quintessential term “**electronic Pearl Harbour**” (Richard Clarke) was coined, relating the threat of a computer attack to an American historical trauma. This phenomenon evolved from the 1990s onwards on to 2001 and featured prominently within the security and terrorism discourse soon after the 9/11 radical Muslim terrorist attacks on USA. Since then, cyber terrorism as a phenomenon had continued to evolve, with enormous humanitarian impact on civilian population. It has consequently now turned out to be imperative to examine the tenets of International Humanitarian Law (IHL) that may shield the civilian populace from the malevolent impacts of such an unequal warfare.

3. Cyber Terrorism and International Humanitarian Law (IHL)

While there is no specific treaty that deals with cyber-terrorism under international law, there are a number of sources, most importantly IHL and other customary international law rules and general principles of law that would be applicable to this phenomenon. Apparently, according to

⁸ South Asian Terrorism Portal, India, available at: <https://www.satp.org/> (visited last on Nov 7, 2019).

Andrea Bianchi,⁹ IHL is sufficiently well suited to provide a “regulatory framework” and “effective mechanisms” to punish acts of terrorism.

Condorelli and Naqvi¹⁰ opine that a demonstration of terrorist activities is censured in both international and non-international clashes, offering a framework for the arraignment and punishment of the individuals who execute them. IHL takes into account “the violent or systematic nature of terrorist acts perpetrated during conflicts although jus in bello suffers from its own set of deficiencies when it comes to terrorism and cyber terrorism.”

Apparently, while dealing with IHL, and cyber terrorism, it is important to remember the distinction between jus ad bellum and jus in bello, where the former means the rules to be consulted before going to war and the latter meaning the standards of conduct after engaging into warfare.(ICRC) For jus ad bellum international law governs the use of force and the dividing line between the use of force and IHL remains unclear because a terrorist act might or might not imitate an armed conflict depending in particular circumstances in which it occurred. Under jus ad bellum, international law governs the use of force through Article 2(4) and Article 51¹¹.

While Article 2(4) of the UN Charter (UN Charter 1945)¹², “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”, Article 51 of the UN Charter emphasises that “nothing in the Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

3.1. Jus Ad Bellum

3.1.1. Self Defence

Hence, as a part of the collective security system, a victim State might resort to the use of force on being authorised by the Security Council under Chapter VII of the UN Charter. In the context of cyber terrorism, tagging an enabled group with cyber-offensive capabilities as a ‘terrorist’ is

⁹ Andrea Bianchi and Yasmin Naqvi. *International Humanitarian Law and Terrorism* (34) (Studies in International Law). Hart Publishing, 2011.

¹⁰ Luigi Condorelli and Yasmin Naqvi. “The War against Terrorism and Jus in Bello: Are the Geneva Conventions Out of Date?” Oxford, 2004.

¹¹ Charter of the United Nations: Statute of the International Court Of Justice, San Francisco, 1945.

¹² Ibid.

not enough because for a state to exercise its right to self-defence against a cyber-terrorist group, it has to launch a violent act of a large scale that would constitute both an illegal “use of force” and an “armed attack.” Moreover, any case of cyber-attack backed by a political or an ideological goal might not essentially trigger the application of IHL, unless the damage caused by such an attack is grave enough to cause physical injury or casualty on the civilian population, cannot effectively trigger an armed attack under the jus ad bellum. Even though in the great Wall Case the ICJ had concluded that there exists an inherent right of self-defence only in the case of armed attack by one state against another state, but along with this, the Court also remarked that the right of self-defence against aggressive non-state actors has been prevalent in internationally customary law outside the Article 51 of the UN Charter. Apart from this exception, Judge Higgins proclaimed that “there is nothing in the text of Article 51 that sets out that self-defence is available only when an armed attack is made by a State.”

In regards to the positions of the countries to exercise their inherent right of self-defence in the case of cyber terrorism, it can be said that though the governments of the states are quite aware of the rising cyber capabilities of the non-state actors, very little has been done till now to counter it. When the **“UN Counter-Terrorism Implementation Task Force (CTITF) Working Group on Countering the Use of the Internet for Terrorist Purposes”** had requested the member states to submit their reports for the 2009 Report on countering the use of The Internet for Terrorist Purposes, none but only two states have submitted a list highlighting cyber terrorism as their greatest threat. On the contrary the rapid development of cyber offensive and defensive capabilities of states like US, China, Russia, Iran, Cuba, Israel and the UK, implies that these states advocate exercising their inherent right of self-defence on cyber terrorists and other non-state actors as a part of their collective security system. Apart from investing immensely in counter terrorism initiatives, only two states US and Israel have exceptionally used force against terrorists and states that have nurtured terrorists on its soil. Sometimes their efforts involved operations that went beyond the limitations of legal obligations. In spite of repeated condemnation of its self-defence acts, Israel continues to support the broader interpretation of the right to self-defence and it might do so even in cases of strikes of cyber terrorism. However, though initially the international community was not convinced with US and Israel’s interpretation of the right to self-defence, there was a huge change of attitude post the 9/11, after which states considered the possibility of self defence against non-state actors. But the attention of the States shifted from the implementation of the right to self-defence to the issues of proportionality while assessing the

legality airstrike near Damascus in 2003, invasion of Lebanon in 2006, 156 and bombings of Gaza in 2007–2012.¹³

Not only Israel, there were questions on the legality of the US' exercise of the right to self-defence until 2001, before the 9/11, after which things took a turn when Security Council in its Resolution 1368 straightaway implied that the US has the right to resort to self-defence against a terrorist organization. But prior to this, UNGA Resolution 41/38, had heavily condemned the bombings of Libyan Jamahiriya in 1986 carried out in response to the Berlin discotheque bombing along with the counter terrorist operations in Iraq in 1993 and Sudan and Afghanistan in 1998. Finally, the international community showed its approval of UNSC Resolution by being silent during Afghan invasion post 2001. This is very relevant in the case of cyber terrorism also because post the 9/11 attack, as an initiative to strengthen their counter terrorism strategy, President Bush made the Office of Cyberspace Security in the White House and delegated his previous counter-psychological warfare facilitator, Richard Clarke, to head it. The admonitions came now from the President, the VP, security counsellors, and government authorities: "Terrorists can sit at one computer connected to one network and can create worldwide havoc," forewarned Tom Ridge, chief of the Department of Homeland Security, in an representative observation in April 2002 stated, "They don't necessarily need a bomb or explosives to cripple a sector of the economy or shut down a power grid."

Today, the issue is no longer whether the violent acts of terrorist (and cyber terrorist) groups can constitute an "armed attack," or not, but rather how much state inclusion is fundamental "to allow the use of force against the territory of the host state." In this context, there are differences of opinions in the ICJ. While some judges during the Armed Activities case agreed, that if a terrorist attack by armed groups of a significant degree cannot be accredited to a particular State then there is no scope for exercising the right to self-defence. On the other hand, Judge Kooijmans believes that armed attacks are armed attack irrespective of whether it is executed under the patronage of a state or not¹⁴. Therefore, any country which tolerates any origin of cyber terrorist attack reaching a significant scale on violence, from its own territory can be subject to self-defence. There is a challenge over here also, because at times in the cases of cyber terrorist attack the location of the perpetrator might not be possible to locate. Then the victim state doesn't know which state to retaliate against. This might happen in lone wolf cyber-attacks where a devastating attack might be

¹³ Benjamin S Lambeth, Air Operations in Israel's War against Hezbollah. Project Report, RAND, 2011.

¹⁴ "The 1996 ICJ Advisory Opinion on threat or use of nuclear weapons, Hague", 1996

carried out by an individual. For example, Osama Bin Laden, but again if the victim state's military operations attack those parts of the perpetrating country in search of just one man then this can raise the question of proportionality which is again another important principle under IHL. In these situations, the host country has to turn towards the Security Council for further opinion.

i. **Armed attack:** For IHL to be applicable there has to be an armed conflict involving an armed attack. Now as ICJ suggested in the Nicaragua states an armed attack is the one that is: "Executed by the State armed forces across international borders or by armed groups, irregular forces and mercenaries when (a) they are "sent by or on behalf of a State" to carry out an armed attack against another State and (b) the attack is of such gravity so that it amounts to an armed attack if it was conducted by regular armed forces of a State."¹⁵

Thus, to be entitled as an armed attack, a particular act of violence should reach a significant threshold. The ICJ also upheld that in order to exercise self-defence, it is therefore mandatory to differentiate between the most dangerous forms of the employing force (constituting an armed attack from other less grave forms, and that the 'scale and effects' of that particular act can determine whether a use of force can be classified as an armed attack or not. However, when it comes to measure the scale and effect of an attack in the case of cyber terrorism, one can draw examples of the 2008 Mumbai Taj Hotel attack famously known as 26/11, which took away 166 lives. Cyber technology was thoroughly used in developing and executing the operation.

On 15th May, 2012, Lieutenant General George J. Flynn of the US Marine Corps stated that the entire operation was pre-planned through Google Earth where for command and control the perpetrators had used cellular phone networks and social media to trace and fight back to the efforts of the Indian army to prevent them. Earlier a report had stated that Voice-over Internet Protocol (VoIP) software was used by the Pakistan patronised Lashkar-e-Toiba (LeT) group to communicate with the perpetrators of 26/11 on the fields to administer the actual large scale operations going on in the real field.¹⁶ According to the Indian Intelligence sources, the entire attack was being watched live by the perpetrators on television through which each and every movement of the attackers were being closely monitored and instructions were being rendered.

¹⁵ The International Court of Justice (ICJ), n.d. available at <https://www.icj-cij.org/en/court> (accessed November 2019, 07).

¹⁶ South Asian Terrorism Portal, India, available at: <https://www.satp.org/> (visited last on Nov 7, 2019).

Again, during the Delhi High Court on attack on September 7, 2011, 15 persons were executed and another 87 severely injured. After a detailed investigation it was concluded that the terrorists had hacked into unsecured Wi-Fi internet connections to send e-mails after the attack. Apart from that, the savage assaults upon discretionary staff and upon their liberty also represented an "armed attack" in the Tehran Hostages case.¹⁷ According to the **ICJ Advisory Opinion 1996 on the threat or use of Nuclear weapons**, that any attack that "releases radiation affecting aspects such as health, natural resources, agriculture, and demography over an extensive area with the potential to damage the natural environment and create deformity in future generations can be termed as an armed attack." Sometimes certain cyber terrorism attacks might not reach the significant threshold in terms of 'scale and effect' to reach the level of the 'use of force' and hence might be kept out from the self-defence framework. For examples, money laundering by terrorist organisations through the use of network might not give rise to the large-scale violence hence cannot come under armed attack regime due to their low intensity.

Therefore, whether an attack in the cyber domain can be brought under the self-defence threshold would depend much on the political circumstances in which it has been executed. Hence, in IHL, there exists a very blurred line between armed conflict and criminal law enforcement.

ii. **Necessity and Proportionality:** A state using self-defence should first make sure that the use of force in reciprocation to an armed attack is necessary and in proportion to the original armed attack and the principle of necessity implies that the victim state must first consider resolving the conflict by the available non-forcible measures, (where non-forcible measures might include diplomacy, law enforcement or sanctions) and if such non-forcible measures are ineffective in preventing the conflict, only then the states should take resort to forcible self-defence. After determining the use of force in self-defence, the state must now show that the response is proportionate. In short, in the jus ad bellum context, principles of necessity and proportionality limit the lawful use of lethal violence. Both jus ad bellum and the **jus in bello** are governed by the principle of proportionality. In the jus ad bellum context, proportionality has a quantitative and operational meaning. The quantitative feature of proportionality necessitates the scale and effect of the counter-force to be similar to an armed attack. In the context of cyber terrorism, exercising the right to self-defence necessitates the response to be necessary and proportional. This is because of the uncertainty that surrounds terrorism as any terrorist attack is always a sudden, instant and unpredictable occurrence. But with the intrusion of technology, cyber terrorism has taken this complexity to a whole new level

¹⁷ Ibid.

as it now appeals for the revaluation of the principles of necessity and proportionality in a new light. It is now necessary for all states to clearly state its reasons to exercise the right to self-defence for acts which are far from being traceable.

3.2. Jus in Bello

Under the **jus in bello**¹⁸ context of cyber terrorism, there are a lot of complexities that are associated with the context of terrorism and in turn cyber terrorism. Apparently, there's a very fine line of understanding between the use of force and the implementation of IHL, to the extent that any instance of a terrorist attack might or might not instigate an armed conflict or a war depending on the scale and effect of such an act. Hence a single terrorist attack not reaching a significant threshold might not give rise to a warlike situation. But the 9/11 did because of the scale of the attack and effects that it had initiated. Other controversies in the context of the applicability of IHL in terms of terrorism arise from the much-debated counter terrorism operations such as the war on terror. However, it is clear that IHL would apply in situations where a cyber-terrorist strike is executed as a segment of an ongoing armed conflict (or armed occupation) itself or if it triggers the armed conflict itself. Terrorism is prohibited equally in times of international or internal armed conflict and acts of violent cyber terrorism are also equally subject to necessity, proportionality, neutrality, humanity, distinction and chivalry.

i. Coming to the **legal mentions** of terrorism, though IHL does not specifically provide a definition of "terrorism", but it does outlaw most of the actions perpetrated during an armed conflict that would have been probably referred to as terrorist actions if committed during peace time. According to IHL, terrorism includes "indiscriminate acts of violence, deliberate attacks against civilians and civilian objects, the use of human shields", attacks on places of worship, and hostage-taking (ICRC 2018). According to **Article 33 of the Fourth Geneva Convention**,¹⁹ "IHL specifically condemns collective penalties and likewise all measures of (...) terrorism", and Article 4 of Additional Protocol II prohibits "all acts of terrorism and all other acts intending to spread terror amongst civilian population." Such attacks might not prohibit any lawful attack on military targets but definitely forbids any terror act that aims in terrorizing people. Terrorism is also listed as a "war crime" under the statute of the

¹⁸ Yaroslav Shiryayev, "Cyberterrorism in the Context of Contemporary International Law." Legal Studies Research Paper No. 2013-03, University of Warwick, 2012.

¹⁹ The Geneva Conventions of 1949 and their Additional Protocols." INTERNATIONAL COMMITTEE OF THE RED CROSS. January 01, 2018. <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>. (Visited last on Nov 07, 2019).

“International Criminal Tribunal for Rwanda and Sierra Leone Special Court”, as well as the “1996 Draft Code of Crimes against the Peace and Security of Mankind.”

ii. As the IHL expects to oversee the **conduct of the state military**, cyber-terrorism might be considered as an old fashioned jus in bello terrorism if delivered by the state armed forces (in case of international armed conflict) or of organised groups controlling parts of state territory (in case of internal armed conflicts). Those actors who are not categorised as state forces will usually be included by the legitimate routine on regular terrorism. Such actors not falling within the state forces categories are generally overseen by the legal regime on traditional terrorism. Apart from that, the venture commenced by the state military forces are mostly debarred from this regime by special provisions in the **“2005 Protocol to the Maritime Convention”**²⁰, the **“2010 Protocol to the Unlawful Seizure Convention”**²¹, the **“2010 Nuclear Terrorism Convention”**²², and the **“2010 New Civil Aviation Convention”**²³. In this way, soldiers seizing a civilian UAV and crashing it into a construction or causing a nuclear emergency in another state through digital attacks amidst an armed clash cannot be held responsible for ordinary terrorism. A related anomaly in regards to all armed forces within the scope of IHL, suggested by the West in the Draft Comprehensive Convention, is still under serious discussion. There is a dearth of sufficient ratification of the four above-mentioned instruments and hence there exists no customary international law on this. However, such exceptions do not point towards an existing legal gap because no matter how old fashioned the notion of jus in Bello is, because any act that contributes in terrorizing the general population leading to large scale violence and devastation would be considered an act of terrorism and be punishable under war crimes.

iii. Other than this, if a potentially violent terror attack through the cyber space is directed towards the civilian population or to force a state or an organization then it would be treated as no less than a conventional terrorism. In this setting one may consider, for instance, de-individuated digital deaths of people.

iv. In instances of armed clash, where conventional terrorism takes place through the cyber space, it might very well be seen as a crime from the point of need, proportionality, humanity, distinction, impartiality, and valour.

²⁰ "Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation," International maritime organization. 2010, available at <http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx> (accessed on October 30, 2019).

²¹ Ibid.

²² Ibid.

²³ Ibid.

Nevertheless, with similar aims and targets conventional terrorism and cyber terrorism may overlap in the years to come.

4. Conclusion

Terrorism as a major challenge to national security in the post-cold war era demonstrates itself in any relevant discussion of global security policy and international law. Keeping that in mind this paper has attempted to give a rough sketch of the legal concept of the term cyber terrorism and its status under the existing international legal framework. Though the concept of cyber terrorism is quite new yet the severity of the cyber-attacks by the terrorists on the relevant government infrastructures, financial institutions, organizations including the ones that use force of a significant threshold causing death and destruction can be devastating and cannot comply with either the values of the UN Charter or that of the IHL. Terrorism itself is an unconquerable phenomenon that had been distressing mankind through ages. Moreover, with the impact of modernity, terrorism has taken a new shape in the form of modern terrorism. Apart from lone wolf attacks which is also a new phenomenon, a modern terrorist is now capable to create havoc sitting in anonymous place just with the help of a mouse and a key board more than any conventional weapon. This phenomenon is increasingly alluring the modern-day terrorist because of many reasons including its cost effectiveness and also due to the garb of anonymity it offers. It is seen that although many international treaties exist to combat this global phenomenon, none of them provide for a binding regulatory jurisdiction. But even then the success of the existing international mechanisms, however less in number they are, to move a step ahead towards combatting cyber terrorism or terrorism on the whole not only depends on the ratification and implementation of these treaties and conventions but also on the efficacy of the big states of the world in complying with the provisions of such legal mechanisms. Cyber terrorism is a transnational phenomenon and only a comprehensive methodology towards battling terrorism in any shape, actualised through the activity of all-inclusive purview of global courts may most likely convey cyber terrorists to equity. Moreover, a universally agreed on legal definition of both the terms 'terrorism' and 'cyber terrorism' is required not only to categorise attacks and ease the investigation processes but also to bring in co-operation among countries to collectively fight this global threat. Apart from that, the multilateral organizations should improve their law enforcement policies so that they can keep away transnational offenders from misusing jurisdictional and legitimate provisos among national security plans. While coming up with cyber security measures a balance should be made between the safeguarding measures and civil sovereignty. It should exist between the specific interests of organizations and governments so much so that it should help form such a technological environment that will

have no room for fulfilling the unethical ambitions of the cyber terrorists, extremists and hackers.

All such measures can be successfully implemented if all the states unite for this common cause. To materialise this commitment all states, need to work towards replacing the inefficient political systems that operate within each of their territories. A new form of world politics should be introduced and preventing any forms of terrorism must thus be seen as one part of an even larger strategy, one that is geared to the prevention of all forms of international violence. The International community should not only focus its attention to eliminate this global menace but should also focus its attention towards a larger aim of elimination international violence. Only this step by the international community can probably help in eliminating the fear of this catastrophic menace thus retaining survival of mankind. It should be understood that amidst the play of global power politics the capabilities of states to prevent a further escalation of the risks related to cyber terrorism that may someday evolve into even newer forms of terrorism, shall become futile unless and until the world leaders put in enormous efforts to restrain their lure of superiority and primacy and instead focus their entire attention on the emergence of a new sense of global obligation. For this to materialise, a universal counter terrorism regime is needed with an inclusive understanding where all states, all men will be seen as one essential body and one whole community. This idea of oneness should not be based on the fanciful and mythical theories of universal brotherhood but rather on the idea that no matter how much individual states hate each other but yet they should be tied together to pursue the quest of survival. This state of peace, not Utopia of course, can only be achieved if policymakers and world leaders do away with their individual interest and private values and merge them with the interest of the nation. This shall hopefully offer a solution for the world to face such a massive menace together in the years to come.

Rape Survivor: A Victim Based Approach!

Surja Kanti Baladhikari¹

Abstract

Rape survivors are often seen as a curse in the society where people start believing that the rape victim was herself into some fault for the commission of the crime. A victim of rape is ignored at every stage of a criminal trial at first when the crime is committed by showing the lack of security she has from the state which is equivalent to the respect a woman has in a society thereafter while registering the complaint with the law enforcement agency thereafter during the investigation, trial along with sufferings of being a rape survivor (victim) in the case. It is very important to acknowledge that it is upon the victim the offence is committed and she has to undergo the ordeals of the justice delivery system while she awaits for justice whether it is taking care about her interim needs to that of her present needs along with giving psychological attention to her. She has every right to know about the progress of her case along with a dialogue with the public prosecutor which often a denial as the criminal justice system is more inclined in protection of rights of the accused. It is also very important to analyze how far the victim compensation scheme which is not a statutory right under Section 357A² has been applied uniformly across India. Whether the victims are getting interim compensation accordingly? The increase in punishment or making the laws more stringent than proper implementation is a victim centric approach or familiarising the victim and giving adequate representation in the criminal justice system is the right path?

Keywords: *Right to be Heard, Victim Compensation Scheme, Physical and Psychological Needs of the Rape Survivor, Criminal Justice Delivery System*

1. Introduction

The evolution of rape laws in India has changed a lot in the course of time it has not only have broadened the scope and ambit of the laws but also have become more stringent now than earlier. Rape survivors are different to that of other victims of crimes to the nature that they suffer both physical and mental trauma during the offence and after the offence is committed on her. The State's duty is to protect all the citizens from any kind of loss/injury and when it fails to do so the State must compensate for the loss/injury is the concept behind the theory of compensation. However, rights such as proper representation in the criminal justice system still remains absent though victim compensation is now a reality with Section 357A of Criminal Procedure Code. The Government of India along with National Legal Service Authority (NALSA) with the objective of 'access to justice for all' has introduced several guidelines, schemes, gazettes for

¹ Research Scholar, National Law School of India University, Bengaluru and Guest Faculty, WB National University of Juridical Sciences, Kolkata

² Code of Criminal Procedure, 1973.

proper implementation of the victim compensation scheme which needs to be assessed with the growing crime rate and indices of crime.

This paper has analysed the need of compensatory jurisprudence of rape victims and how it is applied in India along with the statistical references to support the law. The author has also tried to analyse the schemes and guidelines which are in force and how they are being applied along with better implementation possibilities of the same. Further the author has also referred to other ancillary rights which the victim will need for securing the rights in a more holistic manner.

2. The Offence of Rape

An offence of rape not only deters a woman physically but also psychologically. She is subjected to discrimination in the society though she did not add to the commission of the act. An offence of rape primarily revolves around circumstantial evidence as it often occurs within closed door where it is difficult for the prosecution to gather direct evidence. In the course of gathering evidence, time bound medical examination of the rape victim is of utmost importance which if lost due to time might be detrimental to the case. Prior to 2013 the rape laws were rather less strict and it required 'penetration' to be proved before conviction to constitute the offence of rape³. The Criminal Amendment Act 2013 has not only remodelled the penal provisions altogether for sexual offences committed against women but also have expanded the scope and ambit for the definition of rape which has no doubt protected the women in society. However, at the same time whether the crime can be curbed by increasing punishments, has to be justified with the help of empirical evidence.

Legal representation including legal representation of the victims of rapes is the most basic human right as enshrined in the Indian Constitution and International law. Criminal law mandates that evidence needs to be recorded in presence of the victim. The right to fair and proper hearing shall not be guaranteed unless the victim has a proper representation. Our criminal justice system is a accused centric one which protects the accused pre-arrest stage, during arrest and even during post arrest period. Article 22(1) and 39A of the Constitution of India. The International Covenant on Civil and Political Rights has also recognised that when the accused does not have the means to avail the services of a lawyer, a legal representation must be extended at the expense of the State. In various landmark decisions of the Supreme Court it has been discussed that application of accused for providing him with legal representation is not condition precedent for providing legal representation but mandatory for the success of criminal

³ Section 375 of Indian Penal Code.

trials. Sexual offences are always derogatory upon the victim as well as the society as it fails to protect the citizens from such kind of inhuman offences.

2.1. Section 375 of Indian Penal Code

The definition of rape⁴ have been expanded by taking into consideration penetration of the penis to the extent into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person. Further it also adds to inserting 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. Lastly, the process of manipulating any part of a woman's body 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 is said to be also within the definition of rape.

The definition also clarifies that if the man applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, which falls within these seven principles such as - against her will, without her consent, with her consent, or when the consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt, or with her consent when the man knows that he is not the husband of the woman and that the consent is given because she believes that the another man is lawfully married or with her consent when by reason of unsoundness of mind or intoxication or the administration by the man personally or through another of any stupefying or unwholesome substance, to which the lady fails to understand the nature and consequences of that to which she gives consent or with or without her consent when the lady is under eighteen years of age or when the lady is unable to communicate consent.

After a close reading of the provisions as amendment by the Amendment Act of 2013, it is clear that sexual intercourse is not necessary for constituting rape which was difficult to prove as per the earlier law as now the new definition of rape doesn't make it necessary for sexual intercourse. For instance, when the accused tried to rape a woman by uncovering her private parts but sexual intercourse was not possible due to the lack of physical development of the victim it would have been difficult to prove the offence of rape under the previous law.

⁴ Section 375 of the Criminal Law Amendment Act 2013.

2.2. Rape Law Punishment

Sl. no.	Provision of law	Punishment
1.	Except in the cases provided for in sub-section (2) of Section 375 ⁵	10 years – life imprisonment and also fine
2.	In all other cases (police officer, public servant, superintendent of jail/hospital, repeat offence, victim who is not able to give consent, victim with physical/mental disability, victim who is pregnant)	10 years – life imprisonment and also liable for fine
3.	Below the age of 16 years	20 years – life imprisonment and also liable for fine
4.	Punishment for causing death or resulting in persistent vegetative state of victim – 376A	20 years – life imprisonment and also liable for fine
5.	Sexual intercourse by husband upon his wife during separation – 376B	2 years – 7 years and also liable for fine
6.	Sexual intercourse by person in authority – 376C	5 – 10 years and also liable for fine
7.	Gang rape – 376D	20 years – life imprisonment and also liable for fine (medical expenses and rehabilitative needs of victim)
8.	Punishment for gang rape on woman under sixteen years of age – 376DA	imprisonment for the remainder of that person's natural life, and with fine (medical expenses and rehabilitative needs of victim)
9.	Punishment for gang rape on woman under twelve years of age -376DB ⁶	imprisonment for the remainder of that person's natural life, and with fine, or with death (medical expenses and rehabilitative needs of victim)
10.	Punishment for repeat offenders – 376E	imprisonment for the remainder of that person's natural life, or with death

⁵ Ibid.

⁶ Criminal Law (Amendment) (Ordinance) Act, 2018.

From the above table we can see the punishments in respect to the offence of rape. It is to be noted that though a rape is committed the amount of punishment changes with the identity or position of the accused in society. No doubt the punishments after the 2013 Act are stringent now but in all cases 'rape' is committed but the punishment is not uniform. Also, the concept of marital rape is not yet introduced though rape during judicial separation has been introduced. This non-recognition of marital rape directly affects a woman's right to live a dignified life in the light of Article 14, 19 and 21 of the Indian Constitution where she does have a right to reproduce, terminate a pregnancy, considered equally to that of men in senior positions and many other rights.

It is also to be noted from the above discussion that the Criminal Law Amendment, 2013 has recognised the offence of rape when committed by the husband upon her wife during separation but fails to recognise the offence of rape when the same is committed in during a marital relationship, however the same can be contented that though it is not recognised as a separate penal offence but is said to be covered under the definition of Section 498A of the Indian Penal Code which recognises⁷ mental or physical torture and the result which may drive a married woman to commit suicide or cause grave injury to her life, limb or health. It was also deliberated that how it is now important for the courts to think about rape as no more 'penetrative' in nature rather a it is based on sexual violence relying on the larger ambit of the definition of 'rape' under Section 375 of Indian Penal Code. The drafting of the Indian Penal Code of 1860 was said to be based on the Victorian patriarchies where men and woman were not considered as equal. It is now time to look into Section 375(2) which acts as an exception in regard to rape in marriages. The Women's Sexual, Reproductive and Menstrual Rights Bill 2018⁸ proposes to annul the exception 2 to Section 375. The new bill also proposes to introduce a proviso that "the women's ethnicity, religion, caste, education, profession, clothing preference, entertainment preference, social circle, personal opinion, past sexual conduct or any other related grounds shall not be a reason to presume her consent to the sexual activity." The bill further goes on to propose amendment to the Medical Termination of Pregnancy Act 1971 naming it to be Legal Termination of Pregnancy Act 1977 where it is contended that in rural India the doctors are scared to carry out termination of pregnancy on rape victims which is a curse for them to carry the pregnancy arising out of the rape as doctors fear arrest as per Section 312 of the Indian Penal Code when a person causes voluntary miscarriage of a woman along with extending the

⁷ Marital Rape Already Criminalized as Cruelty Under Section 498A IPC: Delhi Government to High Court available at <https://www.livelaw.in/marital-rape-already-criminalized-cruelty-section-498a-ipc-delhi-govt-hc/>

⁸ Lok Sabha Bill no. 255 of 2018 to be introduced by Dr. Shashi Tharoor.

time of termination of pregnancy from 20 weeks to 24 weeks. This bill not only strengthens women rights but also secures them to have an identity of their own; sometimes it's the re-establishing the lost identity acts as a means of restorative justice. The associated rights of privacy which also included in sexual acts was affirmed in *K.S. Puttaswamy vs. Union of India*⁹ along with considering the right to a dignified life within the meaning of Article 21 of the Indian Constitution in *Kharak Singh vs. State of Uttar Pradesh*¹⁰.

2.3. Compensation of Rape Victims

On earlier occasion the compensation towards victims was provided from the amount of fine recovered from the accused but in cases where the fine was found to be inadequate in such a scenario the victim was further refrained from getting compensation. Further when the accused prefers an application¹¹ for suspension of sentence pending appeal, the payment of fine towards the exchequer of the State gets delayed which in return makes it difficult for the victim to avail compensation.

The jurisprudence behind awarding of compensation originates from the case of *Delhi Domestic Working Women's vs. Union of India*¹² where the Supreme Court of India gave the following guidelines:

- a) The victims of sexual assault cases must have proper legal representation which makes the victim aware of the criminal justice system. Here the job of the victim's advocate will certainly not only be to help the victim to realise about the nature of the court proceedings but also to help the victim to get ready with the case along with assisting the victim in the police station and in court which also includes to provide her with all the means of assistance which she can get from all sources such as psychological or medical assistance.
- b) The court also highlighted upon the need of legal assistance at the police station since the victim's first contact point is the police station, the guidance and support of a legal person while the victim is at the police station and during questioning will be of much help for the victim ensuring proper emotional balance.
- c) It is also to be noted that the police must inform the victim about the right of representation before any questions are asked by the police, along with making a mandatory police report about such compliance – this also brings in the concept of a mandatory duty upon the police which only can be ensured if a similar compliance 'memo' is issued

⁹ (2017) 10 SCC 1

¹⁰ AIR 1963 SC 1295.

¹¹ 'Section 389 Cr.P.C.'

¹² (1995) 1 SCC 14.

by the police like that of the 'arrest memo', 'seizure list' to the victim.

- d) The police stations must maintain details of advocates who are to take up cases of sexual violence against women which the victims may contact when they are unable to find a suitable advocate on her own as she can be completely new to the criminal justice system and its practices.
- e) The appointment of the advocate shall be made by the court on receiving information from the police at the earliest convenient moment which has been reflected in the law as also the presence of an advocate is not only solicited during the trial but also during police questioning.
- f) During the investigation, trial of rape cases or pronouncement of judgment, anonymity of the victim must be maintained as far as necessary. This has now been recognised under Section 228A of Cr.P.C which bears two years of imprisonment and fine. This is also the reason why media houses and victims under the Prevention of Children from Sexual Offences Act 2012 recognises this as an offence if the name¹³, address, family, neighbourhood of the victim is disclosed making it a punishable¹⁴ offence under section 23(4) with at least six months of imprisonment but which may extend to one year or with fine or both.
- g) The court had asked to establish a Criminal Injuries Compensation Board within the meaning of Article 38(1) of the Constitution of India. Rape victims undergoing trauma often face financial crisis. By implementing the victim compensation scheme the States can notify and maintain this fund and the Courts are at liberty to award not only final compensation but also interim compensation along with awarding more compensation than the prescribed limits by the States.
- h) The court also secured the victim rights by declaring that compensation for victims shall be awarded by the courts when the offenders were convicted and also when the trial did not result in conviction by taking into consideration the pain, suffering, trauma, loss of earnings due to pregnancy after a rape incident along with the expenses of child birth if this occurred as a result of the rape.

The jurisprudence behind award of compensation originates from the basic understanding that an offence under the criminal law is the offence against

¹³ Section 23(2) of Protection of children from sexual offences Act 2012.

¹⁴ Ibid, Section 23(4).

the society also which is the reason it is a offence against the State where the State had a duty to protect its citizens from any injury/loss which when failed makes the State vicariously liable in the offence though the State did not aid the accused in the commission of the crime nor the accused was acting upon the direction of the State.

The Calcutta High Court in one of its judgement it is said that the court is not¹⁵ restricted upon the victim compensation scheme as notified by the State and it can exceed the maximum limit for awarding compensation where the case and the situation need, further the Calcutta High Court has opined that denning victim compensation in accordance of Section 357A of Cr.P.C. would amount to infringement¹⁶ of Article 21 of the Constitution.

The incident which occurred in Delhi which shook the entire nation was the gruesome act of gang rape in a moving bus introduced several new provisions in the law and changed the rape laws completely. The victim compensation fund guidelines¹⁷ was released by the Ministry of Home Affairs to aid and better implementation of the victim compensation scheme which was set up with a corpus of Rs. 200 crores and all the States were directed a) to aid and substitute the existing victim compensation schemes which were so published by the States and Union Territories, b) to reduce the irregularity in the amount of compensation vis-a-vis the injuries suffered by the victim as notified by the States and Union Territories of the offences in accordance with the Indian Penal Code, c) to encourage the States and Union Territories for better implementation of victim compensation scheme. The guidelines also disclosed the specified amounts with respect of the offences which required to be implemented by the States and the Union Territories to curb the difference of compensation amounts between the States and Union Territories. The jurisprudence behind this is that the definition of offences as per the Indian Penal Code is similar to all States and the amount of injury suffered by the victim cannot vary from State to State or Union Territory. The guidelines also notified the amount of money allocated for each state and union territory totaling to Rs. 200 cr. Out of which Uttar Pradesh was allocated the highest amount of (Rs. 2810 lakhs) followed by Madhya Pradesh (Rs. 2180 lakhs); Maharashtra (Rs. 1765 lakhs), Rajasthan (Rs. 1545 lakhs); Odisha (Rs. 1060 lakhs); West Bengal

¹⁵ 2017 (1) Calcutta Criminal (Cal) Rep. 692.

¹⁶ Denial of compensation to victim in pursuance to Section 357A Cr. P.C. is infringement of Article 21 of the Constitution: Calcutta HC available at <https://blog.scconline.com/post/2018/07/02/denial-of-compensation-to-victim-in-pursuance-to-s-357a-crpc-is-a-violation-of-article-21-of-the-constitution-calcutta-hc/> (visited 5th September, 2018).

¹⁷ Central Victim Compensation Fund Scheme Guidelines https://mha.gov.in/sites/default/files/CVCFGuidelines_140716.PDF (visited 7th September, 2018).

(1265 lakhs) out of which the least was allocated to Arunachal Pradesh (Rs. 33 lakhs). In regard to the Union Territories the highest amount was awarded for Delhi (Rs. 880 lakhs).

3. Victim Compensation Scheme Guidelines 2015¹⁸

Sl no.	Description of injury ¹⁹	Prescribed amount of compensation ²⁰
1.	Acid attack	Rs. 3 lakhs
2.	Rape	Rs. 3 lakhs
3.	Physical abuse of minor	Rs. 2 lakhs
4.	Rehabilitation of victim of Human Trafficking	Rs. 1 lakh
5.	Sexual assault (excluding rape)	Rs. 50,000
6.	Death	Rs. 2 lakhs
7.	Permanent Disability (80% or more)	Rs. 2 lakhs
8.	Partial Disability (40% to 80%)	Rs. 1 lakh
9.	Burns affecting greater than 25% of the body (excluding acid attack)	Rs. 2 lakhs
10.	Loss of foetus	Rs. 50,000

3.1. Implementation of Victim Compensation Scheme in India

SL No.	Amount of Compensation	State
1.	Rs. 3 lakhs	West Bengal ²¹
2.	Rs. 1.5 lakh	Karnataka ²²
3.	Rs. 3 lakhs	Punjab ²³
4.	Rs. 3 lakhs increased to Rs. 7 lakhs	Bihar ²⁴
5.	Rs. 1 lakh	Gujarat ²⁵

¹⁸ Central Victim Compensation Fund Scheme available at https://mha.gov.in/sites/default/files/CVCFGuidelines_141015_2.pdf (visited 5th September, 2018).

¹⁹ Ibid.

²⁰ Ibid.

²¹ West Bengal victim compensation scheme available at <https://www.wbslsa.org/img/act.pdf> (visited 5th September, 2018).

²² Karnataka victim compensation scheme available at <http://kslsa.kar.nic.in/docs/Victim%20Compensation%20Scheme.pdf> (visited 5th September, 2018).

²³ Punjab victim compensation scheme available at <http://puls.gov.in/WriteReadData/uploads/Scheme%20under%20357-A.pdf> (visited 8th September, 2018).

²⁴ Bihar Victim Compensation Scheme 2018 available at <https://sarkariyojna.co.in/bihar-victim-compensation-scheme-2018-rape-acid-attack-victims/> (visited 5th September, 2018).

6.	Gang Rape – Rs. 3 lakhs along with free medical treatment in government hospital Minors – Rs. 2 lakhs and free medical treatment in government hospital	Madhya Pradesh ²⁶
7.	Rs. 2 lakhs	Uttar Pradesh ²⁷
8.	The official gazette notification does not recognize ‘rape’ as an injury/loss for award of compensation	Maharashtra ²⁸
9.	Rape: Rs. 2 – 5 lakhs Gang rape: Rs. 3 – 7 lakhs	Delhi ²⁹
10.	Rs. 3 lakhs	Kerala ³⁰
11.	Rs. 5 lakhs	Rajasthan ³¹
12.	Rs. 2 lakhs	Andhra Pradesh

The above table shows the implementation of the victim compensation scheme in India which gives us a clear picture though there is a circular by the Government of India there is inadequacy in the quantum of compensation awarded by each State.

²⁵ Gujarat victim compensation scheme available at https://home.gujarat.gov.in/Upload/The_Gujarat_Victim_Compensation_Scheme_11-01-2015656.pdf (visited 5th September, 2018).

²⁶ Madhya Pradesh victim compensation scheme available at <https://www.indianemployees.com/gazette-notifications/details/madhya-pradesh-crime-victim-compensation-scheme-2015> (visited 5th September, 2018).

²⁷ Uttar Pradesh victim compensation scheme available at <https://www.scribd.com/document/275839557/Uttar-Pradesh-Victim-Compensation-Scheme-2014> (visited 5th September, 2018).

²⁸ Maharashtra victim compensation scheme available at <https://legalservices.maharashtra.gov.in/Site/Upload/Pdf/Victim-Eng.pdf> (visited 6th September, 2018).

²⁹ Delhi victim compensation scheme available at <http://plindia.org/wp-content/uploads/2016/11/Victim-Compensation-Scheme-2015.pdf> (visited 5th September, 2018).

³⁰ Kerala victim compensation scheme available at <http://latestlaws.com/wp-content/uploads/2015/08/Kerala-Victim-Compensation-Scheme2014.pdf> (visited 9th September, 2018).

³¹ Rajasthan victim compensation scheme available at <http://www.rlsa.gov.in/JJ%20Consultation%20Material/J4C/Victim%20%20Compensation%20Scheme.pdf> (visited 5th September, 2018).

3.2. Reporting of Rapes in India

Year \Rightarrow	2012 ³²	2013 ³³	2014 ³⁴	2015	2016 ³⁵
No. of cases	24923	33707	36735	32328	36657
Crime rate	2.1	5.7	6.1	5.4	6.1
Conviction rate	23.1 ³⁶	27.1 ³⁷	28.0 ³⁸	29.4 ³⁹	25.1 ⁴⁰

The reporting of cases of rape is increasing at alarming rate but the conviction rate which seems to stagnant with years, whether it is the fault of the prosecution in proving its case or it is the inordinate delay in starting of the trail/during trial or it is the fault in the criminal justice remains unanswered.

3.3. Crime Rate in 2015 and 2016

Sl. NO.	Name of State	No. of cases reported – 2015	Crime rate – 2015	No. of cases reported – 2016	Crime rate – 2016
1.	West Bengal	1199	2.6	1110	2.4
2.	Karnataka	589	1.9	1655	5.4
3.	Madhya Pradesh	4391	11.9	4882	13.1
4.	Uttar Pradesh	3025	3	4816	4.6
5.	Kerala	1256	6.9	1656	9.1
6.	Punjab	886	6.7	838	6.2
7.	Bihar	1041	2.1	1002	2
8.	Gujarat	503	1.7	982	3.3
9.	Maharashtra	275414	9.3	4189	4216
10.	Rajasthan	4144	7.3	3656	10.4
11.	Andhra Pradesh	1027	4	994	3.9
12.	Delhi UT	2199	23.7	2155	22.6

³² <http://ncrb.gov.in/StatPublications/CII/CII2012/Statistics2012.pdf> p. 24 (visited 5th September, 2018).

³³ <http://www.nisc.gov.in/PDF/NCRB-2013.pdf> p. 24 (visited 5th September, 2018).

³⁴ Crime In India 2014
<http://www.ncrb.gov.in/StatPublications/CII/CII2014/Compendium%202014.pdf>
 (visited 5th September, 2018).

³⁵ Crime In India 2016 available at
<http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf> (visited 5th September, 2018).

³⁶ Crime in India p. 360

³⁷ Crime in India pp. 360

³⁸ Crime in India pp. ii

³⁹ Crime in India pp. 200

⁴⁰ Crime in India pp. 200

3.4. Psychological and Physical Needs of a Rape Victim

It is said that the job of the lawyer is not only to assist the victim during the course of the trial but also to inform her about the rights which she is entitled to. It is important to note that the medical examination of the rape victims within the meaning of Section 164A of the Code of Criminal Procedure must adhere to at any cost. Only on the request of a police officer who is not below the rank of a sub-inspector, the medical examination of a rape victim shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority, if there are “reasonable grounds to believe that examination of the victim will afford evidence as to the commission of the offence”. In the absence of any such government hospital within six kilometers of radius from the place of offence, any other medical practitioner can conduct such examination. This is significant because the provision of the law is to enable an alternative when a nearby government hospital is not available otherwise the truthfulness of the medical report will be questioned by the defense which the most important evidence in case of rape is.

3.5. Victim Compensation Scheme

Section 357A was inserted in the Criminal Procedure Code with the Amendment Act 5 of 2009 (with effect from 31.12.2009) to introduce a provision of victim compensation scheme which required the management of the States for its proper implementation. The States in coordination with the Central Government have been directed to prepare a scheme in order to compensate the victims or her dependants who have suffered loss or injury as a result of the crime and who require rehabilitation. It is the responsibility of the District Legal Services Authority or the State Legal Service Authority to decide the amount of compensation as soon as the court recommends for such action and make arrangements for the payment of such compensation, after completing the due enquiry within two months.⁴¹ In case where, at the conclusion of the trial, if the court feels that the compensation is not adequate or the case ends in acquittal, it may recommend for compensation.⁴² Even if the offender is untraceable or unidentifiable but the victim can be identified, the victim herself may apply to the State or District Legal Services Authority for such compensation. This ensured that for the purposes of needs of the victim there shall be no more reliance upon the fines recovered from accused nor the State is in liberty to decide whether to compensate or not the concept changed after introduction of victim compensation scheme.

⁴¹ Section 357A (2) and (5)

⁴² Section 357A(3)

Section 357B was inserted by the Criminal Law Amendment Act, 2018 which prescribes compensation payable by the State Government⁴³ shall be in addition to the payment of fine to the victim under ‘*section 326A, section 376AB, section 376D, section 376DA and section 376DB*’ of the Indian Penal Code, 1860 respectively.

The Amendment Act 2018⁴⁴ also states that all hospitals, public or private, irrespective of it being run by the Central Government or State Government or local bodies or any other person, is liable to provide medical attention without asking costs from the victims when any offence has been committed under section ‘*326A, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E*’ of the Indian Penal Code⁴⁵, 1860 and shall immediately inform the police of such incident.

This has strengthened the position of the victim in the criminal justice system more though rights about information about the ongoing process of the case; whether bail application filed by the accused and whether such application was allowed/rejected is now possible by the e-courts initiative of the Government where the parties are able to track the cause lists as well as daily orders of the cases going on and do not have to rely upon the words of the advocate. But a victim whether a victim of rape or some other offence merely remains a prosecution witness after being a charge-sheeted witness because our criminal justice system has no place for victim impact statement.

3.6. Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes – 2018⁴⁶

National Legal Services Authority has come with a scheme in 2018 discussing or elaborating the scope and ambit of the victim compensation scheme. It states that in case of an interim compensation the order of payment must be 25% of the total compensation as per the State victim compensation scheme. The scheme also makes it clear that within 15 days the amount of compensation has to be released in the bank account of the victim in case of a minor with the help of the guardian.

In cases of acid attack the guidelines has made it distinct that interim compensation of Rs. 1 lakh has to be paid within 15 days from the notice received from District Legal Service Authority and remaining amount to be disbursed within 60 days.

⁴³ ‘Section 357A Cr.P.C.’.

⁴⁴ Ibid.

⁴⁵ Indian Penal Code <http://hyderabadpolice.gov.in/acts/Indianpenalcode1860.pdf> (visited 5th September, 2018).

⁴⁶ Nalsa’s Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes - 2018 http://www.wcd.nic.in/sites/default/files/Final%20VC%20Sheme_0.pdf (visited 5th September, 2018).

Guideline number five of the scheme also talks about interim compensation is to be forwarded by the head (officer in charge) of the concerned police station upon preliminary verification of facts and purpose of interim compensation along with mandatory reporting of FIR by the Superintendent of Police/Deputy Commissioners/ SHO's in case of offences under section '*Sections 326A, 354A to 354D, 376A to 376E, 304B, 498A*' of the Indian Penal Code, 1860. (physical injury).

Lastly, it is also notified that the minimum amount of compensation of a rape victim shall be Rs. 4 lakhs and a maximum amount of Rs. 7 lakhs to be given to the rape victim. However, the direction of interim compensation within 15 days is only for the victims of acid attack and not for other offences as per the victim compensation scheme.

4. Conclusion

A victim is not only a victim of the crime but also the criminal justice system as whole. This makes it very important for all the stakeholders of the system to function in a cogent and holistic manner.

The other issues which remains unanswered are:

1. Whether the lower judiciary can exercise the power of interim compensation? If yes, whether on application of the victim or the public prosecutor or by the court itself?
2. What is the time taken by the District Legal Services Authorities/State Legal Services Authorities to disburse victim compensation?
3. Whether the fund allocated to the States for giving compensation is enough or there is dearth of funds?
4. A need for a impact assessment study on the implementation of Section 357A Cr.P.C.
5. Whether a victim of rape is given a representation in the parole hearings when a parole application is preferred by the accused? Are the victims at all informed about such applications filed?

An important question which arises is that in protecting the rights of defacto complainant or mandatory hearing of the victim's side during granting of a bail application or admission of an appeal against an order of acquittal, whether the State in form of Public Prosecutors/Assistant Public Prosecutors has the right to contact/meet the victim to understand the effect of the crime. Another area to look into is the availing of the facilities of professional counseling for rape survivors is important. There is also requirement of proper training and sensitization of the lawyers who handle these cases as it requires utmost care and patience while dealing with such cases.

Groundwater Crisis vis-à-vis Sustainable Development: A Socio-Legal Exploration

Pratik Salgar¹

Abstract

ISRO, World Bank, NITI Aayog and other authorities have alarmed India about serious Groundwater Crisis. NITI Aayog reports, till 2030 the demand for water will likely to be double the available supply and India is highest groundwater user at global level. The main reasons behind the crisis are: over-extraction, lack of legal restrictions and mismanagement of available resources. There are adverse social impacts which lead to social disturbance, violation of fundamental rights and other social setbacks. To combat this crisis and to achieve sustainable development goals, 'Management' of groundwater resources is the need of the hour which will ultimately result into 'healthy' society. The Judiciary has also contributed to this social illness through landmark decisions and guidelines which underline the performance of various authorities in connection with Groundwater Management. 'Law' plays a significant role by hitting all purposes which are to be achieved while fighting with this extremity. The Researcher here throws light and tries to analyse Socio-Legal perspectives of Groundwater Crisis and factors which are holding back 'Sustainable Development'.

Key Words: Groundwater Crisis, Management, Sustainable Development, Social Issues, Legal Issues

1. Introduction

“पृथिव्याम त्रीणि रत्नानी जलमन्नं सुभाषितं”

The above mentioned Sanskrit quote means that, there are three gems on Earth which are Water, Food and *Shloka*. The poet here signifies that these gems are very valuable and utmost care is to be taken because without these 'gems'; human life is impossible. Being one of the main components of nature, water is a treasure for all living organisms. Are we forgetting value of this precious treasure? Whether we are following the intention which this poet wants to convey through this quote?

Human beings are dependent on nature and not vice versa. The natural resources are inevitable part of human life without which life is impossible. We are getting water as well as air for free of cost. Natural resources are there to fulfil our needs. But what about life of nature? Whether water in nature is immortal?

¹ PhD Research Scholar at Department of Law, Savitribai Phule Pune University, Pune under the Guidance of Professor Dr. Jyoti Bhakare

Today, in this technologically developed and globalised world, we are battling with water crisis. One should not be surprised if the next world war is fought for water. As per Strategic analysis paper published by Australia's Global Interests, India is the world's highest user of groundwater. It consumes over a quarter of the global total equivalent to 230 cubic kilometres per year. An assessment of 6,607 groundwater units in 2011 found that 1,017 were "overexploited", indicating the rate of groundwater extraction exceeded replenishment. Around one-third of all units in India were under stress. The World Bank predicts that by 2032, around 60 per cent of aquifers in the country will be in a critical state. Sustainable management of this scarce resource has become a challenge nowadays owing to increased demands of increasing population, growing urbanization and rapid industrialization combined with rising agricultural production.² These are not merely 'figures' but this 'figures' out the real situation in India. If this situation is to be compared with sustainable development, then it is clear that management is needed in this regard. Groundwater contamination and its equitable distribution are significant issues which have serious social and legal implications.

Groundwater contamination is a 'qualitative' facet while equitable distribution is a 'quantitative' aspect regarding groundwater resource management. The quality of water is affected by various factors like rate of monsoon, dilution during monsoon, high evaporation rate during the summers, sporadic pollution loads from various anthropogenic activities, flow rate of water and so on.³ The human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.⁴ India, being the country extracting highest amount of groundwater, has to consider this issue seriously because quality of drinking water is directly proportional to the health of citizens.

Unrestricted extraction of groundwater is one of the major reasons for groundwater contamination. Here, the question of distribution of water arises and more specifically, the question is about 'equitable' distribution. In conflict with of 'right' and 'conservation'; right to water prevails resulting into over-extraction. In relation with sustainable development, equitable distribution has become serious subject matter of groundwater management. Being the major concerns of groundwater management, researcher throws

² Government of India, Report: *DYNAMIC GROUND WATER RESOURCES OF INDIA* (Central Ground Water Board Ministry of Water Resources, River Development & Ganga Rejuvenation, 2017).

³ Government of Maharashtra, Report: *E- Bulletin of Water Quality National Water Monitoring Programme* (Maharashtra Pollution Control Board).

⁴ G.A. Res. 16/2, at 1, U. N. Doc. A/HRC/RES/16/2 (April 08, 2011).

light on these issues in connection with sustainable development and analysis from socio-legal point of view.

2. Sustainable Development-Reality Check

The World Commission on Environment and Development, 1987 has defined 'sustainable development' as, "development that meets the need of present without compromising the ability of future generations to meet their own needs." When we consider the 'Groundwater' as a subject matter in connection with abovementioned realities, then sustainability of groundwater is in question. These crucial issues have to be taken into consideration while making the plan for management of groundwater resources.

While groundwater resources in nearly all regions of the world are stressed by overuse, population growth, and climate change, there are important differences in policy and management to minimise stressors on groundwater resources between the developed and developing world.⁵ With existing facts and circumstances, reality check is necessary for overall social and legal development. This reality check can be achieved by balancing the existing situation with sustainable development.

A very enthralling development in the constitution has taken place after *Maneka Gandhi*⁶ which has enriched life of human being. Life of human being has transformed into 'quality life'. An extended view of Article 21 of our Constitution enshrines 'right to health' as well as 'right to clean and healthy environment' as fundamental rights. Indian constitution has no express provisions for these rights. Indian Judiciary understood the silence behind Article 21 and interpreted that silence which resulted into extended view. While analysing the nexus between Groundwater crisis and sustainable development; interpretation of silence under article 21 which rightly pointed out by Judiciary which has paved a way to sustainability and development of environmental jurisprudence.

Now, it is high time to understand silence behind the definition of 'sustainable development'. Abovementioned definition takes into consideration the needs of present as well as of future generations. As far as natural resources are concerned; it is too difficult to fulfil needs of present generations. Then, should the present generations compromise their needs? The definition is silent on that. Thus, there is conflict of interests of present and future generations to meet their needs. The main reason behind that is 'one's conservation becomes another's consumption'. This conflict has

⁵ United Nations, Report: Groundwater and Climate Change (United Nations Educational, Scientific and Cultural Organization and International Hydrological Programme).

⁶ AIR 1978 SC 597

evolved the major concerns of ‘Groundwater Contamination’ and ‘equitable distribution of Groundwater’. Although a number of statutes have been enacted with a view to protect environment against pollution, and an administrative machinery has been put in place for the purpose of enforcement of these statutes, the unfortunate fact remains that the Administration has done nothing concrete towards reducing environmental pollution.⁷In regard with abovementioned issues, administrative actions are also to be taken into consideration to have effective machinery for groundwater management.

The NITI Aayog has expressed very serious concerns for Groundwater crisis. India is undergoing the worst water crisis in its history. Already, more than 600 million people are facing acute water shortages. Critical groundwater resources which account for 40% of our water supply are being depleted at unsustainable rates.⁸ Goal 06 of Sustainable development is “clean water and sanitation”⁹. Basin upon these goals of sustainable development, the Ministry of Statistics and Programme Implementation has published the report. As far as our discussion is concerned, following chart is the part of report which specifically revolves around the subject matter of sustainable withdrawals and water scarcity. This chart shows that the annual survey is carried out by MoWR regarding withdrawal of groundwater, its availability etc.

Target¹⁰	National Indicator	Periodicity	Data Source (Ministry/ Department)
By 2030, substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water	Percentage ground water withdrawal against availability	Annual	MoWR (Ministry of Water Resources, River
	Per capita storage of water(m3/person)		

⁷ M P Jain, Indian Constitutional Law1173 (2014).

⁸ Government of India, Report: Composite Water Management Index (NITI Ayog, 2018).

⁹ Sustainable Development Goals, United Nations Development Programme-UNDP (Nov. 05, 2018), <http://www.undp.org/content/undp/en/home/sustainable-development-goals.html>.

¹⁰ National Indicator Framework, Ministry of Statistics and Programme Implementation-MOSPI (Nov. 05, 2018), http://www.mospi.gov.in/sites/default/files/main_menu/SDG_Framework/National_Indicator_Framework_6nov18.pdf.

scarcity and substantially reduce the number of people suffering from water scarcity	Per capita availability of water (m ³ /person)		Development and Ganga Rejuvenation)
--	---	--	-------------------------------------

Due to the groundwater crisis, equitable distribution and availability of freshwater for human consumption; both of these are major concerned issues. On the large canvas of the society and law, both of these issues are very serious and must be considered to have check on sustainable development. The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a channel.¹¹ The phrase “all water under the land” signifies unlimited extraction of groundwater. Thus, this provision ultimately results into inequitable distribution of groundwater which is violation of fundamental right of citizen under Article 21.

Other issue of groundwater contamination has nexus with the health of citizens. Maharashtra Pollution Control Board has conducted investigation and submitted a detailed report to the Collector vide letter which also confirms the Groundwater contamination as the oil and grease contents in the well water is about 50 per cent which is abnormally high.¹² Groundwater contamination occurs when man-made products such as gasoline, oil, road salts and chemicals get into the groundwater and cause it to become unsafe and unfit for human use.¹³ Thus, it is evident that contaminated groundwater is hazardous for health due to which “public health” is in danger. Ultimately, when both of these issues are considered; it is clear that the sustainability of groundwater sources is in question. Is there any solution for meeting sustainability??

3. Groundwater Contamination and Health: Socio-Legal Analysis

Discharge of toxic elements from industries and landfills and diffused sources of pollution like fertilisers and pesticides over the years has resulted in high levels of contamination of groundwater with the level of nitrates exceeding permissible limits in more than 50% districts in India.¹⁴ A perusal of the report submitted by Central Pollution Control Board reveals many glaring things, as for instance, that the industries are operating without

¹¹ Indian Easements Act, 1882 (Act 5 of 1882), s. 7(g).

¹² Shri Sant Dasganu Maharaj Shetkari Sangh Akolner v. The Indian Oil Corporation Ltd., Application No. 42/2014 before NGT Western Zone Bench, Pune.

¹³ Groundwater Contamination, Groundwater (Nov. 10, 2018), <https://www.groundwater.org/get-informed/groundwater/contamination.html>.

¹⁴ Vishwa Mohan, “Across India, High Levels of Toxins in Groundwater”, *The Times of India*, Jul. 31, 2018.

obtaining a valid consent, operating in the premises which is actually in the name of some other closed industry, so as to give an impression that no industry is working in the said premises.¹⁵ Also, due to effluents from these industries, sources of groundwater are contaminated due to which health of the people in surrounding regions is in danger. Taking account of this, National Green Tribunal has ordered closure of 57 industrial units in Derabassi region of Punjab. This phenomena underlines the seriousness of groundwater contamination and its effects on the health of the public at large. While dealing with this particular issue, researcher has tried to investigate functions of various authorities and data regarding the groundwater contamination and its relation with public health. In comparison with the standards of drinking water by BIS (Bureau of Indian Standards) and WHO¹⁶ (World Health Organisation) with existing groundwater conditions as per the study conducted by CGWB (Central Groundwater Board); one can realise how the condition of groundwater is. The Following chart gives the permissible standards of various chemical components for healthy drinking water:

Authority	Fluoride (mg/l)	Nitrate (mg/l)	Arsenic (mg/l)	Iron (mg/l)
BIS¹⁷ (Bureau of Indian Standards)	1 to 1.5	45	0.01 to 0.05	0.3

Thus, it is evident that the Bureau of Indian Standards is functioning well in case of drinking water standards. The standards set are based on the various aspects of human health. When these standards are compared with the existing groundwater sources; pathetic condition is seen and the sources are contaminated to that extent that the water is too dangerous to the health. Central Groundwater Board has published the report regarding the contaminated sources of water and it is seen that the sources of groundwater have contaminated on greater extent. Thus, being a social concern, this particular issue was questioned in Loksabha. The questions were regarding the chemical contents of water, WHO (World Health Organisation) standards and reaction of Union Government on this issue. While answering these queries, the Minister of State for Water Resources, River Development and Ganga Rejuvenation has published evidentiary data of this issue.

¹⁵ Karnail Singh & Ors. v. CPCB & Ors., Application No. 30/2013, Order by National Green Tribunal dated 25/10/2018.

¹⁶ Drinking Water Quality Guidelines, World Health Organisation-WHO (Nov. 20, 2018), https://www.who.int/water_sanitation_health/publications/drinking-water-quality-guidelines-4-including-1st-addendum/en/.

¹⁷ Water Quality Standards, Central Ground Water Board-CGWB (Nov. 20, 2018), <http://cgwb.gov.in/Documents/WQ-standards.pdf>.

State ¹⁸	Fluoride (mg/l)	Nitrate (mg/l)	Arsenic (mg/l)	Iron (mg/l)
Maharashtra	17	30	--	20
West Bengal	7	2	9	15

Hence, it is very clear that the groundwater contamination has resulted into health issues which are affecting social structure of health. And immediate action is needed for the same.

4. “Need” versus “Fulfilment” of Water: Legal Conflict for Equitable Distribution of Groundwater

In the world of industrialisation, we, as human beings, are neglecting our environment. Any development which compromises with the environment is not sustainable. Plachimada, a village suffered calamity of water crisis; not due to any ‘natural disaster’ but due to uncontrolled utilisation of natural resources by human. The bottling plant of Coca-Cola was set up nearby Plachimada and due to over-extraction of groundwater, the people in nearby villages have suffered groundwater crisis. The people in surrounding villages didn’t get water for their daily needs and also due to increasing percentage of salts and chemical ingredients, people were facing health issues. It was only after the people protested that the plant was closed within 3 years after its opening. In this instance, the significant issue which is to be noted is that, due to over extraction by Coca-Cola unit, the people in surrounding area were deprived of their fundamental right.

Fundamental rights are not absolute; they come with ‘reasonable restrictions’ which take care of another’s right. Basing upon this principle itself, the judiciary has considered the interest of greater number of citizens and ordered closure of bottling plant. The battle between ‘need’ and ‘availability’ is now difficult to manage in case of groundwater; because providing ‘sufficient water’ for daily needs of human is not possible as far as groundwater crisis is concerned. Thus, we are left with only solution of harvesting (to maintain and increase groundwater table) and to restrict use of water.

We, as human beings don’t pay a single rupee for available natural resources. Being the owner, the state can impose ‘charge’ on consumption of water by which usage can be administered and controlled. On this basis, the gains out of imposition of ‘cess’ on water, can be reused for the same purpose i.e. conservation as well as management of groundwater resources. This will make the citizens as well as the state aware about their duties towards environmental conservation and effective management to face the

¹⁸ Government of India, Ministry of Water Resources, River Development & Ganga Rejuvenation, Lok Sabha, Unstarred Question No. 341 Answered On 19.07.2018.

calamity of groundwater crisis. This principle has been incorporated in Maharashtra Groundwater (Development and Management) Act, 2009.¹⁹

As per the Water (Prevention and Control of Pollution) Cess Act, 1977 the industry consuming water is liable to pay water cess based on the quantity consumed for which records are to be maintained and are liable for verification. Therefore it is always possible for the authorities to ensure that the industry does not exceed the allowable quantity.²⁰ Still, when we notice the similar circumstances like 'Plachimada'; effectiveness of implementing Water (Prevention and Control of Pollution) Cess Act, 1977 is in question.

The reason behind non-effectiveness of this Act is that the cess which is imposed is too less that it will not serve the purpose of prevention. There is no balance between amount of cess and extent of water on which it is applicable. In comparison with quantity of water; payment of cess becomes easy way transaction which results into non-deterrence. This whole scenario ultimately ends at environmental degradation due to which sustainability cannot be achieved.

In *Mazibuko v. City of Johannesburg* (2009), the applicants challenged the legality and constitutionality of the City's policy of imposing prepayment water meters, as well as the provision of a free basic water supply of 25 litres per person per day or 6,000 litres per household per month.²¹ The design of this policy was that to provide free basic water i.e. 25 litres per person per day or 6000 litres per household per month. And once the allocation was done, the meters would automatically shut. This meant that the applicants went without water for almost 15 days. The high court held this system to be unlawful, unreasonable and unconstitutional and ordered to provide 50 litres free water per person per day. In appeal, the Supreme Court, on examining the facts and circumstances, ordered 42 litres water per day per person. In contradiction with both of these orders, Constitutional Court opined that 25 litres free water per day per person was reasonable. Along with this, Constitutional Court has emphasised on accountability of citizens towards state through litigation.

¹⁹ Section 8(3): On the advice of the State Authority, the State Government shall give such guidelines to the concerned Authority to levy such cess as may be prescribed, on the use of existing deep-wells in the non-notified areas. Provided that, the proceeds of cess levied shall be forwarded by the concerned Authority to the Panchayat or the urban local body, as the case may be, and the same shall be used for implementing groundwater conservation programme.

²⁰ M.D. Yogesh and Ors. vs. Union of India and Ors. (13.02.2017 - NGT) : MANU/GT/0012/2017.

²¹ United Nations Report on: The Right to Water, UN Fact sheet No. 35 (United Nations).

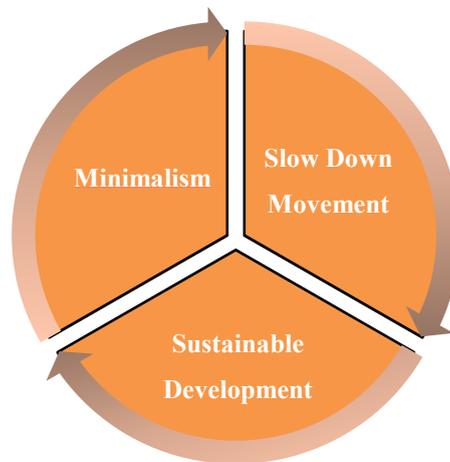
5. Concluding Remarks and Suggestions

In order to prevent the pollution of groundwater resources, it is important that periodic analysis of sources of groundwater be promptly made by the Government. This periodic assessment can be determined on the basis of various factors like, establishment of new industry, digging of new bore wells, effluents from industries and various factors which are responsible for contamination of groundwater. On the basis of these factors, the policy of groundwater contamination assessment can be developed in co-operation with the health department which can examine an extent of contamination in connection with public health. Also, to arrive at practically possible conclusion, exhaustive research is needed. To conduct good research, various administrative authorities should maintain data integrity so that it will be useful for further research.

With the concern about equitable distribution of groundwater and levy of cess to restrict usage of groundwater, the amount of cess should be such that the wrongdoers will have to pay substantial amount of their income by which only deterrence will be created. For non-payment of cess, heavy punishment be imposed and effectively implemented so that citizens will understand the value of water and will take the duties seriously. By implementing these solutions, along with creating awareness in citizens and creating seriousness about duties towards environment; the sustainable development can be achieved.

“Slow-Down Movement” and “Minimalistic Theory (Minimalism)” are the ideologies developed for sustainable development as well as water usage. Minimalism implies living deliberately and considering the consequences of your actions. Through minimalism, humans can reduce their eco-footprints and make sure overconsumption doesn’t strip the Earth bare.²² Thus, minimalism can be a way to the conservation of water which will be helpful for sustainable development.

²² Minimalism: How to living simply meet recycling, Global Citizen (Feb. 07, 2019), <https://www.globalcitizen.org/en/content/minimalism-how-to-living-simply-meet-recycling/>.



Slow movement talks about doing the things at appropriate time in right pace. These concepts fall under a relatively new cultural revolution known as the ‘slow movement’, which is against the notion that fast is always better. It espouses the need to move with purpose, to prioritise quality over quantity, and to savour moments rather than treat things as a means to an end. It is also about balance: doing things at right speed; speeding up when it’s purposeful to do so, slowing down when needed or riding the in-between.²³ In this globalised world, human being is concerned about ‘development’ rather than protection and conservation of environment. To be powerful in the world, every nation is trying to grow fast which compromises environment and at the end ‘environment’ is only the treasure of nation on the basis of which it can develop. Thus, from the point of view of sustainability and groundwater resource management, we need to apply the principles of minimalism as well as slow movement. This will make management efficient and successful ultimately resulting into happiness of citizens from all perspectives.

²³ Why slowing down creates joy, Mindful Company (Feb. 07, 2019), <https://www.mindful-.com/blogs/notebook/the-slow-movement-why-slowing-down-creates-joy>.

The National Bank for Agricultural and Rural Development (NABARD) Act, 1981: A Significant Effort towards Socio-Economic Development in Rural India

Sanjay Dutta¹

Abstract

NABARD has been established as a unique institution in India under the National Bank for Agriculture and Rural Development Act, 1981, which combines the roles of a central bank, a development agency, a financial institution, an infrastructure funding agency, a microfinance institution, a planning board and an apex-level policy maker. NABARD has taken various initiatives toward Sustainable Development Goals (SDGs), poverty alleviation and inclusive growth through increasing agricultural production, rural employment and Self Help Group (SHG)-Bank Linkage Programme. The establishment and participation of NABARD has been serving various fruitful purposes at the grass-root level which includes enhancing the health of the rural credit delivery system and strengthening the same since its inception.

Keywords: *NABARD, Sustainable Development Goals, Rural Credit Delivery System*

1. Introduction

“If we can come up with a system which allows everybody access to credit while ensuring excellent repayment- I can give you a guarantee that poverty will not last long”-

Prof. Dr. Muhammand Yunus

The Statement of Object of the National Bank for Agricultural and Rural Development (NABARD) Act, 1981 states that:

“An Act to establish a development bank to be known as the National Bank for Agriculture and Rural Development for providing and regulating credit and other facilities for the promotion and development of agriculture small-scale industries, cottage and village industries, handicrafts and other rural crafts and other allied economic activities in rural areas with a view to promoting integrated rural

¹ Research Scholar, Department of Economics, University of North Bengal & Assistant Professor in Economics, Department of Law, University of North Bengal.

development and securing prosperity of rural areas, and for matters connected therewith or incidental thereto”².

NABARD has built itself up into a unique institution in this world under the National Bank for Agricultural and Rural Development Act, 1981, which combines the roles of a central bank, a development agency, a financial institution, an infrastructure funding agency, a microfinance institution, a planning board and an apex-level policy maker. It also plays an important role in grass-roots level credit planning and monitoring through its district presence³. The prime objective of NABARD is to promote the health and strength of rural credit delivery system through supporting the institutional credit sources i.e. Commercial Banks, Regional Rural Banks and Cooperatives. The establishment of NABARD is in consonance with the Constitution of India where under the Preamble it is clearly mentioned the purpose to secure justice in the name of Social, Economic and Political have been enumerated⁴.

2. Research Methodology

2.1 Objective of the study

- i) To understand the status of credit facilities provided by NABARD to the rural population.
- ii) To study various initiatives of NABARD toward Sustainable Development Goals (SDGs), poverty alleviation and inclusive growth through increasing agricultural production and rural employment.
- iii) To understand the role of NABARD in promoting Self-Help Groups (SHGs) through SHG-Bank Linkage Programme (SHG-BLP).

2.2 Methodology

The study is confined to the NABARD and Reserve Bank of India (RBI) literature. The study makes use of secondary data related to institutional credit in India. The data is collected from the documents published by NABARD, RBI and other websites and published documents. For analysis, I have collected data from above mentioned sources since inception of NABARD.

² The National Bank for Agriculture and Rural Development Act, 1981 [https://www.nabard.org/auth/writereaddata/tender/0307180838 Nabard Act 1981.pdf](https://www.nabard.org/auth/writereaddata/tender/0307180838%20Nabard%20Act%201981.pdf) (Accessed on 06.01.2020 at 1.47 P M)

³ P. S. Rao, NABARD and RBI- A 30-year legacy being upturned, *Economic & Political Weekly*, Vol XLVII, No. 38, September 22, 2012.

⁴ Preamble to Constitution of India, P M Bakshi, *The Constitution of India*, Universal Law Publishing Co. Pvt. Ltd. 5th Edn. 2003, Pp. 1.

2.3 Limitation of the Study

- i) This study is limited to NABARD and cannot be generalised.

3. Genesis of NABARD

At first the Agricultural Finance Committee (Gadgil Committee 1945) suggested that an autonomous public corporation should be established for agricultural credit, but All-India Rural Credit Survey Committee (1951-54) disfavoured the idea of such corporation⁵. The Agricultural Refinance Corporation was set up in 1963 and again the idea of National Agricultural Bank was received by the Mirdha Committee on cooperation in 1965 to establish a National Cooperative Bank which would act as an apex of the cooperative structure of credit in the country⁶. Once again the proposal has been rejected by the All-India Rural Credit Review Committee in 1969⁷.

The Banking Commission of 1972 advised to combine the Agricultural Refinance and Development Corporation (ARDC) and Agricultural Finance Corporation (AFC) to outline a new institution within the RBI regime. In 1976 the National Commission on Agriculture encouraged the RBI to step forward with its primary role to “integrating the total structure for financing agriculture and rural development from ground level upwards right upto the creation of an Agriculture Development Bank of India as the apex organization”⁸.

After recommendation of the National Commission on Agriculture, RBI appointed a Committee to Review arrangement for Institutional Credit for Agricultural and Rural Development (CRAFICARD) in 1979. The prime objective of the committee was to evaluate the structure and operations of ARDC under the circumstances of an increasing need of institutional credit at national, state, district and village levels.

After a comprehensive analysis of arguments in favour and against the establishment of a National Bank for agriculture, the committee found that a new institution which would be equally responsible as the RBI and

⁵ Report of the High Powered Committee on Cooperatives, Ministry of Agriculture, Government of India, May 2009. Pp. 75-76. www.indiaenvironmentportal.org.in/files/hpcc2009new.pdf (Accessed on 14.01.2020 at 9.00 P M)

⁶ Ibid. pp. 85.

⁷ Tapas Kumar Chakrabarty, Rural Income: Some Evidence of Effect of Rural Credit During Last Three Decades, Reserve Bank of India Occasional Papers, Vol. 24, No. 3, Winter 2003, pp. 225-239. <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/60618.pdf> (Accessed on 14.01.2020 at 9.00 P M)

⁸ CRAFTICARD, P. 258. <https://nabard.org/auth/writereaddata/Flipbook/2017/Publication/Nabard-17-CRAFTICARD-Sivaraman-Committee-Report/files/assets/common/downloads/publication.pdf> (Accessed on 06.01.2020 at 09.13 P M)

coordinate the entire credit operation that will improve the financial health of the rural India. They also observed that the problem of agricultural credit is correlated with rural development at a large scale. Finally, the committee realized that “An Organizational Device” is much needed to give prior attention to credit problems of agriculture arising out of integrated rural development. Therefore, the committee came to the following conclusions: “Therefore, the committee is convinced that the balance of advantage in the present context lies in setting up a national level bank with close links with the RBI. However, we envisage the role of the RBI as one of spawning, fostering and nurturing the new banks, somewhat in the same manner as the ARDC. We would cast a special responsibility on the RBI to develop the new institution which in our view is a logical step in the organizational evolution of the RBI itself”⁹.

The CRAFTICARD suggested the name for a national level organization as National Bank for Agriculture and Rural Development (NABARD). The prime aim of NABARD was to decentralize the Central Bank’s function for providing all kinds of production and investment credit to agriculture, small-scale industries, artisans, khadi and village industries, handicrafts and other allied economic activities for agricultural and rural development¹⁰. In accordance to the recommendation of the Shivaraman Committee (CRAFTICARD) in March 1979, the National Bank for Agricultural and rural Development (NABARD) was established on 12 July, 1982 as per the NABARD Act 1981.

4. Main Objectives of NABARD

The main objectives which guide the functioning of NABARD are-

- i) To provide refinance to eligible institutions for development activities in rural areas.
- ii) To improve the absorptive capacity of the credit delivery system.
- iii) To coordinate the activities of different agencies engaged in development work at the field level.
- iv) To keep liaison with Government of India, State Governments and RBI and other national level institutions connected with policy formulation¹¹.

⁹ *Ibid.* p. 261.

¹⁰ Mohd. Furqan; A critical study of organization and management pattern of NABARD- An appraisal; Aligarh Muslim University, 2005. Pp. 79. ir.amu.ac.in/1308/1/T6290.pdf (Accessed on 14.01.2020 at 9.48 P M)

¹¹ *Ibid.* pp. 80-82.

5. Functions of NABARD

NABARD was established as a development bank to perform the following functions-

- i) To serve as an apex financing agency for the institutions providing investment and production credit for promoting various developmental activities in rural areas.
- ii) To take measures towards institution building for improving absorptive capacity of the credit delivery system, including monitoring, formulation of rehabilitation schemes, restructuring of credit institutions and training of personnel.
- iii) To co-ordinate rural financing activities of all institutions engaged in developmental work at the field level and liaison with the government of India, the state governments, the Reserve bank of India and other national level institutions concerned with policy formulation.
- iv) To promote research in agriculture and rural development NABARD provides financial support.
- v) To undertake monitoring and evaluation of projects refinanced by it. NABARD's refinance is available to State Co-operative Agricultural and Rural Development Banks (SCARDBs), State Co-operative banks (StCBs), Regional Rural Banks (RRBs), Commercial Banks and financial institutions approved by the Reserve Bank of India¹².

6. Role of NABARD in Rural Financing in India

After independence for the rural people in India to meet their credit need gradually started preferring institutional credit more than non-institutional credit because the institutional credit sources (the Governments, Commercial banks, Co-operatives, NABARD and others) are having organizational attitude, non exploitative nature, following all the rule and regulations and also taking various policies to provide credit for rural masses. On the other side, the Money lenders charged quite high rate of interest which often much above the maximum rate legally prescribed by the state governments and followed all sort of malpractices to exploit the rural people in village India. They also controlled the socio-economic environment in the village India by capturing the rural credit market.

¹² S. K. Mishra and V. K. Puri, Indian Economy-Its development experience, Himalaya Publishing House, 27th & updated edition, 2009, pp. 308.

Table- 1
Relative share of Borrowing of Agricultural Households from different Sources

Sources of Credit	(Per cent)						
	1951	1961	1971	1981	1991	2002	2012
Non-Institutional sources (A)	92.7	81.3	68.3	36.8	30.6	38.9	41
<i>of which</i>							
Money Lenders	69.7	49.2	36.1	16.1	17.5	26.8	31
Institutional agencies(B)	7.3	18.7	31.7	63.2	66.3	61.1	59
<i>of which</i>							
Co-operatives Societies/ Banks	3.3	2.6	22.0	29.8	23.6	30.2	28.9
Commercial Banks	0.9	0.6	2.4	28.8	35.2	26.3	30.7
Unspecified (C)	-----	-----	-----	-----	3.1	-----	-----
Total (A+B+C)	100.0						

Source: All India Debt and Investment Survey and NSSO¹³.

The above table-1 shows the relative share of borrowing of Agricultural Households from different sources. It is found that the share of non-institutional credit sources gradually declined from 92.7 percent in 1951 to 41 percent in 2012. On the other side there was a remarkable growth in institutional finance from 7.3 percent to 59 percent during the same period.

Table- 2
Agency wise Ground Level Credit (GLC) Flow to Agriculture and Allied Sectors

Agency	(Amount in Rs. Crore)	
	2011-12	2018-19 (P)
Commercial Banks	3,68,616	9,49,622
RRBs	54,450	1,51,259
Cooperatives	87,963	1,53,882
Total	5,11,029	12,54,762

Source: NABARD Annual Reports 2011-12¹⁴ and 2018-19. (P)= Provisional.

¹³ www.mospi.gov.in/sites/default/files/publication_reports/KI_70_18.2_19dec14.pdf (Accessed on 14.01.2020 at 9.48 P M)

It is found from the above table-2 that the total amount of Ground Level Credit (GLC) to agriculture and allied sector was Rs. 5,11,029 crore in 2011-12 which increased to Rs. 12,54,762 crore in 2018-19. The said data reveals that in order to provide the institutional credit commercial banks are playing a dominant role with compare to RRBs and Cooperatives.

In the post- nationalisation of banks in India, the institutional credit agencies have been achieved a spectacular progress in terms of the scale and outreach. The Banking Institutions not only act as the observers of their credit but also take an active role in initiating such activities wherever they are not already in operation. The importance of banking institutions in promoting rural development in India and also encouraging the saving of the community, mobilized the deposits of the maturity and liquidity and extended the resources by way of loans for agriculture, industry, transport, commerce and allied activities as well as to the government for various development purposes.

Under the provision of Section 21.(1) of the NABARD Act, 1981¹⁵, NABARD provides refinance, loans and advances through various institutions (i.e. Commercial Banks, Regional Rural Banks, Co-Operative Banks and others) for the purpose of covering both investment and production credit in farm and non-farm activities. NABARD formulates policies for its refinance business (short and long-term credit) and direct business, keeping in mind of promoting national programmes and missions, maintaining regional and inter-sectoral balance, improving health status of the rural financial institutions.

¹⁴ NABARD Annual Reports 2011-12, pp. 81. Available at: https://www.nabard.org/auth/writereaddata/tender/0609161051AR_2012-13_E_fullrr.pdf (Accessed on 21.09.2019 at 07.17 am)

¹⁵ Section 21.(1) of the NABARD Act, 1981. The National Bank may provide by way of refinance, loans and advances, repayable on demand or on the expiry of fixed periods not exceeding eighteen months, [to State cooperative banks, central co-operative banks]1, regional rural banks, or to any financial institution or to any class of financial institutions, which are approved by the Reserve Bank in this behalf, for financing- (i) agricultural operations or the marketing of crops, or (ii) the marketing and distribution of inputs necessary for agriculture or rural development, or (iii) any other activity for the promotion of or in the field of agriculture or rural development, or (iv) bona fide commercial or trade transactions, or (v) the production or marketing activities of artisans or of small-scale industries, industries in the tiny and decentralised sector, village and cottage industries or of those engaged in the field of handicrafts and other rural crafts.

Table- 3

**Agency Wise Disbursement of Short-Term (ST) & Long-Term (LT)
Refinance as on 31st March, 2019 (Amount in Rs. Crore)**

Agency	Purpose	
	Short-Term (ST)	Long-Term (LT)
StCBs	73,143	6,464
RRBs	16,946	13,862
SCBs	--	54,082
NBFCs	--	12,764
SCARDBs	--	1,936
NABARD Subsidiaries	--	1,146
Total	90,089	90,254

Source: NABARD Annual Report, 2018-19¹⁶.

Note: StCBs = State Co-operative Banks, RRBs = Regional Rural Banks, SCBs = Scheduled Commercial Banks, NBFCs = Non Banking Finance Companies, SCARDBs = State Co-operative Agriculture and Rural Development Banks.

It is found from the above table-3, during 2018-19, an amount of Rs. 90,089 crore was disbursed to StCBs (Rs. 73,143 crore) and RRBs (Rs. 16,946 crore) to meet the seasonal credit demand for rural economic activities [i.e. Short Term Seasonal Agricultural Operation (ST—SAO), additional ST-SAO and ST(others)]. On the other hand, NABARD provided Rs. 90,254 crore to different agencies for Long-Term (LT) refinance. The Long-Term (LT) credit has been disbursed for both Agricultural and Non-Farm activities [i.e. Dairy Development, Farm Mechanization, Fisheries, Forestry, Land development, Minor Irrigation, Bio-Gas, Plantation and Horticulture, Rural Housing and SHGs etc.]

In order to achieve Sustainable Development Goals (SDGs), poverty alleviation and inclusive growth, NABARD is taking an active part in various Government of India sponsored programmes and schemes like Pradhan Mantri Jan Dhan Yojana (PMJDY), Pradhan Mantri MUDRA Yojana, Pradhan Mantri Awas Yojana (PMAY) and Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) etc.

In addition to this, NABARD established a Tribal Development Fund (TDF) with an initial corpus of Rs. 50 crore out of its profit in the year

¹⁶ NABARD Annual Report 2018-19, pp. 73-77.
[https://www.nabard.org/auth/writereaddata/tender/3107191001NAR 2018-19 \(E\), Web-RGB \(Checked - Final\), 2019.07.29, 0830hrs.pdf](https://www.nabard.org/auth/writereaddata/tender/3107191001NAR 2018-19 (E), Web-RGB (Checked - Final), 2019.07.29, 0830hrs.pdf) (Accessed on 15.10.2019 at 9.41 a.m)

2003-04 for achieving sustainable development of the tribal population. NABARD has taken 748 projects which covered 5.35 lakh families across the country and also sanctioned the amount of Rs. 2,198 crore as on 31st March 2019¹⁷.

7. Role of NABARD in supporting the SHG-Bank Linkage Programme (SHG-BLP)

A Self Help Group (SHG) is a group of 10-20 individual members who by free association come together for a common collective purpose from the same village, community and even marketing neighborhood, who operate on the principle of self-help, solidarity and mutual interest. These people are having same economic and social status at the village level and the Self Help Group (SHG) can be registered or unregistered. The concept of SHG in India was introduced in 1985 and as a result of which a pilot scheme was launched by NABARD in 1992 known as Self Help Group Bank Linkage Programme (SHG-BLP), thus, SHG act as a financial intermediary so as to improve the livelihood and quality of life of the rural poor¹⁸. At the beginning, the SHG-Bank Linkage Programme started with 225 credit linked groups and a loan amount of Rs. 29 Lakh in 1992, but within 3 years 4750 SHG were credit linked with different banks with a loan of Rs. 6.06 crore. The overwhelming success of the pilot led to Reserve bank Of India (RBI) mainstreaming SHG-BLP as normal business activity and finally it become priority lending activity in 1996¹⁹. Self Help Group Bank Linkage Programme (SHG-BLP) was good for both sides. The banks were able to inject a huge amount of credit into the rural market like the low-income households, transactions cost were low and also high repayment rate. On the other hand the SHGs were able to improve their operations with more financing and more credit products become available to them.

The main objective of SHGs is to include the habit of thrift, saving and banking culture to gain economic prosperity through credit. The most important component of SHG is the mobilization and organization of women towards the basic strength of solidarity, informality and collective action. Self Help Group methodology is a novel approach in development of economics and it can create a unique, alternative, need-based credit delivery mechanism by pooling their insufficient resources for catering to their consumption and occupational requirement²⁰. According to Pandit

¹⁷ *Ibid.* Pp. 46-47.

¹⁸ Shruti Agarwal and Dr. O. P. Singh, Role of Self Help Groups in India, Journal of Management and Social Science, Vol. 1, Issue 4, August, 2014. Pp. 4-14.

¹⁹ Status of Micro Finance in India, NABARD 2018-19. https://www.nabard.org/auth/writereaddata/tender/1207192354SMFI_2018-19.pdf (Accessed on 04.01.2020 at 11.12 P.M)

²⁰ Majid Karimzadeh, Ghayoum Nematinia and Masoud Karimzadeh; Role of Self Help Groups through Micro-finance for poverty alleviation and Micro-Entrepreneurship of

Jawaharalal Nehru, the first Prime Minister of India, “*Freedom depends on economic condition even more than political. If women are not economically free and self-earning, she has to depend on her husband or son or father or someone-else and dependents are never free.*”

The SHGs are classified into five categories are as follows-

- i) Model I: SHGs formed and financed by banks.
- ii) Model II: SHGs formed by NGOs and formed agencies but directly financed by banks.
- iii) Model III: SHGs financed by banks using NGOs as financial intermediaries.
- iv) Model IV: NGO guided but self-supported SHGs.
- v) Model V: Completely Self-Supported SHGs²¹.

Table- 4

Progress of SHG-BLP as on 31st March 2019.

Particulars	Number of SHGs (lakh)	Amount (Rs. In Crore)
Savings with banks	100.14	23,325
Loan disbursed	26.98	58,318
Loan outstanding	50.77	87,098
NPA level (%)		5.19
No. of Members (lakh)		122.37
Average loan disbursed per SHG (Rs. In lakh)		2.16

Source: Status of Micro Finance in India, NABARD 2018-19 and Annual Report NABARD 2018-19.

It is found that in the above table-4, the SHG-Bank linkage programme has grown exponentially and reached many a milestone with a total membership of about 1.14 crore groups covering 12.37 crore households across India since inception. The SHG-BLP become the largest microfinance programme in the world with total deposits of Rs. 23,325 crore. As on 31st March 2019, the programme has made an indelible mark on the Indian financial landscape by extending loan disbursement of Rs. 58,318

women; Conference on Inclusive Growth and Microfinance Access, Banaras Hindu University; January 2011.

²¹ R Uma Devi; An evaluative study on the role of Self-Help Groups in Empowering women in India; The International Journal of Management; Vol 2. Issue 1; January 2013.

crore and a loan outstanding of Rs. 87,098 crore. The average loan disbursed per SHG has touched of Rs. 2.16 lakh. It is also seen that the Non Performing Asset (NPA) has reached at 5.19 % is quite remarkable.

7.1 Social impact of SHG-Bank Linkage Programme (SHG-BLP) in India

7.1.1 Employment

Since inception the implementation of SHG-BLP has created 12.34 crore Self-employment opportunities for India through establishing their own micro-enterprises. Another achievement of this program is that NABARD provided a cumulative grant assistance of Rs. 132.91 crore to Women Self-Help Groups (WSHG) till 31st March, 2019 and also cumulatively around 2.10 lakh participants received training and capacity building programme under WSHG fund support.

The women of rural India are economically and socially empowered after creating self help groups among themselves. This empowerment cannot be transformed or delivered it must be self generated and it allow them to take control over their lives.

7.1.2 Decision-making within the Household

The social impact of the SHG program increased involvement in Decision-making, awareness about various programs and organizations, increased access to such organizations, increased expenditure on Health and Marriage events, there is a Change in the attitude of male members of the families, now they are convinced about the concept of SHG and encourage women to participate in the meetings and women reported that they have savings in their name and it gives them confidence and increased self respect. Within family the respect and status of women has increased. Children Education has improved significantly. Especially girl education was very low but now SHG members are sending their children including girls to school. The Sanitation in

Members' households have improved and it has led to better health in members' families. Now women are taking treatment from qualified doctors, even if they have to travel to nearby towns. Members are now confident enough to raise social status²².

²² A Sundaram, Impact of Self-Help Group in Socio-economic development of India, IOSR Journal of Humanities and Social Science (JHSS), Vol. 5, Issue 1 , Nov-Dec 2012, pp.20-27.
<https://pdfs.semanticscholar.org/f27e/e7d81e6bb4c88582ebd28665e31ca5b8b70b.pdf>.
(Accessed on 11.01.2020. at 01.08 P M).

7.1.3 Participation in Local Government

Because of SHG, women know about their local political institutions such as the Gram Panchayats and have better knowledge of where to report certain types of grievances. As part of the political empowerment process, it is a pertinent fact that many women have not only been elected to the Grama Panchayats but have become the role holders too.

In a majority of the cases, the women perceived themselves as now having some influence over decisions in the political life of village, and in a smaller number of cases, the women named their participation and influence in village political life as an important and note-worthy change. However, in general, the opportunities available to the women to participate in village life were limited, as most of the village processes were still being male-dominated and patriarchal. Though the SHGs generate positive impact on the rural economy through empowering women and enhancing the rural income of those participant households, the issue of group size has been of long standing concern²³.

7.1.4 Social Justice

Social justice is the presence of moral and ethical conduct in areas that are historically typified with backward and abusive customs. There have been several occurrences of SHGs resolving disputes between members and the community at large. These instances include initiating legal action, arbitration, divorce and others. While there have long been dispute resolution mechanisms in villages, in the past it was controlled by men. Now, there are instances of women, SHG members, being involved in resolving disputes. Whether or not the women are working for their own interests or in the case for justice varies, regardless SHGs' impact on the political arena is certainly being seen also in social justice, albeit in a slow and evolutionary²⁴.

7.1.5 Change in Family Violence with increase in self confidence among Members

The SHG helped to improve members' talent, leadership qualities and status in their family. They are getting more knowledge about banking and government activities which feel them more confident and find respect in their own villages. The family members changed their attitudes towards them after the financial support to their family. In several times the women group members revealed that involvement with SHG reduced the family violence due to their economic improvement.

²³ *Ibid.* pp. 20-27

²⁴ C S Reddy and Sandeep Manak; Self-Help Groups: A keystone of Microfinance in India- Women empowerment & social security; Mahila Abhivruddhi Society, Andhra Pradesh; October 2005.

7.1.6 Financial Inclusion and Social Security drive in E- Shakti Project

NABARD launched “E-Shakti” a pilot project for digitization of SHG in March 2015 in Ramgarh district (Jharkhand) and Dhule district (Maharashtra). The prime objective of E-Shakti is to capture the demographic and financial profile of the SHG as well as their members, so as to provide them all sort of financial services along with increasing the bankers’ comfort in credit appraisal and linkage. During January to March 2019, NABARD initiated a large scale financial inclusion and social security drive among SHG in the 100 districts under E-Shakti Projects to accelerate the opening of savings or Jan Dhan accounts, maximize enrolments into Atal Pension Yojana and other micro-pension policies, and increase subscriptions to micro insurance schemes like Pradhan Mantri Jeevan Jyoti Bima Yojana and Pradhan Mantri Suraksha Bima Yojana. As a result, 3.82 lakh fresh accounts were opened and cumulative details of 9.96 lakh accounts were captured under E-Shakti projects. It is also found that 47.91 lakh members were captured under E-Shakti Projects, 21.37 lakh i.e. 44.60 % of the total held Jan Dhan or other savings bank accounts, 2.60 lakh i.e. 5.43 % of the total were enrolled into micro-pension plans, 9.29 lakh i.e 19.38 % of the total had life insurance and 12.57 lakh i.e. 26.23 % of the total had health insurance²⁵.

7.1.7 Livelihood and Enterprise Development Programme (LEDP)

One of the goals of the SHG-Bank linkage programme (SHG-BLP) is to generate income and alleviate poverty through livelihoods. With a view to creating sustainable livelihoods among SHG members and to create maximum impact of skill upgradation with hand holding and credit linkages the Livelihood and Enterprise Development Programme (LEDP) was launched by NABARD in December 2015²⁶. Around 61,000 SHG members were supported for setting up livelihoods through 532 LEDPs up to 31st March 2019²⁷.

8. Conclusion

From the above analysis it is observed that credit is an indispensable input for the agricultural and rural development process. The farmers require credit for capital investment as well as working capital for effective change in scale of production and technology. In this regard, the establishment and

²⁵ NABARD Annual Report 2018-19. Pp. 52.

²⁶ NABARD Annual Report 2015-16. Pp. 87. Available at: <https://www.nabard.org/auth/writereaddata/tender/0609160550Annual-Report-2016.pdf> (Accessed on 21.09.2019 at 06.48 am)

²⁷ NABARD Annual Report 2018-19. Pp. 54. [https://www.nabard.org/auth/writereaddata/tender/3107191001NAR 2018-19 \(E\), Web-RGB \(Checked - Final\), 2019.07.29, 0830hrs.pdf](https://www.nabard.org/auth/writereaddata/tender/3107191001NAR 2018-19 (E), Web-RGB (Checked - Final), 2019.07.29, 0830hrs.pdf) (Accessed on 15.10.2019 at 9.41 a.m)

participation of NABARD in agricultural financing has quantitatively and qualitatively improved the institutional credit delivery system in India.

Majority of the population of India concentrated in rural areas and they are suffering from poverty, unemployment and socio-economic inequalities. The above study revealed that NABARD is a historical landmark to achieve Sustainable Development Goals (SDGs) through generating employment opportunities and taking various poverty alleviation programmes with help of Government of India. NABARD is also taking active role to improve the rural infrastructure through Rural Infrastructure Development Fund (RIDF).

With an aim to provide adequate refinance support to Commercial banks, Regional Rural banks and Cooperatives, NABARD act as a perfect liaison with the government of India, the state governments, the Reserve bank of India (RBI) and other national level institutions concerned with policy formulation.

In order to give focus to rural masses, the microfinance of NABARD has remarkable success and emerged as one of the largest microfinance programmes in the world through its SHG-Bank Linkage Programme (SHG-BLP). Around 1.14 crore SHGs are getting financing and training support through SHG-BLP as on 31st March 2019. It is clearly playing a central role in the social lives of the poor specially the rural women. It changed the social status and standard of living of rural women through the economic independence.

Finally to conclude, the overall performance of NABARD can be said as satisfactory to achieve its aims and objectives. The NABARD also acted as an apex institution of institutional credit as well as development institution for agricultural and rural development in true sense. Henceforth it can be said that the establishment of NABARD served a fruitful purpose, the benefit of which is available to the people of our country in accordance with the main goal that was to be achieved as per the requirement of the Preamble of the Constitution of India

Role of Central Armed Forces in Combating Cross Border Crimes: A study of Indian legal Framework

Joyjit Choudhury¹

Abstract

“For to be free is not merely to cast one’s chains, but to live in a way that respects & enhances the freedom of others”. - Nelson Mandela

Human trafficking is a criminal offence or a crime against humanity. It is a problem not only in SAARC countries rather it is a global issue. Human trafficking has become a multinational trade, making billions of dollars at the expense of millions and millions of victim, many of them includes young girls and children, who are deprived of their dignity and freedom. The porous border between India, Bhutan, Nepal and Bangladesh and lack of proper law for the implementation to combat human trafficking for sexual exploitation has led to the rise in the rate of trafficking. It has been decades since the SAARC has been formed but till today no such laws has been implemented to combat human trafficking in any form. Nepal, Bhutan and Bangladesh being the closest neighbors of India having similar demographic features, cultural heritage, economic stability, similarity of customs and traditions etc, have accounted to the human trafficking in the border areas and cross border areas which has become very difficult to control.

Keywords: Cross Border Crimes, Human Trafficking, Smuggling, South Asia, North Bengal, Crimes, Prostitution, SAARC Countries, Public International Law, Constitution of India, etc.

1. Introduction

Human Rights- two simple words but when put together they constitute the very foundation of our existence. Human Rights are commonly referred to as inalienable fundamental rights enshrined under the constitution of India 1950, to which a person is inherently entitled simply because he or she is a human being.

Concept of human rights can be traced back to the philosophy of natural law school and the main philosophers of the schools Locke and Rousseau had explained the concept of natural as human rights.

According to Locke, “man is born with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature” and he has by nature a power to preserve his property- that is, his life, liberty and estate, against the injuries and attempts of other men”². Thus, the concept of human rights represents right to life, liberty and

¹ Research Scholar, Department of Law, University of North Bengal

² Paton: Jurisprudence

property and an attempt to protect the individual from oppression and injustice.

Today we are living in a world that has to a great extent accepted the outright control of one human being on the other, and regionalism has shockingly implied both an increase and decrease in the rate of crimes in the rising 21st century where the greatest challenge that the world is now facing is that of human trafficking and terrorism.

The rising level of human trafficking both for prostitution and slavery has become a rising trend in the globe today which has become a global issue and is multiplying in the speed of a cancerous cell which has mainly been accounted to rise due to poverty, illiteracy, unemployment, low income, domestic violence, natural disaster (as in case of Nepal earthquake) etc.

It has become a global issue today where no country can admit that they have not been affected by it at all. It is not always necessary that such crimes takes place only in urban or rural area, it may occur anywhere but usually happens in a poorer region where people are shown the lifestyle of the glittering rich countries and somewhere it is rightly said “ everything that shines is not gold”, and this is exactly what happens with the victims of trafficking.

Trafficking of human is a gross violation of human rights and is indeed the fastest growing criminal industry today. Every year millions of women , children and even men to a certain limit have been trafficked across the different borders and also within their own country mainly for prostitution, sexual slavery, commercial sexual exploitation for the traffickers or others,³ forced marriage, bondage, child labour, organ trafficking and also an armed combatants by some terrorists and insurgent groups etc.

Human terrorism has a direct impact on the facilitation of human trafficking and especially upon the right to life, liberty and physical integrity of the trafficked beings. Terrorists acts can destabilize governments, undermine civil society, jeopardize peace and security, threaten social and economic development, and may especially negatively affect certain groups. All of these have a direct impact on the enjoyment of fundamental human rights.

Human trafficking has been established as the third largest offence worldwide, which contributes to the sum of profit, which is being earned by the organized groups in charge of running this racket. On an average

³ <http://www.Amnesty.org.au> , last accessed on 15th August, 2019.

6,00,000 to 8,00,000 women and children have been trafficked.⁴ This estimate does not include those trafficked within their own countries or missing children.⁵ Of these 70 percent are women and 30 percent are children.

Human trafficking at present has become a transnational organized crime, where no member state of the South Asian Association for Regional Cooperation can come forward and claim that its borders are not affected by it and that they have not been a party to this rising trend of human trafficking.

Human trafficking is a great violation of human rights, which has taken the shape of a trans boundary criminal activity. Therefore, governments and various volunteering organizations are trying to eradicate the problem of human trafficking or at least mitigate it by detecting more and more cases of illegal activity in different countries of the world. Despite every effort the issue remains a global problem till date. Every year measures are undertaken to overcome this global issue but no permanent remedy has still been found to eradicate it completely. The United Nations And even the Human Rights Commission are working towards finding a permanent solution to this trans boundary criminal act.

According to the “SAARC Convention On Prevention And Combating Trafficking in Women and Children for Prostitution”⁶, “Trafficking” means the moving , selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person who is subjected to trafficking”.⁷

The definition is a very comprehensive one comprising all forms of human trafficking it is evident from the definition that the ‘trafficking of individuals’⁸ for commercial sexual exploitation has three constitute elements, such as the act, i.e. recruitment, transportation, transfer, harboring or receipt of persons; the means i.e. threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim. The last element is the purpose i.e. sexual exploitation, forced labour, slavery or similar

⁴ Human Trafficking, Lok Sabha Secretariat Parliament Library and Reference, Research, Documentation and Information Service available at <http://164.100.47.134/intranet/HUMAN%20TRAFFICKING.pdf>

⁵ *ibid.*

⁶ https://www.unodc.org/documents/humantrafficking/2011/Responses_to_Human_Trafficking_in_Bangladesh_India_Nepal_and_Sri_Lanka.pdf

⁷ Article 1(3) of the “SAARC Convention On Prevention And Combating Trafficking in Women and Children for Prostitution.”

⁸ *supra*, note 3.

practices and the removal of organs.⁹ And ‘trafficking in human being’ means selling and buying of human being like goods and includes immoral traffic in women and children for immoral and other purposes.¹⁰

The conceptualisation of the issue of human trafficking is most vividly thought to be for the sole purpose of prostitution but the issues involved in the conceptualization of the victimhood reaches much beyond it. Human trafficking can be also linked to the rising terrorism terror worldwide due to extortion of every vulnerable group of people. Men, women, children, educated, uneducated, aged, specially aided people and all forms of people who are vulnerable in the society falls a victim in the chain of trafficking and terrorism.

Human trafficking is proven to be one of the most pervasive form of exploitation and infringement of basic human rights of the vulnerable groups. It has become a major social and political concern globally as well as nationally.

Human trafficking is a grave violation of human rights. Until 2000 there was no internationally recognized definition of human trafficking. The definition of the human trafficking under different legal system is given below:

In 2000, Article 3 of the “UN Protocol to prevent, suppress and punish trafficking in persons”¹¹ defined the human trafficking as the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of person having control over another person, for the purpose of exploitation.¹²

According to the U.S. law called the “trafficking Victim Protection Act, 2000” trafficking in persons is defined as: All acts involved in the transport, harboring, or sale of persons within national or across international borders through coercion, force, kidnapping, deception or fraud, for purpose of placing persons in situations of forced labor or services, such as forced prostitution, domestic servitude, debt bondage or other slavery-like practice.¹³

According to a recent survey women are bought and sold with impunity and trafficked to other countries from different parts of India. They

⁹ *Ibid.*

¹⁰ *Raj Bahadur v. Legal Remembrancer, Government of West Bengal*, AIR 1953 Cal. 522.

¹¹ 34e0018a-fe30-44a8-8e06-e99a6060210f

¹² Article 3 of the UN. Protocol to prevent, suppress and punish trafficking in persons.

¹³ Section 102 of the “Trafficking Victims Protection Act, 2000, United States.”

are forced to work as sexual workers undergoing several exploitation and abuse. These women are the most vulnerable group in contracting HIV infection.¹⁴ Due to poverty, gender discrimination, illiteracy, lack of employment opportunity, lack of awareness and lack of good governance these women are easily trapped in trafficking. The position is same in almost all the SAARC countries.

2. Human Rights Violation Of The Vulnerable Groups

In modern times, it is widely accepted that the right to life with dignity and right to liberty is the very essence of a free society and it must be safeguard at all times. Trafficking is a serious type of violation of human rights since ancient times.

Since the dawn of civilization human being has been enjoying the human rights. In this twenty first century with the advent of science and technology, people have entered into the space age and globalization.

The entire universe has become a global village. Violation of basic human rights of the vulnerable groups especially women and children have become a rampant that we as individuals need to reassess whether we become more civilized or uncivilized.

3. Trafficking And Prostitution

Due to limited economic opportunities, illiteracy, existence of porous borders in the South Asian Region of India, Nepal and Bangladesh and low socio-economic and cultural status, the majority of trafficking victims are women and girls. It is very often seen that those women and girls, who are involved in marginalized livelihoods, deserted by their husbands or families, victims of abuse and violence, and are from disadvantaged communities and extremely poor families, are more vulnerable to trafficking. In SAARC region, victims are from all areas, but most targeted are those which are traditionally disadvantaged and marginalized groups.

In India, girls and women, mostly from the northeast are taken from their homes and sold in faraway states for sexual exploitation. Parents in tribal areas think that they are sending their young girls for better life in terms of education and safety. According to National Human Right Commission of India,¹⁵ over 40,000 children are reported missing every year of which 11,000 remain untraced.¹⁶

¹⁴ [www.awadindia.org/social-issues/women trafficking in India](http://www.awadindia.org/social-issues/women%20trafficking%20in%20India)

¹⁵ http://nhrc.nic.in/documents/publications/TheProtectionofHumanRightsAct1993_Eng.pdf

¹⁶ <http://www.mapofindia.com/my-india/government/child-trafficking-indias-silent-shame>.

Trafficking into the brothels of India and domestic & sexual slavery in the Middle East is a historic trade with between 5,000 and 12,000 girls aged from as young as 7 years old disappearing from Nepal every year.¹⁷ An estimated 200,000 girls from Nepal are working in brothels in India.¹⁸

The average life span of a girl working in prostitution in India is just 34 years.¹⁹ The United Nation cites human trafficking as the third largest international criminal industry, with traffickers making an estimated US \$ 32 billion annually.²⁰

4. Trafficking in South Asia

Human trafficking is one of the biggest problem which has emerged in South Asian countries in the recent times. The South Asian nations as a whole has put in some serious efforts in combating the problem but lack of coherence and statics on number of victims has always added to the complexity of the matter. According to International Journal of Gynecology & Obstetrics²¹ 1.5 to 2 million women, men and children are trafficked around the world and almost 35% to 40% of them are from SAARC region.

The rate of human trafficking in SAARC mentions in increasing at an alarming rate and most of the victims are women, who are usually forced into prostitution and sexual exploitation. The South Asian countries especially India and Bangladesh are considered as the biggest sex market of the world. More than 60% of trafficked women in India are adolescents of age of 12 to 16 years.²²

The main reason of inflation of trafficking in these regions are considered as poverty, migration, urbanization etc. one of the biggest problems arising from this is the increasing number of AIDS victims, according to WHO report of 2012 more than 40% of prostitutes in India suffers from HIV AIDS which is a very large number.

The following section shall put forward the country wise trends in sphere of human trafficking with special reference to SAARC countries.

4.1. India

Human trafficking is an illegal activity prevalent all over the world and in India too. There are many reasons which can become root cause such as migration, natural disaster, poverty and absence of employment level, sex tourism and loopholes in the law dealing with it and lack of implementation

¹⁷ <http://www.asha-nepal.org/pages/the-issues/trafficking.php>

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ ljgo.org.(2016) available at <http://www.ljgo.org/>

²² UNDP report, 2014

procedure, war/internal armed conflicts in the country, porous borders, low level of education, low regard of women's right, cast driven victim and these are not exhaustive.

Poverty can be said as a major reason²³ for such activity but not for sole one. In India there are millions making it hub for world's largest poverty country. Government introduced many schemes to alleviate poverty in a long run to avoid trafficking at large such as MNREGA, MID-DAY meal, Dhanlakshmi, Sampurna Gramin Yojna (SGRY), Swarnajayati Gram Swarozgar Yojna (SGSY), etc.

One of the other root cause is a lack of comprehensive data in the country about the trafficked people, traffickers, procurers, brothel-keeper, and the people associated with it. In order to combat with evil and to net the criminal perpetually it is necessary to strengthen the reliable study on the crime which is widespread, regarding nature and extent. Unless a figure is before the table it is tough to make approaches in fighting the bad cause. Adding to this, migration is also a major reason which is generally the result of poverty, in search of livelihood and food security may be either due to natural phenomenon,²⁴ it is a situation where people can be trafficked easily by using bait of employment²⁵ and better future which is surely a fraud. Migration could be within the country or illegally between countries.

India is also a destination for women and girls from Nepal and Bangladesh trafficked for the purpose of commercial sexual exploitation. Nepali children are also trafficked to India for forced labor in circus shows and domestic helps. Children from Nepal are trafficked for labor in industrial sectors. Indian women are trafficked to middle east for commercial sexual exploitation. Indian migrants who migrate willingly, every year to the Middle East and Europe for work as domestic servants and low skilled laborers also end up being a part of the human trafficking industry and once they are into it, there is no way out of the exploitation.

Children below eight years are forced into begging. The older ones are pushed into child labor. Organised gangs kidnap minors and transport them to other cities. A rough estimate prepared in 2008 by an NGO, End

²³ Sadika Hameed, Human Trafficking in India: dynamics, current efforts and intervention opportunities for the Asia foundation VI (2010), available at <https://asiafoundation.org/resources/pdfs/StandfordHumanTraffickingIndiaFinalReport.pdf>, accessed on April 24, 2019.)

²⁴ DC correspondent, "Human trafficking at Indo-Nepal border after earthquake" deprei chronicle, last modified January 10, 2016 (last accessed on 27th April, 2019).

²⁵ A large proportion of cross border trafficking in Bangladesh is due to migration in search of employment.

Children's Prostitution in South Asia tourism, reveals that there are around 2 million prostitutes in India, 20% of them being minors.²⁶

4.1.1. Trafficking in the State of West Bengal

The state of West Bengal in India is a major source, destination and transit point for victims of trafficking.²⁷ West Bengal borders the Indian states of Sikkim, Bihar, Orissa, Jharkhand and Assam and shares international borders with the countries of Nepal, Bangladesh and Bhutan.²⁸

The capital, Kolkata, is the trade and cultural center of the eastern India and Siliguri (the chicken neck of West Bengal) in the northern part of the state – acts as the gateway to Nepal, Sikkim, and Bhutan and also to North-East due to its strategic location.²⁹

The National Crime Records Bureau reports that in 2009 there were 160 registered cases of trafficking in West Bengal.³⁰ Although the reports of both governmental and other actors suggest that the actual number of trafficking cases is much higher.³¹ Two-third of all children who are trafficked in West Bengal is girls. Nearly 90 percent of those girls have either dropped out of primary schools or have never attended school,³² thus evidencing a strong link between lack of education and the risk of being trafficked.³³

Within West Bengal, the districts of Jalpaiguri, Darjeeling, North 24 Parganas and South 24 Parganas present particular challenges from a trafficking stand point. Jalpaiguri and Darjeeling, which are located in the north of West Bengal, have been facing problem of unsafe out-migration by individuals bound for Kolkata and other metropolitan cities in search of livelihood opportunities.

²⁶ Hindusthan Times, 11th October, 2012

²⁷ <http://documentslide.com/documents/final-report-girls-project.html>

²⁸ *ibid.*

²⁹ Sen and Nair, above n 17, 35

³⁰ National Crime Records Bureau, <http://ncrb.nic.in/CII-2009-NEW//cii-2009/Chapter%206star.pdf>.

³¹ Global March Against Child labour, South Asian March Against Child Trafficking, <http://www.globalmarch.org/childtrafficking/010307.php> and C. Bhattacharjee, - trafficking's second Haven, The Sunday Indian, 5 April 2009, reporting that: - it was nothing short of sensation when West Bengal Chief Minister Buddhadeb Bhattacharjee admitted on the floor of assembly that over 60,000 girls have been trafficked out of the state in just four short years.

³² D. Gupta, - Right to Protection: Decoyed Lives!, Tehelka (2009), http://www.tehelka.com/story_main43.asp?filename=cr071109right_to_asp

³³ *Ibid.* See also SANLAAP, Trafficking our children: a brief situational Analysis on the trend of migration, child marriage and trafficking in eight districts of West Bengal (April 2006).

For example, Kolkata, is generally considered as major trafficking destination center for brothel-based prostitution, along with Mumbai and Delhi. Trafficking of girls and women coming from the tea estates of these districts is prevalent in the entire region. As for North and South 24 Parganas, recent data report say that these districts are two of the most significant source areas for trafficking in the state of West Bengal.³⁴ Push factors include single crop growing fields, lack of livelihood opportunities and natural disaster.

A 2003 study of trafficking in Madhusudanpur, a village in South 24 Parganas, showed that every second to third household in the village lives off the income of a trafficked girl between the age of 13 to 15.³⁵

4.2. Bangladesh

Bangladesh is one of the most vulnerable countries for trafficking today due to a host of factors. These are the large population of Bangladesh, chronic poverty among large groups of people, ongoing natural disaster like cyclones, tornados, river erosion, drought, flood and lack of shelter during disaster periods. Moreover, rural-urban migration in search of work due to unemployment or natural disasters increases violence against women including the risk of being trafficked.³⁶

Bangladesh has a 4,222 kilometers long border with India covering 28 districts of Bangladesh and India as the main recipient country receive trafficked women through 20 transit points of Bangladesh Indian Border.³⁷ To understand trafficking in Bangladesh, we have to look at it both from the historical and geographical perspectives.

In 1947, Indian subcontinent got the independence from British colonization and was divided in two countries named India and Pakistan. Pakistan had two regions namely East Pakistan and West Pakistan and these were geographically located 1200 miles away from each other. At that time, Muslim families from India migrated to Pakistan and Hindus from Pakistan moved to India. From that period, there are many enclaves found in border between India and Bangladesh and India and Pakistan. These enclaves are small piece of land belonging to a nation other than that which surrounds them.³⁸

³⁴ S. Sen and M. P. Nair, *Trafficking in Women and Children in India* (Hyderabad: Orient Longman Private Limited, 2005).

³⁵ *ibid*, at 681.

³⁶ Sarker, Profulla C. And Panday, Pranab Kumar, "Trafficking in women and children in Bangladesh: A National Issue In Global Perspective" 2/2 AJSP, 1-13

³⁷ Shamim, I. (2001). Mapping of Missing, Kidnapped and Trafficked Children and Women: Bangladesh Perspective. International Organization for migration (IOM).

³⁸ https://www.unodc.org/documents/humantrafficking/2011/Responses_to_Human_Trafficking_in_Bangladesh_India_Nepal_and_Sri_Lanka.pdf.

There are 111 Indian enclaves in Bangladesh and 51 enclaves of Bangladesh in India. Bangladesh National Women Lawyers Association (BNWLA)³⁹ in their report shows that these enclaves are used to collect the survivors and they are trafficked through these enclaves easily by the traffickers.⁴⁰

Traffickers use route over land, air and water. Western border districts of Bangladesh, particularly Jessore and Khulna are widely used by traffickers. The main trafficking route is Dhaka-Mumbai-Karachi-Dubai. Many of the victims end up in Middle East nations.

In a report, it was claimed that a small number of women are taken directly by air from Bangladesh to Middle East and Europe as in Dhaka Airport Corrupt officers helped issuing necessary documents. Bangladesh is thus largely a source country as far as trafficking is concerned, from which women, men and children are trafficked into different sites of employment in the destination country. Apocalyptic days are gone by but some serious problems haunting it since its inception; human trafficking crisis is one of the vicious ones. It is alarming that Bangladesh has become a fertile breeding ground for national and international trafficking mafias and their local perpetrators.

Today Bangladesh is primarily a source country for persons who are trafficked to other South Asian Countries (Malaysia, Brunei and Palau), Middle Eastern Countries (Bahrain, Iraq, Jordan, Lebanon, Kuwait, Oman, Saudi Arabia, UAE).⁴¹ Recently many mass graves have been recovered in Malaysia, Thailand and Myanmar who are suspected to be the victims of trafficking from Bangladesh and neighboring countries and witnesses heinous brutality.

Bangladeshi men and women migrate willingly to Saudi Arabia, Bahrain, Kuwait, The United Arab Emirates (UAE), Qatar, the Maldives, Iraq, Lebanon, Malaysia, Singapore, Europe and other countries for work, often legally via some of the more than 1000 recruiting agencies belonging to the Bangladesh Association of International Recruiting Agencies (BAIRA).⁴²

These agencies are permitted legally to charge workers recruitment fees that are equivalent of a year's salary, but these recruiting agencies often charge additional amounts in contravention of government regulations.

³⁹ http://wiscomp.org/Publications/38%20%20Prespectives%2031%20%20Cooperation%20to%20Combat%20Cross%20Border%20Trafficking%20India_Nepal_Bangladesh.pdf

⁴⁰ Gazi, R. et. al. (2001). Trafficking of Women and Children in Bangladesh: An Overview. Dhaka: ICDDR, B. Center for Health and Population Research.

⁴¹ Human Trafficking Report on Trafficking Persons, 2013.

⁴² Bangladesh Global Slavery Index, 2013.

These exorbitant fees place migrant workers in a condition of debt bondage, in which they are compelled to work out of fear of otherwise incurring serious financial harm. There are reports of an increased number of Bangladeshi transiting through Nepal to obtain Nepalese visas and work permits for employment in the Gulf; some are trafficking victims.⁴³ Some Rohingya Refugees from Burma have been subjected to human trafficking.⁴⁴

4.3. Nepal

In South Asia, Nepal remains the top country that carries the burden of worldwide child and women trafficking followed by India. As far as cross border trafficking from Nepal to India and then to the Middle East is concerned, it has become a challenge to the governments and the law enforcement agencies and social activists. The recent earthquake in Nepal and its adverse effect on its tourism industry and the overall economy has coupled the problems.

Nepal, a land locked country bordered to the north by Republic of China, and to south, east and west by the Republic of India has always been a favorite hunting ground for the traffickers. Nepal is one of the least developed countries of the world, lacking in sufficient economic capital, infrastructure, and developed human resources to forge an independent path of development.

Overwhelmingly, agrarian in nature, 90 percent of its 21 million inhabitants rely on subsistence agriculture. Adult literacy is as low as 23 percent for females and 57 percent for males; infants and maternal mortality rates are the highest in South Asia. The historically high level of out migration of people searching for sustainable livelihood options is escalating. In certain districts in the country the out migration of men and women of prime productive and reproductive age is particularly high.⁴⁵ Trafficking is an important offshoot of migration in Nepal, and one of its most abusive forms.

The reason for trafficking of women and girls are myriad, ranging from poverty and the search for viable means of livelihood to the endemic social disadvantages suffered by women as a gender.⁴⁶ Other reasons may include individual compulsion and needs that fuel the desire to move, especially for young people, who may suffer abuse at home or merely wish

⁴³ Global Slavery Index, 2013.

⁴⁴ Bangladesh Narrative, 2013.

⁴⁵ Sangraula Yubaraj 2000. Draft study on Trafficking in Nepal. Kathmandu: Centre for Legal Research and Resource Development.

⁴⁶ Acharya, Usha. 1998. "trafficking in Children and Their Exploitation in Prostitution and Other Intolerable Form of child Labor in Nepal: A country Report." "with support from ILO/IPEC, Kathmandu and ASHMITA. 1998. "Efforts to prevent Trafficking in Women and Girls; A Pre Study for Media Activism." Kathmandu.

to explore the world. These reasons are many of the same reasons that people migrate from the countryside to the cities, and from one country to another.

Trafficking of Nepalese women and girls to Indian brothel was established in 1960. Even before the Rana rule in Nepal women required a special authorization to go to India. About 50 percent of Nepal's female sex workers have previously worked in Mumbai and more than 200,000 Nepalese girls are involved in the Indian sex trade.⁴⁷

According to the working agencies in anti-trafficking activities in Nepal, there is increasing tendencies in trafficking among Middle class women who are being trafficked to gulf countries under the veil of attractive jobs and handsome salaries. The magnitude of trafficking has increased over the years, but neither the extent nor the real expansion has been verified. The illegal structure of trafficking, community vested interests and lack of actual information/data and networking among stakeholders are the major constraints to preventive measures of trafficking.

Disadvantaged groups in all spheres of Nepali society plus the one and half decade long severe political instability and internal conflicts contribute to increasing vulnerability to trafficking. Many studies in the past revealed that the conflict induced inflows of women and girls to urban Nepal increased the commercial sexual exploitation and thus the internal trafficking too. Over the past few years, research has been a crucial component of anti-trafficking measures, but statistically data on trafficking victims remains widely varied. Figures range from 12,000 per annum as per an ILO Report to over 20,000 Nepali girls being trafficked to Indian brothels as per Maiti Nepal.⁴⁸ UNICEF (1998) shows that more than 20% of the total persons involved in sex work in Nepal are under the age of 16 years, with some young as 11.

Similarly, an ILO report shows that 29 districts of Nepal have a high occurrence of trafficking⁴⁹ where-as, UNIFEM study⁵⁰ identifies 39 districts as vulnerable compared to 26 identified by the government of Nepal. However, NGO's working these sectors claimed that 70 districts out of 75 are vulnerable in terms of human trafficking.

⁴⁷ Sangroula Y. Trafficking of Girls and Women in Nepal : Building a Community Surveillance System for Prevention. Kathmandu: Kathmandu School Of Law (Kathmandu), 2001.

⁴⁸ Mcgirk T. Nepal's Lost Daughters, "India's Soiled Goods. Nepal/India News 1997 Jan, 27.

⁴⁹ Hardman R. Prince brings hope to Nepal's rescued sex slaves, London Telegraph 1998 Feb, 9.

⁵⁰ New ERA. A situation analysis of sex work and Trafficking in Nepal. Kathamandu: New ERA/UNICEF, 1998.

These figures are based on trafficking cases reported in 2008. Nepalese girls, trafficked and sold into prostitution in India are abandoned when they infected with HIV. Out of the 218 Nepalese girls rescued in February 1996 from a Bombay brothel, 60-70% of them were HIV positive.⁵¹ Due to their highly marginalized status, female sex workers in Nepal have limited access to information about reproductive health and safe sex practices.

When we take a glance at human development indicators in the world, Nepal is lowly ranked. In 2004, 90% of Nepalese relied on subsistence agriculture, and 82% lived on less than \$ 2 US per day. This poverty specifically and disproportionately impacts women, in that it leads to the desire to migrate, which opens lanes for sexual trafficking and families begin to rely on young girls for income while investing in their son's future by providing them with an education.

Nepal's only 61% of girls are enrolled in school while 80% of boys were, and only 25% of women could read while 57% of men could. This investment in male offspring stems from the fact that sons are more likely to contribute economically to their families later in life, while women will be responsible for their families.⁵²

Based on the scenario parents sometimes sell their daughters, and husbands sell their wives to brothel. Parents are more likely to sell their daughters, since there is cultural preference for boys. That is largely because girls are considered economic burden since parents need to pay dowry upon marriage. This age of trafficking ranges from 7-24 years old, with the average being 15.⁵³

Nepal Earthquake and Human Trafficking

The tragic Nepal earthquake of 25th April, 2015 had shaken the whole world. This earthquake was said to be the largest of its kind. The death toll was above human imagination and the damage caused brought down the historical evidences of the country. Majority of people were rendered homeless while the ones who survived their lives were even worse as they had no one left with them and they kept searching for their dear ones in the rubbles.

⁵¹ Wadhwa S. Nepal- Facts on Trafficking and Prostitution, Coalition Against Trafficking in Women. In Fact book on Global Sexual Exploitation. Combating Human Trafficking in Asia. A resource Guide to International and Regional legal instrument, political commitments and recommendation practices, New York: Economic and social commission for Asia and Pacific, United Nation; 2003.

⁵² Wordpress, (n.d.). Dartmouth from Dartmouth edu:<http://sites.dartmouth.edu/NepalQuake-CaseStudies/human-trafficking/>

⁵³ Yngvdottir, A.E. (June 2016). The 2015 Earthquake in Nepal: Disaster Management and Human Trafficking. Reykjavik.

While the country was trying to overcome this tough period, it subsequently faced another problem with regards to human trafficking. Even after protection measures taken up by the Government of Nepal and several NGO's to curb human trafficking, the rate of traffickers increased tremendously. The main reason behind an increasing rate of human trafficking during that period was due to scarcity of food and money and the deteriorating living conditions that they were in. In order to search for better living conditions and a better life many people were trafficked and the basis of false promises and fraud.

Nepal earthquake 2016 is one of the vital reasons behind the rise in the rate of human trafficking for commercial sexual exploitation both internally and in the international level in the form of cross border human trafficking. There is news now and then in the news paper stating about young girls being found in railway stations and on verifying their whereabouts it is found that they belong to Nepal and unaware about their travel to India. Such girls are usually dragged and trafficked to the main centre, so that there are no problems while completing the assignment of the travel.

4.4. Bhutan

The geographical location of Bhutan as a landlocked country, sandwiched between two large nations has made its people vulnerable to traffickers and to them being trafficked. This is evidenced from historical records, which reveal that kidnapping and trafficking of people was a frequent reason for border disputes between the then British Raj in India and Bhutan⁵⁴.

Historically Bhutan served as a major trade route between India and Tibet, and there was frequent movement of people from both sides. The small population of the country was not able to till the lush and fertile valleys of Bhutan and as a result many people from the plains were trafficked into the interiors of the country. This gave rise to the establishment of serfs in the country, with many of them having been brought into the country either as captives following border skirmishes or as a result of having been trafficked. The serfs were bonded for generations to wealthy families and were mainly employed as labours.

The British Political Officer Pemberton noted in 1838, that there were some thousands of these serfs in the hills and were restricted to undertaking most of the menial jobs.⁵⁵ Many of them had married Bhutanese

⁵⁴ Collister P., *Bhutan and the British*, UBS Publishers' Distributors' Ltd, New Delhi; 1996 p 51, 66.

⁵⁵ Pemberton BB. *Report on Bhutan*. In: *Political Missions to Bhutan*. Asian Educational Services (Publishers), New Delhi 2001; p 81

people of lower grade and with children of their own did not find the heart to leave and go back to the plains in India. This system of modified slavery, also known as serfdom was to last for 120 years when His Majesty, the third King of Bhutan abolished slavery by royal edict in 1958.⁵⁶ In addition the third King implemented many other social reforms such as abolishing the caste system, granting equitable distribution property rights and improving the position of women in society.⁵⁷

The print media has been the only source of information on trafficking in Bhutan often writing about the heinous crime to inform and educate the public. Over the last few years it has also reported on few cases that were apprehended and charge sheeted by the courts. It is clearly evident from those reports that trafficking does occur in Bhutan, although in very small numbers. It also firmly establishes the country as both a source as well as a destination place for trafficking. Reviewing the media reports, the evidence as a source country comes from two articles published in Kuensel in 2010 about a 12 year old Bhutanese girl who was trafficked to Nepal and a 16 year old boy trafficked to Kashmir.⁵⁸ Both children were rescued and subsequent information provided by the children and further investigation by the Police confirmed these to be cases of trafficking in humans. Similarly as a destination country, the first case of trafficking in Bhutan involved a 16 year old girl trafficked from Darjeeling to work as a baby sitter in Bhutan.⁵⁹

Two of the victims were from Chukha and one was from Trashigang and they were rescued with the help of the police. The man was convicted of trafficking under section 154 of the Penal Code and also for harassment under section 462. All three victims were interviewed for this study and their story is presented as a case study in the box below. The case highlights the circumstances under which trafficking occurs and also the background of the victims.

5. Why Human Trafficking Is Still A Challenge In SAARC Countries

There is no definition of organised crime in either the SAARC⁶⁰ Convention on Mutual Assistance in Criminal Matters, 2008, or the SAARC Convention on Preventing and Combating Trafficking in Women and

⁵⁶ Singh N. Bhutan: A Kingdom in the Himalayas; Thomas Press India Limited, New Delhi; 1978; p 109

⁵⁷ Parmanand. The Politics of Bhutan, Retrospect and Prospect. Pragati Publications, Delhi, 1998; p 87

⁵⁸ Kuensel. Women Vendor detained; 24th August, 2010

⁵⁹ Bhutan Times. Human Trafficking from Bhutan; Available at: http://www.bhutantimes.bt/index.php?option=com_contents&task=view&id=1048&Itemid=1

⁶⁰ https://www.unodc.org/documents/humantrafficking/2011/Responses_to_Human_Trafficking_in_Bangladesh_India_Nepal_and_Sri_Lanka.pdf

Children for Prostitution, 2002.⁶¹ One of the challenges is that police authorities are not serious about human trafficking involving corruption factor in it.

The scenario is same everywhere whether defect in governmental policies, victim's rights (rehabilitation, employment, compensation, standard of living etc.), implementation procedures, prosecution and conviction, corruption. Practically the penal laws in all the SAARC countries are different although SAARC convention provides definition for the same, thus it will have a minimal impact on controlling the crime. However, it is useful in cooperation efforts and in making future policy for the South Asian Region which would help to combat trafficking.

As regard to Constitution application the situation differs in each country as while Bangladesh prohibits all forms of forced labour,⁶² talks of taking effective measures to prevent prostitution, and not sex trafficking.⁶³ In 2011, Bangladesh enacted special act in order to prevent and suppress all forms of human trafficking and protects the victims of human trafficking.⁶⁴ The duty of a state to protect children seems to be mute on trafficking⁶⁵ under Sri Lankan Constitution.

6. Legal Framework in India to Deal with Human Trafficking

In the South Asian region, countries have their own domestic legislation while an international instrument requires ratification by the domestic government to have legally binding effects. Thus, these countries are now monist.⁶⁶ But on the other hand relevance of international instruments cannot be discarded the only thing being that it is not uniform across South Asia.

The Constitution of India provides fundamental rights against human trafficking including forced labour. Above all, Constitution⁶⁷ is supreme legislation providing right against exploitation in the form of forced labour and traffic in human being but defining neither of them.⁶⁸

Constitution provides Fundamental Rights to its citizens as well as protection and ensures safety and security too from the danger. Even though

⁶¹ Ibid.

⁶² Constitution of Bangladesh, 1972, Article 34 (1)

⁶³ Constitution of Bangladesh, 1972, Article 18 (2)

⁶⁴ Human trafficking (Deterrence and Protection) Act, 2011

⁶⁵ Constitution of Sri Lanka, 1978, Article 27 (13)

⁶⁶ Legal regimes where treaties upon ratification become part of domestic law automatically without further procedural formalities.

⁶⁷ Constitution of India, Article 23.

⁶⁸ A large proportion of cross border trafficking in Bangladesh is due to migration in search of employment at 16

the laws are stringent, there are certain loop holes in the statutes which are dealing with trafficking and making it a criminal act. The following are the loopholes in various statutes in India:

a. Indian Penal Code, 1860

Before the criminal law amendment in section 370⁶⁹, Indian Penal Code, 1860, India, was not having inclusive definition i.e., covering all aspects for the offence of human trafficking. A complete Act has still not been enacted; there are different statutes in fragmented manner providing prohibition, prevention and prosecution of the offenders. This particular provision of Section 370 of Indian Penal Code, 1860 has very wide scope which includes within its ambit prostitution⁷⁰ or other forms of sexual exploitation, forced labour or service, slavery or practices. Section 366,⁷¹ 366A,⁷² 366B,⁷³ 367,⁷⁴ 371,⁷⁵ 372,⁷⁶ 373,⁷⁷ 374⁷⁸ are also included amongst laws to combat human trafficking.

⁶⁹ Trafficking of person.—(1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by— First.—using threats, or Secondly.—using force, or any other form of coercion, or Thirdly.—by abduction, or Fourthly.—by practising fraud, or deception, or Fifthly.—by abuse of power, or Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

⁷⁰ *ibid.*

⁷¹ Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid].

⁷² [366A. Procurement of minor girl.—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

⁷³ Importation of girl from foreign country.—Whoever imports into 3 [India] from any country outside India 4 [or from the State of Jammu and Kashmir] any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, 5*** shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.]

⁷⁴ Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.—Whoever kidnaps or abducts any person in order that such person may be subjected, or

b. The Immoral Traffic (Prevention) Act, 1956 (ITPA)

Some of the drawbacks in the ITPA, 1956 are that it continues to penalise the victims including the women and children of trafficking treating in the same line as of the traffickers, safe rehabilitation and corruption, lack of compensation schemes, prosecution of offenders, inadequate punishments to deter trafficking, poor infrastructure facilities, insufficient psychological care facilities, rapid prosecution are some of the issues which needs attention now and requires appropriate amendments for the prohibition of crime. Although India has a specific law on trafficking, it does not define trafficking, but defines ‘prostitution’ to have the usual attributes of trafficking for sexual exploitation⁷⁹.

c. Juvenile Justice (Care and Protection of Children) Act, 2000

For the rescued children it is necessary that a proper set is made where they can stay as part of rehabilitation programme and is also a legal mandate under the Juvenile Justice Act, 2000 for their protection especially minor girls. Even though juvenile home being requisite several states don’t have such facility, also they are sometimes overcrowded or are inadequately

may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

⁷⁵ Habitual dealing in slaves.—Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with [imprisonment for life], or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

⁷⁶ Selling minor for purposes of prostitution, etc.—Whoever sells, lets to hire, or otherwise disposes of any [person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

⁷⁷ Buying minor for purposes of prostitution, etc.—Whoever buys, hires or otherwise obtains possession of any [person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

⁷⁸ Unlawful compulsory labour.—Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

⁷⁹ UNDOC, engaging a person in prostitution with or without consideration and having sexual intercourse with a prostitute are examples, http://www.undoc.org/pdf/insia/Nat_Rep2006-2007.pdf. visited 24th April, 2017.

equipped. Apparently there is dearth in the mechanism dealing with it and is applicable only to minors below 18 years. Insufficient compensatory schemes or financial support and little knowledge of legal process to get assistance make the situation worse.

7. Implementation of International Treaties or Conventions in India

There are several national legislation to combat this illicit human trade as well international treaties and convention to deal with immoral trafficking. A positive step taken by India by formally ratifying International Protocol Relating to Human Trafficking that is the United Nations Convention against Transnational Organised Crimes (UNTOC) and its supplementary protocol which provides a roadmap for cross national collaboration as well as recommendations for enacting effective domestic human trafficking laws.

As already established, India is a monist it has its own regime to deal with implementation of international treaties and conventions that is dualist regime. It means that even after the treaties or convention are being ratified it does not have force of law in domestic courts automatically.⁸⁰ There is also another provision under the Constitution of India that states that, “*The State shall endeavour to foster respect for international law treaty obligations in the dealings of organised peoples*”.⁸¹

In *Gramophone Co. of India v. Birendra Bahadur Pandey*⁸², the Supreme Court held that there was no question that nations must march with the international community and the municipal law must respect rules of international law as nations respect international law. The comity of nations requires that the rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Legislation.⁸³

Further, the Supreme Court in *Vishaka v. State of Rajasthan*⁸⁴ established that provisions of international treaties might be read into existing Indian law in order to “expand” their protections. “In the absence of domestic law occupying the field, to formulate effective measures to check (certain evils), the contents of International Conventions and norms are significant for the purpose of interpretation.” Any International Convention that is not inconsistent with the Part III of the Constitution and in harmony

⁸⁰ National Commission to review the Working of the Constitution, “A Consultation Paper on Treaty Making Power under Our Constitution” (2001) available at <http://lawmin.nic.in/ncrw/finalreport/v2b2-3.htm>

⁸¹ Constitution of India, Article 51 (c), <http://www.lawschool.cornell.edu/Clinical-Programs/international-human-rights/upload/BiharBriefFINAL-2.pdf>

⁸² 1984 AIR 667.

⁸³ *Gramophone Co. of India v. Birendra Bahadur Pandey*, 1984 AIR 667

⁸⁴ AIR 1997 SC 3011, Para. 7.

with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.⁸⁵

8. Role of Central Armed Forces in Dealing with the Crisis

As per current surveys, it is observed that the central police forces play a vital role in managing and controlling trans boundary human trafficking activities. It is the sole responsibility of such governmental agencies to secure the border areas and boost a healthy, safe and habitable environment. Border management is a security function that calls for coordination and concerted action by various government agencies within our country. The aim is to secure our frontiers and safeguard our nation from the risks involved in the movement of goods and people from India to other countries and *vice versa*.

While some of these borders are properly fenced and require proper documentations for any form of transit, at the same time there are few border areas which are porous and transit of any form is easy as no documentations are required. It has been seen that when any third country tries to take passage into India through these porous borders they require proper documentations or else transit is prohibited. It is here that we get to see an increase in the rate of cross border crimes mainly in the Northern part of West Bengal including the small town of Siliguri which forms the chicken neck corridor of West Bengal connecting the rest of India with the North East of India and Sikkim. It also has border areas with Bangladesh, Bhutan and Nepal where the borders of Nepal and Bhutan are said to be porous and transition through these are very easy as no Visa or Passport are required. Here lies the major problem since the use of fake documentation is very prominent and common. The keen observations of the security forces of both the countries are always on high alert. Whereas the border area of Bangladesh has been fenced to a certain limit and require a proper visa and passport for any transit to take place.

In the border areas of Pakistan the only threat that the country faces is of terrorism and war attacks. To the certain limit money laundering is also carried out. But through the border areas of Nepal, Bangladesh and Bhutan a number of illegal and unethical acts are carried out such as human trafficking, organ trafficking, supplying of drugs and narcotics etc., which is again a contributing factor in human trafficking. There are various remedial ways opted by the Ministry of Home Affairs and the Ministry of Defence of all the countries to curb out menace. Yet due to the loopholes in the international laws the scope widens day by day. The international covenants need proper channelization for such upliftments. The UNO has also put forward its major concern in regard to the issue of human trafficking and

⁸⁵ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

violation of human rights due to it. Various additional powers are delegated to the security forces to curb out and control such menace but often it is observed that the powers are misused.

However, the police and the armed forces have come together to overcome this problem. Likewise a proper coordination between the four pillars of the society i.e., communication, law, production and economy, must prevail to eradicate human trafficking.

9. International Human Rights Law and its Ratification by SAARC Countries

Majority of the SAARC member states are yet to ratify the optional protocols (OP) to the International Convention on Civil and Political Rights (ICCPR) and the convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which would enable the respective bodies to receive individuals complaints on violation of these treaties.⁸⁶ Only Maldives and Nepal have ratified both optional protocols, while Sri Lanka has ratified the CEDAW OP only. Among the SAARC countries, Bhutan are yet to ratify the ICCPR, International Convention of Economic, Social and Cultural Rights (ICESCR), and the Convention Against Torture (CAT). Sri Lanka is the only member to have ratified the Convention on the Rights of Migrant Workers (CMW). Only Nepal has ratified the Second Optional Protocol to the ICCPR aimed at abolition of the death penalty.⁸⁷

10. Conclusion

Trafficking in women and children are very rampant in the SAARC region particularly in India, Bangladesh and Nepal. Poverty, lack of education and awareness are the main reasons to trap the women and children by the traffickers. Many NGOs have been working for child rights in these regions. They establish various centres and help to create awareness among the women and children about the dangers of trafficking and similar crimes. Prevention of these types of heinous crimes requires proper investigation, prosecution, conviction, addressing the need effectively. There is also a need to implement proper schemes for Rehabilitation and Compensation of the victims so that they could lead a better and meaningful life as guaranteed by the Constitution. Although the criminology and victimology have settled principles of Victim Compensation, the State is not adequately implementing these principles due to lack of infrastructure. The states have not formulated proper schemes, allocating funds for such activities, etc. Lack of proper mechanism for Rehabilitation and

⁸⁶ http://nlrd.org/wp-content/uploads/2012/02/11_38_48Final_Landmark_Judgement.pdf

⁸⁷ Surya Deuja, "Establishing a Robust Regional Human Rights Mechanism in South Asia Regional Human Rights Mechanism," Vol. 6, No. 1, 5.

Resettlement, the victims are vulnerable to re trafficking, lack of livelihood etc. Various International, Regional, National Organisation are working towards spreading awareness among the general public about Terrorism, Trafficking, Money laundering, Smuggling etc., to keep them away from such cross border crimes and presently the various kinds of Military and Security forces are deployed in these regions to combat these crimes. The rate of conviction in the region is also very low in these countries, mainly due to two reasons, one, that the laws are not punitive, but reformative and two, the corruption among the departments. The need of the hour is by the international and regional communities should join hands and take necessary steps to get rid of these kinds of heinous crimes between the borders and also spread the awareness among the mass about this growing menace.

Applicability of *res judicata* in the Public Interest Litigation, Arbitration and Income Tax Proceedings

Gurpreet Singh¹

Abstract

The article discusses the applicability of the rule of *res judicata* in the situations where Section 11 of the Code of Civil Procedure, 1908 does not apply. The article also discusses the applicability of *res judicata* in public interest litigation, arbitration and income tax proceedings. Apart from this, a catena of the judgements of the High Courts and the Supreme Court are discussed on the rule of *res judicata*.

Keywords: Suit, Res Judicata and Finality, Code of Civil Procedure, Public Interest Litigation, Arbitration, Income Tax Proceedings

1. Introduction

Res judicata is a Latin term and it derived from the words “*res*” and “*judicata*” which means a ‘property’ and ‘judicially decided or determined’ respectively. *Res judicata* actually means “a matter already judged”. The basic origin of the word *res judicata* is the Latin maxim “*res judicata pro veritate occipitur*”² which means is ‘a judicial decision must be accepted as correct’ and this maxim over the years has shrunk to mere ‘*res judicata*’. It is a principle of law, once a matter which has been litigated cannot be re-litigated between the same parties in the next stage of the case. Now, this principle has been accepted in all civilised legal systems of the society.³

Res judicata is a remedy available in civil proceedings within the purview of Section 11 of the Code of Civil Procedure, 1908. The rule of *res judicata* is based on the principle that one should not be vexed twice for the same cause and that there should be finality in litigation. The primary aim of this principle is to give finality to suit in original or in appellate proceedings. This principle does not allow an issue or a question which was adjudged and attaining finality, to be re-opened or re-agitated again. The principle of *res judicata* is entirely based on public policy and it has two primary aims; firstly, there should be finality to litigation and secondly, a person should not be harassed twice over the same litigation.⁴

¹ Research Scholar, Punjabi University, Patiala, Punjab (India).

² Duhaime’s Law Dictionary, available at: <http://www.duhaime.org/LegalDictionary/I/InterestReipublicaeUtSitFinisLitium.aspx> (Visited on 06 May 2019).

³ Res Judicata in India, available at: <http://www.legalserviceindia.com/article/l454-Res-Judicata.html> (Visited on 20 June 2019).

⁴ Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure* 184 (Lexis Nexis, Nagpur, 2011).

2. Section 11 Not Exhaustive

The provisions of Section 11 of the Code of Civil Procedure is mandatory and not directory. This section is not an exhaustive one but the principle of *res judicata* has been applied by the courts to give finality in litigation even where Section 11 does not apply. The amendment made in the Section 11 in 1976 by the Joint Committee,⁵ enhances its applicability and scope in various fields of the civil law. Before applying the principle of *res judicata*, the five conditions which are enshrined in Section 11 must be satisfied.⁶

The section does not cover the entire situation as to when a subject matter may be *res judicata*. In the case of *Kalipada v. Dwijapada*,⁷ passage from the judgement of Sir Lawrence Jenkins in *Sheoparsan v. Ramanandan*⁸ was referred by the Privy Council with approval where it was observed by the Lordship that while applying this rule of law the Indian Judiciary should be guided by the merit of the case within the limits permitted by the law and should not pay attention to its technical form.

Moreover in *Hook v. Administrator General*⁹ it was said by Judicial Committee that the application for *res judicata* prevails in spite of the limited provisions of the Code and referred to decision of board in *Ram Kirpal v. Rup Kuari*¹⁰ where it was held that in execution proceedings the binding force of an interlocutory judgement would depend upon general principle of law rather than the section of CPC. The Privy Council also said that the verdict on a dispute under section 31(2) of the Land Acquisition Act, 1894 regarding compensation deposited in a court would constitute *res judicata* in a later suit between the same parties.

Their Lordship observed that it will not make any difference whether a decision was or was not made in a former suit because it was recently highlighted by the Board in *Hook v. Administer General*¹¹ that the rule which forbidding the similar matter being litigated twice is of general application and is not confined by the specific wordings of the Code of Civil Procedure in this respect.

The Apex Court purported this view and pronounced that the fundamental principles behind Section 11 are the conclusiveness in legal disputes and that an individual should not be punished twice for the same cause and these principles are applicable irrespective of the fact that the case

⁵ Report of the Joint Committee, Gazette of India 804 (1976).

⁶ *Sheodan Singh v. Daryao Kunwar*, AIR 1966 SC 1332.

⁷ AIR 1930 PC 22.

⁸ (1916) ILR 43 Cal 694.

⁹ (1921) ILR 48 Cal 499.

¹⁰ (1884) ILR 6 All 269.

¹¹ *Supra* note 8.

falls under Section 11 or not. On this principle it has been observed that a judgement pronounced by the court at initial stage will have binding effect.¹²

3. *Res Judicata* in Public Interest Litigation

The issue of applicability of the rules of *res judicata* to the public interest litigations has overwhelmed the mind of jurists and judges. The issue of the applicability of rule of *res judicata* in public interest litigations is still not solved even though the judgements of the Supreme Court had not been accurate on this point. While few courts have found the rules to be applicable to public interest litigation and some others rule out its applicability. But after the study of a catena of judicial decisions of the Supreme Court, a balanced approach followed by the courts, i.e. it neither rule out the applicability of *res judicata* in public interest litigation nor allow it in all matters which hit the interest of the public.¹³

The Supreme Court stated with authorisation, the observation in its previous landmark judgement decided the most controversial issue of the applicability of *res judicata* in PIL wherein *Rural Litigation and Entitlement Kendra v. State of U.P.*¹⁴ case the court rules out the applicability of *res judicata* taking into consideration the social safety of the person where they have to live in a protective environment as enshrined in the constitution. In the matters of grave public importance, technical rule of the procedure do not apply.

In *R.S. Keluskar v. Union of India* case,¹⁵ the petitioner entertained repeated petitions representing compensation for victims of the railway accident. The petition was filed in personal capacity of the petitioner without taking any authorisation letter or consent from the injured individuals, in spite of the fact that the petition was represented in the public interest. The petitioner suppress the fact of refusal of his previous writ petition claiming the similar relief and it was quoted by the court that the record shows personal interest of the petitioner up to some extent and he cannot take the benefit of the *grave public importance* plea and the petition is strike by the rules of constructive *res judicata*.¹⁶

In *V. Purushotham Rao v. Union of India*¹⁷ case the comparison of personal interest and public interest was concluded i.e. the public interest should override. Rule of constructive *res judicata* cannot be applied in all

¹² *Daryo v. State of U.P.*, (1962) 1 SCJ 702.

¹³ *Supra* note 3 at 270.

¹⁴ (1989) SCC 1 Supp 504.

¹⁵ (2008) 3 Mah LJ 13.

¹⁶ *Ibid.*

¹⁷ (2001) 10 SCC 305.

public interest litigations; court has to see the interest of public and its impact on society at large, irrespective of the demand of the petitioner.

Explanation VI to Section 11 of Civil Procedure Code, 1908 mainly emphasis on bonafide litigation and is applicable to public interest litigation as well. For striking the rule of *res judicata* under this construction, petitioner must prove that the former writ petition is bonafide in regard of a respective right which was common and claimed by all and if the former writ petition was not bone fide then the rule of *res judicata* not attract. Similarly, in *Forward Construction Co. v. Prabhat Mandal* case,¹⁸ where explanation VI was applied by the Supreme Court, in which the court stated that before applying this construction, the petitioner has to show that the previous writ petition was bonafide filed for public interest, where all others have common interest and is not filed for personal or private grievances. The rule of constructive *res judicata* is applicable to the public interest litigation by virtue of explanation VI. Following are the glimpses upon the *res judicata* in public interest litigation:-

- i. The rule of *res judicata* does not strictly apply in the proceedings of public interest litigation.¹⁹
- ii. In public interest litigation proceedings, *res judicata* is applicable even though the parties in the subsequent petition are not the same.²⁰
- iii. In public interest litigation proceedings, while awarding a decision, court is not bound to follow the strict or procedural technicalities on various Acts, even though the statutory clauses of the law of land exists.²¹
- iv. The Supreme Court issues directions for environmental prevention and environment protection in setting up oil refinery in a previous public interest litigation - rule of constructive *res judicata* is attracted on the new writ petition connecting similar subject matter as agitated before, even though the petitioner was not party in previous public interest litigation.²²
- v. Fresh petition was not blocked by *res judicata* where in the previous public interest litigation the question involved or agitated was not finalised.²³

¹⁸ (1986) 1 SCC 100.

¹⁹ *Maharaji Kunwar v. Sheo Shankar*, second Appeal No. 2276 of 1977 (Allahabad High Court).

²⁰ *V. Subramanian v. Union of India*, (2004) 4 MLJ 380.

²¹ *Rural Litigation Entitlement Kendra v. State of Uttar Pradesh*, (1989) Supp 1 SCC 504.

²² *Gujarat Navodaya Mandal v. State Of Gujarat*, AIR 1998 Guj 141.

²³ *Sundargarh Citizen v. Orissa State Transport Authority*, AIR 2009 NOC 1690.

- vi. If the issue in the previous public interest litigation was in the interest of public in large and litigated bona fide, it presumed to be judgement in *rem*. Subsequent litigation filed involving same issue as were in the previous litigation would be barred by the rules of *res judicata*.²⁴

4. *Res Judicata* in Arbitration

Arbitration is a form of Alternative Dispute Resolution, in which people settle their dispute outside the premises of court with the help of third person (known as arbitrator, mediator, conciliator) with whom they agree to follow his decision. Arbitration law came to India with the arrival of East India Company. To diversify its business, they solve their dispute in a rapid manner by the way of arbitration. The term is normally used for solving commercial disputes, chiefly the international commercial transactions. For enforcing foreign awards, India is signatory of the New York Convention, 1958 and our arbitration act is generally based on the UNCITRAL Model Law, 1985. Arbitration proceeding is cheaper and faster than the civil court procedures even though non-public.²⁵

Doctrine of *res judicata* and provision of Civil Procedure Code, 1908 is applicable to the arbitration proceedings by virtue of the Arbitration Act, 1940 (now Arbitration and Conciliation Act, 1996). The contentions of *res judicata* are footed on the doctrine that there should not be multiplicity of proceedings and that there should be ending to proceedings. Decision of arbitrator is binding upon the parties to the agreement, as like a decree of court. Once arbitration award is pronounced by the arbitrator, then there is no provision in the law to challenge it except under section 34 of the act.²⁶ Previously, in *ex parte* cases or where gross negligence done by the arbitrator, court can remand the matter back to the arbitrator to cure the defect. Now in *Kinnari Mullick & Another v. Ghanshyam Das Damini* case,²⁷ the Supreme Court stated that there is no provision in the act to remand back the matter to the arbitrator and to judge the decided points again.

A decree on an award pronounced by the arbitrators is final as *res judicata* among the parties. But where applicant is not party to arbitration proceedings and files subsequent suit, rule of *res judicata* is not applicable.²⁸ *Res judicata* will not apply when the award is challenged under section 34 of

²⁴ *State of Karnataka v. All India Manufacturer Organisation*, (2006) 4 SCC 683.

²⁵ *Res Judicata in Arbitration*, available at:
<http://www.legalservicesindia.com/article/1339/Res-Judicata-in-Arbitration.html> 2/11
(Visited on 7th July 2018).

²⁶ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996) s.34.

²⁷ (2018) 11 SCC 328.

²⁸ *Bhai Hospital Trust v. Parvinder Singh*, AIR 2002 Delhi 311.

the act regarding invalidity of the agreement or clauses enshrined under the section.²⁹

In *Union of India v. Videocon Industries Ltd.* case³⁰ the Delhi High Court applies the principle of *res judicata* even in international arbitration. In this case the seat of arbitration was previously finalised by the Supreme Court of India *qua* Commercial Court of London. There was a clause in the agreement that the seat of arbitration is Kuala Lumpur and the agreement is governed by English law. Now the issue before the court is whether defendant can re-litigate the proceeding before Commercial Courts, London..? The Delhi High stated that defendant is restrained to pursuing any claim before the London Court which is severe, oppressive and abuse the process of principle of *res judicata*.

Now a day's Indian courts take positive steps and follow best practice in international arbitration by applying the principle of *res judicata*. In *Mauritius Holdings v. Unitech Limited* case,³¹ the Delhi High Court took a positive approach towards enforcement of foreign arbitral awards and rejects objection by applying the rule of *res judicata* and gives a robust approach for foreign investors that Indian courts will not permit judgement debtor to re-agitate the matter at enforcement stage.

In *Dolphin Drilling Ltd. v. Oil and Natural Gas Corporation Ltd.* case,³² dispute arose between the parties and the respondent failed to invoke the arbitration proceedings then appellant approached the Supreme Court to appoint an arbitrator to solve the dispute. The respondent (ONGC) took the plea that appellant cannot initiate the arbitration proceeding again in a single agreement in which the dispute was previously settled. But the Supreme Court rejected the plea of respondent and gave a finding that it is not easy to curtail the scope of arbitration act and it is not a onetime measure to settle a dispute; it cannot be held that if the arbitration clause is invoked once, the remedy of arbitration cannot be invoked again in the disputes which might arise in the future.

In *Indian Oil Corporation Ltd. v. SPS Engineering Ltd.* case,³³ the application filed under Section 11 of the Arbitration Act, 1996 before the High Court was barred by invoking *res judicata*. The Supreme Court set aside the impugned judgement of the High Court and stated that Section 11 of the arbitration act has a very limited scope; court has no power to reject the application by applying the rule of *res judicata* and has no power to

²⁹ Sudipto Sarkar and V.R. Manohar, *Sarkar's The Code of Civil Procedure* 177 (Lexis Nexis, Gurgaon, 2011).

³⁰ (2011) 6 SCC 161.

³¹ (2017) SCC OnLine Del 7810.

³² (2010) 3 SCC 267.

³³ (2011) 3 SCC 507.

comment on the maintainability of the claim either on fact or in law. The court further stated that it is the duty of the arbitral tribunal to check whether the claim is hit by the rule of res judicata or not.

In *Uttam Singh v. Union of India* case,³⁴ the Supreme Court held that all the rights and the claims of the parties, which are the subject matter of the suit, are made reference to the arbitrator and after the pronouncement of award, all the rights or the claims are deemed to merge in the arbitral award. Any subsequent questioning or reference to the rights which were claimed in the award would be strike by the rule of *res judicata*. Same position is settled in *Bhajahari Saha v. Behary Lal* case,³⁵ when the arbitration award was final between the parties is in fact or in law, any subsequent reference would be incompetent except the prescribed procedure of law.

4.1. Constructive Res judicata in Arbitration Proceeding

The rules of *res judicata* or the universal rules of constructive *res judicata* are applicable to arbitration proceedings as well as awards. All claims and issues of law which were referred to arbitration, deemed to be merge in that award and if any right or liability of the individual regarding any claim, can only be considered at the time of finality of award. Neither any subsequent action can be started on the initial claim which is the theme of the reference nor any issue in fact or in law raise after the award is awarded; any successive action is hit by the rules of constructive *res judicata*. Therefore, petitioner have to raise all claims simultaneously at the time of filing of plaint, subsequently if he raised any of the issue which was remaining in the previous suit, rules of constructive *res judicata* apply.³⁶

After signing an agreement, if one party filed a civil suit in District Court and other party filed the application under section 8 of the arbitration act *qua* to refer the dispute to arbitration proceedings, constructive *res judicata* would not be applicable when a claim petition is filed before the arbitrator.³⁷ The plea which the government cannot raise before but raised subsequently in execution at the time of implementation of the award would be barred by the rule of constructive *res judicata*.³⁸

³⁴ Civil Appeal No. 162 of 1962 (SC).

³⁵ ILR (1909) 33 Cal 881.

³⁶ *Himachal Sorang Power Pvt. Ltd. v. NCC Infrastructure Holdings Ltd.*, CS (COMM) 12/2019 (Delhi).

³⁷ *Charanjit Kaur v. S.R.Cable*, 2008 (4) MPLJ 221.

³⁸ A. N. Saha, *The Code of Civil Procedure, 1908* 215-216 (Premier Publishing Company, Allahabad, 2006).

5. *Res Judicata* in Income-Tax Proceedings

Generally, the rule of *res judicata* is applicable in almost all spheres of the jurisprudence. But, as a surprise, the rule of *res judicata* is not applicable to matters of taxation. In taxation proceeding, each and every assessment year is final and is not binding upon the successive assessment year. The explanation IV *qua might* and *ought* or general principles of constructive *res judicata* is also not applicable to the taxation proceeding. Omission to raise specific objection by an assessee, does not preclude him from taking the similar objection in a later proceeding which *might* and *ought* to have been taken in the previous assessment year.³⁹ Each assessment year have different tax rates, so it is not possible to cover under the single decision. It is settled position of the law that if fresh cause of action arises, previous adjudication could be opened by a later proceeding for another period of time which developed subsequently. Therefore, an income tax officer (ITO) is at liberty to resile from a previous year assessment order.⁴⁰

In income tax proceeding there is no bar to re-open the decision of previous assessment year in a following year. Office of income tax officer is not a court; ITO is not bound by the rules of *res judicata* while dealing with two different assessment years. The officer while ignoring the previous order, should not adjudge the case arbitrarily, must follow the rules of natural justice.⁴¹

According to Spencer Bower & Turner, in income tax proceedings, there is an exception to the basic rules of *res judicata*, decision of one assessment year only assigns respect to that year's rates and taxes, not binding upon the second assessment year by virtue of the fluctuation of every year's rates and taxes.⁴²

The views regarding the non-applicability of *res judicata* by the English, Indian and American Jurists is almost the same. But there are two conflicted decisions of the English authorities haunting the Indians even today. In *Hoystead v. Taxation Commissioner Case*,⁴³ *res judicata* is applicable if any court of competent jurisdiction pronounced a final decision then the party is restrained to re-agitate the issue in fresh or subsequent proceedings. But in another case of *Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council*⁴⁴ the rule of *res judicata* could not be

³⁹ *Radhasoami Satsang v. Commissioner of Income Tax*, (1992) 1 SCC 659.

⁴⁰ Solil Paul and Anupam Srivastava, *Mulla The Code of Civil Procedure* 335-336 (Butterworths India, New Delhi, 2001).

⁴¹ *Udayam Chinubhai v. Commissioner of Income Tax*, Gujarat, (1967) 1 SCR 917.

⁴² George Spencer Bower & Sir Alexander Kingcome Turner, *The Doctrine of Res Judicata* 260 (Butterworths, London, 2d edn., 1969).

⁴³ (1925) All E.R. 56.

⁴⁴ (1925) All E.R. 672.

applied in subsequent year with respect to fresh question and different assessment year even the issue was adjudged in the previous year.

Similarly, in India the view of two High Courts in regard to the applicability of the rules of *res judicata* in taxation is contradictory in the initial phase. In *C. L. T. v. Massey & Co. Ltd.*⁴⁵ the Madras High Court stated that *res judicata* did not apply to taxation proceedings. But in *Sankaralinga Nadar v. C.I.T.* case⁴⁶, after one year, the full bench of Madras High Court gave a contradictory judgement to previous one that where right of parties do not vary with the yearly income and are decided by the court; the same issue would be *res judicata* if challenged or re-opened in the later case.

5.1. Exception to the Rule of *Res Judicata*

Applicability of the rule of *res judicata* in income tax proceedings is very stringent. *Res judicata* would apply to the tax proceedings when the nature of the assessee on which their taxed rights are based or the nature of the property is not changed and year wise year income remains stable. For example, adjudication final on the issue of a Trust whether it is a Charitable Trust or not which has no relation to the fluctuation of the yearly income and if the same issue is adjudged again it would be *res judicata* in subsequent adjudication. Similarly, if the status of the party cannot be varied or changed every year, *res judicata* would be applicable in any infringement to the previous status.⁴⁷

In *H.A. Shah & Co. v. C.I.T* case,⁴⁸ the Bombay High Court implied certain limitations on the tax authorities by holding the rule of *res judicata* that successive year decision should not lead to injustice and must be fair and lawful. When the assessee loses an important benefit or advantage under the income tax proceedings then court may interfere to stop tax authorities from resiling the previous decision unless it leads to arbitrariness, injustice or is biased and inequitable.

In another case where the income is stable and assessment does not change yearly, any issue is adjudged or awarded by a court on reference, *res judicata* would strike and decision would not be re-challenged at any stage of the case.⁴⁹

In *C.I.T v. Belpahar Refractories Ltd* case,⁵⁰ the High Court held that generally the rules of *res judicata* did not apply to the income tax

⁴⁵ AIR 1929 Mad 453.

⁴⁶ AIR 1930 Mad 209.

⁴⁷ Principle of Res Judicata, available at: <https://taxguru.in/income-tax/principle-res-judicata-applicable-proceedings-income-tax-act.html> (Visited on 25 July, 2019).

⁴⁸ (1956) 30 ITR 618.

⁴⁹ *Kamlapat Motilal v. Commissioner of Income Tax*, AIR 1950 ALL 249.

⁵⁰ (1981) 128 ITR 610.

proceedings, but the principle have two exceptions; firstly any issue adjudged cannot be re-challenged or re-opened until and unless it is unlawful, arbitrary or without proper inquiry. Secondly, the rule of *res judicata* would be applicable if the result of the previous decision leads to injustice and do not follow the rules of natural justice.

In the landmark judgement in *Radhasoami Satsang v. C.I.T case*,⁵¹ the Supreme Court quoted that the rule of *res judicata* has no application in tax proceedings. Finding in one assessment year could be re-opened in subsequent year with respect to different income or fluctuation in tax rates. But when no material change occurred in the subsequent year in the status of the party, tax authorities are barred by *res judicata* to take a separate view in regard to exemption granted in a previous year. When no fresh cause of action is raised, the authorities are bound by the previous decision, contrary stand would not be allowed by the prescribed principles of law. The income tax authorities are a quasi judicial body and cannot ignore the natural principles of law.

Similarly, in *Parshuram Pottery Works Co. Ltd. v. ITO case*,⁵² the Supreme Court held that basic principles of the rule should not be ignored; there should be finality in the litigations. *Res judicata* applied on the stale issues, must not be permitted by the law to re-challenge beyond a particular stage, when once attains finality after a lapse of time.

6. Conclusion

The basic theme of the rule of *res judicata* is to give finality to the litigation and nobody should be vexed twice for the same litigation. Generally, the applicability and scope of *res judicata* is ample and comprehensive but there are some exceptions in which the principle is not strictly applicable. Like in public interest litigation, there is a balanced approach followed by the Indian Judiciary i.e. neither the applicability is rule out nor applied strictly. *Res judicata* has made a prominent place in arbitration and principle is applied from the virtue of the Arbitration Act. International awards were also made enforceable in India by applying the golden rule. But the Income Tax Act is an exception to the general rule where *res judicata* is not applicable. The conclusion derived from the various judgments of the Supreme Court and High Courts is that *res judicata* is not applicable under the Act. The mere applicability of the rule is with respect to status of the assessee, gross profit of the business, charitable trust, etc. and arbitrary decision which leads to injustice. Apart from this, there is no provision under the Income Tax Act to follow a technical rule.

⁵¹ (1992) 193 ITR 321.

⁵² AIR 1977 SC 429.

Functioning of Adjudication Machinery under the Industrial Disputes Act, 1947 in West Bengal

*Kallol Dutt*¹
*Dr. Debasish Biswas*²
*Dr. Tarak Nath Sahu*³

Abstract

This study attempts to examine the functioning of adjudicating machinery under the Industrial Disputes Act, 1947 in West Bengal during the period from 1991 to 2015 i.e., entire post globalisation period. During the study period the mean rate of disposal per year is 16.4% which is quite low. Again, on an average, in 34 cases per year there are complaints regarding violation of award. If we deduct the cases of award violation, the effective rate of disposal comes to around 13.83%. During the same period the mean rate of award violation is 15.65% which is quite high. If the cases where the parties preferred appeal before higher Courts are considered the rate of disposal will fall further. The study shows that adjudication as a means of settling industrial disputes is not serving its purpose.

Key Words: *Industrial Jurisprudence, Industrial Relations, Labour Laws, Labour Disputes, Dispute Resolution*

1. Introduction

Industrial Disputes Act, 1947 provides machinery for peaceful resolution of industrial disputes and to promote harmonious relation between employers and workers. The Act seeks to pre-empt industrial tensions, provide the mechanics of dispute resolutions and set up the necessary infrastructure so that the energies of partners in production may not be dissipated in counterproductive battles and assurance of industrial peace may create a congenial climate. The Act enumerates the contingencies when a strike or lock-out can be lawfully resorted to, when they can be declared illegal or unlawful, conditions for laying off, retrenching, discharging or dismissing a workman, circumstances under which an industrial unit can be closed down and several other matters related to industrial employees and employers.

To create conducive industrial relation climate, recent HR practices stress upon replacing adversarial relation between the management and the workers and trade unions by a collaborative relation. Again, in many new

¹ Research Scholar, Department of Business Administration Vidyasagar University, Midnapore, West Bengal

² Assistant Professor, Department of Business Administration, Vidyasagar University, West Bengal

³ Assistant Professor, Department of Commerce with Farm Management, Vidyasagar University, West Bengal

industries there are no trade unions. Thus, the field of industrial relation is undergoing a sea change.

The mechanisms for handling industrial disputes can be preventive or curative. Most of the preventive mechanisms like code of discipline, Joint management councils, grievance handling procedure etc. are non-statutory and voluntary in nature. The provision for Works Committee is the only statutory preventive mechanism.

The Act provides for following Authorities for Investigation and settlement of industrial disputes:

- (i) Works Committee.
- (ii) Conciliation Officers.
- (iii) Boards of Conciliation.
- (iv) Courts of Inquiry.
- (v) Labour Courts.
- (vi) Industrial Tribunals.
- (vii) National Tribunal.

Among the authorities mentioned above Works Committee belongs to preventive mechanism of industrial disputes and rest are part of curative mechanism under the Act. Section 10-A of the Act also provides for joint reference of industrial disputes to voluntary arbitration which has hardly been used in India.

2. The Adjudication Machinery under the Industrial Disputes Act, 1947

The principal techniques of dispute settlement provided in the Industrial Disputes Act are collective bargaining, conciliation, investigation, arbitration and adjudication. Adjudication means a mandatory settlement of Industrial Disputes by Labour Courts, Industrial Tribunals or National Tribunals under the Act. By and large, the ultimate remedy of unsettled dispute is by way of reference by the appropriate government to the adjudicatory machinery for adjudication. The adjudicatory authority resolves the Industrial Dispute referred to it by passing an award, which is binding on the parties to such reference.

The composition of Labour Courts, Tribunals and National Tribunals are described in section 7, 7-A and 7-B of the Industrial Disputes Act, 1947 and their procedure, powers and duties are provided in Chapter IV of the Act. Disputes are referred to Labour Courts or Tribunals u/s 10 of the Act.

Usually, a dispute is raised by any of the affected parties before the conciliation officer. The conciliation officer may also intervene in case of apprehended dispute. If the dispute cannot be resolved by the conciliation machinery, it sends a failure report to the appropriate government u/12(4) of

the Act. After considering the report, the appropriate government may refer the dispute for adjudication to the Labour Courts or Tribunals.

In West Bengal, the Act has been amended to insert a new sub-section 10(1B) which empowers an individual workman to file an application directly before the Labour court or Tribunal if the individual dispute remains unresolved for 60 days before the conciliation officer.

3. Statement of the Problem

For designing efficient and effective dispute resolution machinery keeping pace with the globalised world and existing industrial relations scenario we need to understand the functioning of the existing mechanisms. Against this backdrop, this study attempts to examine the functioning of adjudicating machinery under the industrial Disputes Act, 1947 in West Bengal during the period from 1991 to 2015. The present study is both extensive and intensive though limited in coverage within the state of West Bengal and excludes central industrial relations machinery.

4. Research Gap and Objectives of the Study

In view of the Statement of Problem, the following has been observed:

- There is dearth of studies on industrial disputes resolution machinery in West Bengal.
- There is lack of studies on Adjudication mechanism.

In view of the research gap identified in this study an attempt for a detailed analysis of the adjudication of industrial disputes with the objectives to study the effectiveness of adjudication in resolving industrial disputes has been made in this research paper.

5. Hypotheses

H01= Adjudication is not effective in resolving industrial disputes

6. Methodology

The period of study is from 1991 to 2015 and covers the cases referred or filed before the Labour Courts or Industrial Tribunals under sections 10 and section 10(1B) of the Industrial Disputes Act, 1947 within West Bengal.

The data was collected mainly from 'Labour in West Bengal' published by the Labour Department, Government of West Bengal.

7. Analysis with Interpretation

There are nine Industrial Tribunals and two Labour Courts functioning in the State of West Bengal. Generally Industrial Tribunals are presided over by the officers of West Bengal Higher Judicial Service cadre deputed by the Hon'ble High Court at Kolkata. Occasionally a few of the

judges of Tribunals are appointed by the Labour Department by way of re-employment. The Labour Courts are also manned by the members of the West Bengal Judicial Service posted on deputation by the Hon'ble Court.

Industrial Tribunals and Labour courts are empowered to adjudicate various disputes covered under Industrial Disputes Act, 1947, Industrial Employment (Standing Order) Act, 1946, and Working Journalists (Miscellaneous Provisions) Act, 1955. Industrial Tribunals and Labour courts adjudicates matters under section 10, 10(1B)(d), 33A, 36A, 33(2)(d), 33(3)(b), 33C(2), 2A(2) of the Industrial Disputes Act,1947. However, for the purpose of this study we will consider the performance of Industrial Tribunals and Labour courts under section 10 and 10(1B)(d) of the Industrial Disputes Act, 1947 under which it directly adjudicates industrial disputes.

Under section 10 of the Industrial Disputes Act,1947, the state Government refers industrial disputes for adjudication and under section 10(1B)(d) the affected workman can directly approach the industrial tribunal or labour court for adjudication of its dispute.

The performance of the adjudication machinery for both types of disputes taken together is given below:

Table 1. Performance of Adjudication Machinery u/s 10 & 10(1B)(d) of I.D. Act, 1947

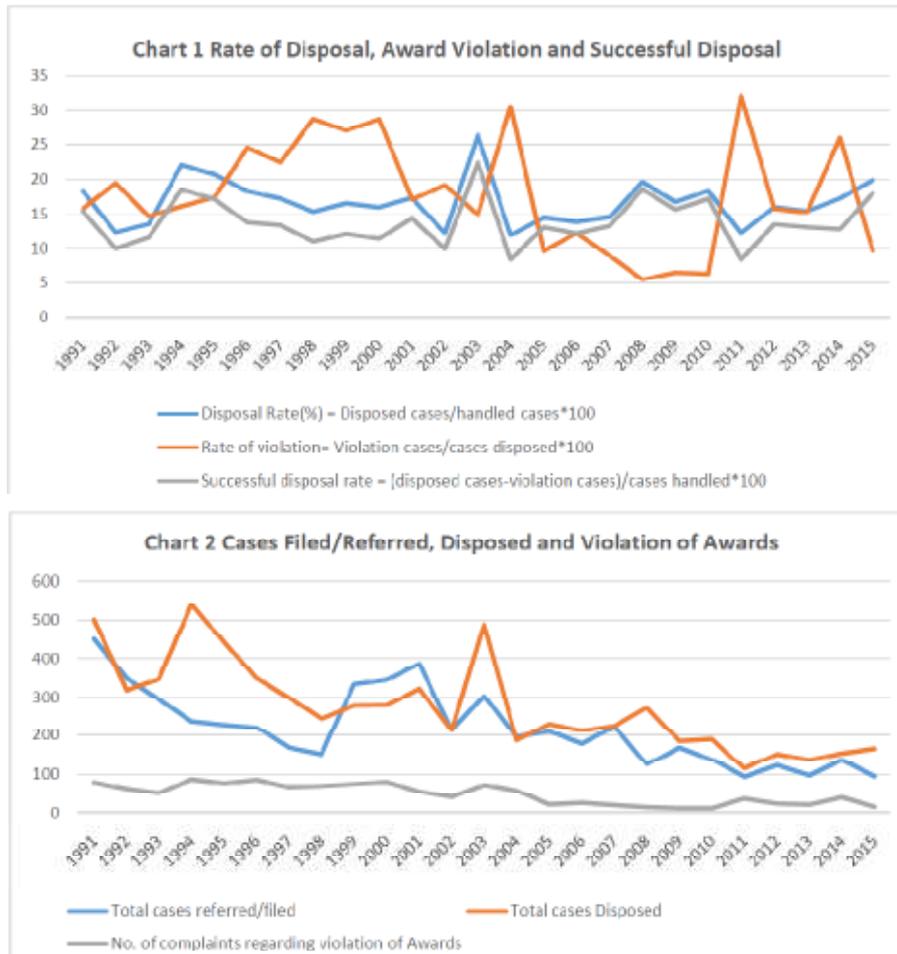
Year	Total cases Handled	Total cases Disposed	Total cases referred/ filed	No. of complaints regarding violation of Awards	Disposal Rate (%) = Disposed cases/handled cases*100	Rate of violation= Violation cases/cases disposed*100	Successful disposal rate = (disposed cases-violation cases)/cases handled*100
1991	2733	501	450	79	18.33	15.77	15.44
1992	2582	319	350	62	12.35	19.44	09.95
1993	2558	347	295	51	13.57	14.70	11.57
1994	2448	540	237	87	22.06	16.11	18.50
1995	2136	442	228	77	20.69	17.42	17.09
1996	1915	350	221	86	18.28	24.57	13.79
1997	1734	299	169	67	17.24	22.41	13.38
1998	1587	244	152	70	15.37	28.69	10.96
1999	1677	278	334	75	16.58	26.98	12.10
2000	1745	279	346	80	15.99	28.67	11.40
2001	1853	322	387	55	17.38	17.08	14.41
2002	1746	214	215	41	12.26	19.16	09.91
2003	1858	489	304	73	26.32	14.93	22.39
2004	1565	187	196	57	11.95	30.48	08.31
2005	1588	230	210	22	14.48	09.57	13.10
2006	1537	213	179	26	13.86	12.21	12.17
2007	1546	225	222	20	14.55	08.89	13.26
2008	1390	273	125	15	19.64	05.49	18.56

2009	1105	185	169	12	16.74	06.49	15.66
2010	1037	190	138	12	18.32	06.32	17.16
2011	941	115	094	37	12.22	32.17	08.29
2012	949	152	123	24	16.02	15.79	13.49
2013	894	138	097	21	15.44	15.22	13.09
2014	893	154	136	40	17.25	25.97	12.77
2015	834	166	095	16	19.90	09.64	17.99

Table 2. Descriptive Statistics of Performance of Adjudication Machinery u/s 10 & 10(1B)(d) of I.D. Act, 1947

	<i>Total cases Handled</i>	<i>Total cases Disposed</i>	<i>Total cases referred/ filed</i>	<i>No. of complaints regarding violation of Awards</i>	<i>Disposal Rate(%) = Disposed cases/handled cases*100</i>	<i>Rate of violation= Violation cases/cases disposed*100</i>	<i>Successful disposal rate = (disposed cases-violation cases)/cases handled*100</i>
Mean	1634.04	274.08	218.88	48.20	16.67	17.77	13.79
Median	1588.00	244.00	210	51.00	16.58	16.11	13.26
Standard Deviation	558.90	117.73	98.03	26.23	3.40	7.96	3.43
Kurtosis	-0.57	0.04	-0.25	-1.58	1.29	-0.95	0.25
Skewness	0.34	0.89	0.77	0.00	0.87	0.23	0.57
Range	1899.00	425.00	356	75.00	14.37	26.68	14.10
Minimum	834.00	115.00	94	12.00	11.95	5.49	8.29
Maximum	2733.00	540.00	450	87.00	26.32	32.17	22.39

During the 25 years' study period the state adjudication machinery handled on an average 1634 disputes per year and disposed of around 274 cases. The mean rate of disposal per year is 16.67%. A dispute when adjudicated upon results in award or no award. The parties have the option of preferring an appeal in higher courts. But in some cases, the parties neither go for appeal nor comply with the award. In such cases, the other party files complaint regarding violation of award. On an average, in 48 cases per year there are complaints regarding violation of award. Further, unlike conciliation, the adjudicating machinery has the power to dispose of the cases on its own. They do not need the consent of the parties to pronounce the award. Considering these, the rate of disposal by the adjudicating machinery is quite low. If we deduct the cases of award violation, the effective rate of disposal comes to around 13.79%.



From the above chart, it can be seen that till 2005 there is a relation between the number of disputes handled and the number of disputes disposed. However, after 2005 the number of disposals stabilised around 200 irrespective of the number of disputes handled and the number of disputes handled steadily declined over the years. The number of disputes handled declined because the number of disputes referred or filed for adjudication declined.

It is seen that even after adjudication in many cases the award is not honoured/implemented. Apart from violation of award the parties have the option of preferring an appeal in higher courts. However, data relating to cases where the parties preferred appeal is not available.

From the above chart, it is interesting to note that when the disposal rate showed an upward trend the violation rate showed downward trend and vice versa. One reason may be that there is a time lag between the two. Complaints of violation of award is filed not immediately after the case is disposed of by award. The affected party waits for some time and even pursues the case before the other party before filing a formal complaint.

8. Conclusion

During the 25 years' study period the state adjudication machinery handled on an average 1634 disputes per year and disposed of around 274 cases. The mean rate of disposal is per year is 16.67%. Again, on an average, in 48 cases per year there are complaints regarding violation of award which is around 17.77%. Further, unlike conciliation, the adjudicating machinery has the power to dispose of the cases on its own. Considering these, the rate of disposal by the adjudicating machinery is quite low. If we deduct the cases of award violation, the effective rate of disposal comes to around 13.79%. If the cases where the parties preferred appeal before higher Courts are considered the rate of disposal will fall further. The objective of this study was to evaluate the functioning of the adjudicating machinery under the Industrial Disputes Act, 1947 in West Bengal which shows that adjudication as a means of settling industrial disputes is not serving its purpose.

9. Limitations and Scope for Further Research

Examining the reasons behind low rate of disposal by the adjudicating machinery and considerable number of cases of Award violation are not within the scope of this study. Again, there is lack of data regarding number of appeals filed before higher courts. There is scope for further research in this area based on primary data. The functioning of the adjudicating machinery may be studied in details and perception and suggestions from the stakeholders may be gathered.

Book Review

A. Lakshminath: Judicial Process Precedent in Indian Law, Eastern Book Company, Lucknow, Third Edition 2009, Hardcover, ISBN: 978-81-7012-180-0

Suparna Bandyopadhyay¹

Precedent is one of the unique and an important feature of a common law legal system. From the Hamurabi Code, the Twelve Table or the Justian Code the development of law can be viewed as an eternal, continual or an evolutionary saga of human mind or society to free itself from the shackles of systematic code and go forward to a well organized judicial process. The book essentially focuses on the process followed by judiciary while deciding the cases before it as well as it elaborately describes the practice of precedent in India. The book has immensely examined more than 300 cases from various angles by giving special reference to the landmark judgments pronounced in India in addition to U.S. and U.K cases which are limited in this book.

The author in his book has quoted J. Cardozo who described the Judge's task as an eclectic exercise that blends in varying proportions. A judicial power is best understood in terms of methods used by courts to preserve their institutional integrity, prestige, power and dynamic decision making. The book rightly focuses on the law laid down in majority judgment but less emphasis has been given to minority judgments.

In total the book contains eight chapters where the author has keenly elaborated the working of Precedent in Pre and Post-Independence era with regard to the Government of India Act, 1935 and its principle which transformed into the Constitution of India. Supreme Court as a legal successor of Privy Council and Federal Court did not have to follow the ideological legacy of rigidly following fixed legal opinion in regard to judicial law making within the straightjacket of *stare decisis*. The court was at liberty to deviate. But the Supreme Court followed the legacy until 1955 when *Bengal immunity Co. Ltd v. State of Bihar* (AIR 1955 SC 661) was pronounced.

Further the book highlights the importance of Supreme Court by highlighting the role of Privy Council and Federal Court which was a bridge between English legal institutions and the native institutions. The Privy Council was not only the institution who emerged precedent but also acted

¹ Teaching Assistant, Department of Law, University of North Bengal

as a bridge in the transition from *la* doctrine to *la* jurisprudence or enacted law which writes little about the Hindu jurisprudence and the role of *Dharmasastras*, *Dharmasutras* or *Vedas*.

Classical jurisprudence posited that law was founded by judges through application of logic; in the Austinian sense the adherence to fixed principles. But the application of law involves a reasoned decision behind every judgment and a reference to past judgment. It is observed that judges not only are charged to find what law is, but also to make law while deciding upon constitutional validity of a statute. It is necessary that while deciding cases a judge must be guided by the principle of public policy.

Article 141 of the Constitution of India has been interpreted wisely throughout the book with case to case basis. It states that a law declared by the Supreme Court is binding on all inferior courts but whether Supreme Court itself bound by its previous decision or not is laid down in Bengal Immunity case. The book has nicely described the position of Precedent in pre and post Bengal Immunity case as well in a classic assertion of its power of overruling; Supreme Court of India ruled that it would not be absolutely bound by its own decisions. Since then the Court has exercised the power of overruling in as many as 50 decisions. The frequent overruling of precedent of recent authority has gravely undermined the values of certainty, predictability and continuity in law. The overruling has been criticized by lacking precedent consciousness. The book essentially keeps a neutral opinion and examines the applicability of precedent and overruling as to why it should not be considered wrong or right. Today the Apex court may overrule its prior decision by giving proper reasons. In progressive chapters, the author mentioned the cases which have been overruled and therefore the overruling is considered as a *sine qua non* for maintaining the dynamism in law. A conflict arises when a legal system recognizes precedent as well as the overruling. And existence of two rules in one legal system makes the rule of precedent a myth or a lie. The book is titled as Precedent in Indian Law where the author has confined the work in the territory of India which is a Common Law Country and it has given less emphasis to Civil Law countries.

Simultaneously, the author has described the role of *ratio decidendi*, *obiter dicta* and prospective overruling which are the principles of precedent along with cases. The author has also addressed the problem of multiple versions of *ratio decidendi* or *multiple rationes decidendi* produced by a single judicial decision. While analyzing the *ratio* the author asked what exactly is overruled in a case whether the entire decision or a principle laid down in a case? The book in addition enumerates the sociological perspective of judges from being authoritative to liberal to conservative and sometimes individualistic which somehow influences the decisions of court. As a social-psychological norm *stare decisis* must be assessed in its

functional context. In conclusion the author referred recent cases and legal theories. And also slightly compared Indian legal system with code based legal system- In French judgments individual precedents are not cited as they are cited in India. Similarly, in China precedents are nowhere accepted. Traditions like Islamic, Tamudia lack any notion of precedent.

Overall, the book is a great compilation of cases of all years along with the laws enumerated in those cases. The author had conducted a detailed investigation on cases for establishing *ratios* by examining the role of precedent and justifying overruling. The language is lucid and easily understandable as a whole it is a great help to legal researcher towards the field of judicial process and precedent.

Book Review

R. Venkataramani: Judgments By O. Chinnappa Reddy-A Humanist,
International Institute Of Human Rights Society (Regd.) 1989.

Sagnika Das¹

On a time frame when the trust on the Indian Judiciary is dwindling and questions are raised regarding transparency and the modality of judicial process, the book written by **R. Venkataramani** entitled as “**Judgments by O. Chinnappa Reddy- A Humanist**” reflects upon the golden era of Indian judiciary. The book deals with a few landmark judgments delivered by late Justice O. Chinnappa Reddy not critically but exploratively looking into the subject matter.

The book consists of eight parts dealing with different legal issues. The first part of the book is entitled as “We The People Of India... To Secure To All Its Citizens: Justice, Social, Economic...Liberty Of Thought, Faith...Equality Of Status And Opportunity...Give To Ourselves This Constitution.” This part consists of twelve Articles which particularly focuses on the freedom of conscience and right to religion of people. The author shows how the judge grounded his judgment on various Fundamental Rights enshrined in the Constitution of India. In *Bijoe Emmanuel & Ors. v. State of Kerala & Ors*, the Hon’ble judge has highlighted the right to remain silent as an integral part of the right to expression of one’s thoughts or convictions.² Similarly in *S.P. Mittal etc. v. Union of India and Ors*³, he has held that all the religious minority communities have right to establish and administer an educational institution of their choice. These judgments of Justice O. Chinnappa Reddy expanded the scope and ambit of Part III of the Constitution of India.

The second part of the book is “Interpretation Of Statutes; The Text And Context Rule.” This part comprises of a single Article. In this part the author focuses on the importance of interpretation of Statute and how Justice Reddy depends on the text and the context together while interpreting the subject matter of dispute.

The third part of the book deals with “To Hear And Decide – Preventive Medicine Or First Aid” and it contains of three case studies

¹ Research Assistant, Department of Law, University of North Bengal.

² *Bijoe Emmanuel & Ors. v. State of Kerala & Ors*, (1986) 3 SCR 518 = (1986) 3 SCC 615.

³ (1983) 1 SCR 729 = (1983) 1 SCC 51.

involving the principles Natural Justice. All the three cases reflect the effort made by Justice Reddy to incorporate the principles of natural justice in all the cases he dealt with. The author drives home the point with the help of three case laws. Justice Reddy incorporates the principles of Natural Justice in every legal sphere especially at the time of making legislation as well as at the time of pronouncing judgment. The author points out that Justice Reddy was of the view that there is need to make an appropriate distinction between Natural Justice in its application to fundamental liberties, civil and political rights and Natural Justice in its application to vested interests.⁴

The fourth part is entitled as “State As Shareholder: Could It Take Cover Under The Private Law?” This segment focuses on the judgment laid down in *L.I.C. of India v. Escorts Ltd. &Ors.*⁵ Here J. Reddy was of the opinion that the actions of the State as a shareholder in a company do not belong to public law and hence are not liable to be subjected to judicial review. The Court here prominently declared that it will examine the actions of the State if they pertain to the domain of public law and it is impossible to draw the line with precision and the question must be decided on case to case basis. It further declared that when the State purchases the shares of a company, it assumes to itself the role of a shareholder and has all the rights and duties just like any other shareholders.

The fifth part is very interestingly titled as “Jurisprudence For The Lilliputians – Voyage Through Part IV Of The Constitution” and it consists of three Articles. Under this part the author tried to highlight the humanist nature of J. Reddy where he argues that the workers working on daily wage should get equal wage as that of the permanent workers of any Government department.⁶ He further urged abolition of the contract labour in certain economic activities and strongly urged the implementation of the Contract Labour (Regulation & Abolition) Act, 1970.⁷ He put emphasis on the plight of the Harijans all over the country and asked the Indian Judiciary to take special notice to their miserable housing conditions so that they can live with their basic inalienable human rights.⁸

The sixth part is titled as “Contribution To Criminology: Humanising Penology.” This part deals with six Articles regarding the execution of punishments including the capital punishment. Through these case studies the author has shown that J. Reddy believed in the reformative theory of punishments and had given minimum period of two and half years

⁴ *Swadeshi Cotton Mills Ltd. v. Union of India*, (1981) 2 SCR 533 = (1981) 1 SCC 664.

⁵ (1986) Supp. 3 SCR 909 = 1 SCC 264.

⁶ *Surinder Singh v. Engineer-in-Chief, C.P.W.D.*, (1986) 1 SCC 639 = AIR 1986 SC 584.

⁷ *Catering Cleaners of Southern Railway v. Southern Railway*, (1987) 1 SCC 700.

⁸ *Kasireddy Papaiah v. Government of Andhra Pradesh*, AIR 1975 AP 269.

for the convicted offender to remain under observation in order to determine whether to alter the capital punishment.⁹ Delay in trial is another issue on which J. Reddy was deeply concerned. The unmindful and deliberate delay and inactivity of the prosecuting agencies pained him immensely which led him to proclaim firmly that right to speedy trial is a part of Fundamental Right to Life under Article 21 of the Constitution of India for both the victim as well as for the accused.

The seventh part is entitled as “Philosophy, Concern And The Person: The Judge Through His Lectures” containing two Articles. Under this part of the book the author strives to uphold the philosophy and personality of the Judge. Through the two Articles it becomes evident that Justice Reddy was very much concerned with the environment, most importantly with water and land and its continuous mindless exploitation became a matter of concern for him. To overcome such situation he suggested that all the machineries of the State should work in harmony. It is a point of view that has been upheld by the Indian judiciary again and again over a period of time. Justice Reddy also showed his deepest concern for the oppressed class of the society suffering from poverty, untouchability, superstition, irrationalism and requested the intellectuals of the country to lend a helping hand to them so that they can uplift themselves to the level where they can live with dignity. Thus Justice Reddy weaved a dream of inclusive society where the people of the country will truly live upon the Constitution and its principles with immense love and care.

The final part of the book is titled as “The Journey’s End” where the author gives his reasons for calling Justice Chinnappa Reddy ‘A Humanist’. According to the author, a humanist is a person who is inclusive, respects human dignity and fundamental rights; a person who reacts to the grievances of people in the changing socio-political structure and Justice Reddy lived upon all these principles throughout his career which is reflected upon his judgments.

It will be appropriate to say that the content of the book perfectly justifies its title. The judgments of Justice O. Chinnappa Reddy reflect the glorious days of Indian judiciary where the judiciary proactively upheld the principles of Human Rights and strove hard to make the Indian society a multicultural yet inclusive society. The discussion of the cases reflect the reverence the author had for Justice O. Chinnappa Reddy and effectively makes the readers realize the profoundness of his judgments. The author has also added his own perspectives on the judgments with clarity. The book is easy to read and has a quality of a master story teller. The language of the book is lucid and hence one need not struggle to comprehend the inner

⁹ *Javed Ahmed Abdul hamid Pawalav*. State of Maharashtra, (1985) 2 SCR 8 = (1985) 1 SCC 275.

messages in the judgments. The book is worth reading not only for the students of law but also for any public spirited citizen of the country believing in the principles of the Constitution of India.

Printed at North Bengal University Press, Raja Rammohunpur,
P.O. North Bengal University,
District: Darjeeling (W.B.), India, Pin - 734013,
for the Department of Law, University of North Bengal

DEPARTMENT OF LAW, UNIVERSITY OF NORTH BENGAL

The Department of Law is prominently situated on National Highway 31 between Bagdogra and Siliguri in the District of Darjeeling, West Bengal. The distance from Bagdogra is 6 kilometers and from Siliguri is 7 kilometers. The Department has its own campus in the south Block of the North Bengal University. The sprawling campus of the University enjoys the pristine beauty of the eastern Himalayas and is the intellectual hub of North Bengal. Siliguri is an important subdivision of the district and commercial capital of North Bengal. Located at the foot hills of eastern Himalayas, Siliguri is the gate way to North eastern India and land locked countries like Bhutan and Nepal. It shares a huge and porous international border with Bangladesh, Nepal and Bhutan. It is well connected with all metropolis and major cities by air and rail.

The Department of Law was formerly known as the University College of Law and was established as such in the year 1974. It was upgraded as the Department of Law in the year 2000. Presently the Department offers a B.A. LL. B. [Honours] 5 year integrated course, LL. M. course and Ph. D. The intake at the LL. B. level is 80, and the LL. M. course which was started in 1993 has 25 seats. The criteria of admission both at LL. B. and LL. M. is on merit. The Department has a rich Ph. D. programme. It was started in 1999 and since then more than 34 Ph. D. degrees have been awarded. Presently there are about 15 scholars engaged in doctoral research under various faculty members under the UGC Regulation, 2016. The Department attracts scholars and students from all over India and especially from Sikkim, Assam, Tripura, Arunachal Pradesh, Uttar Pradesh and Odisha. It also attracts students from Bhutan, Nepal and Bangladesh. The self financing P.G. Diploma course on Environment has presently been discontinued.

The Department was jointly selected by the British Council, Delhi, University of Warwick, U.K., and the National Law School of India University to carry out the 'Human Rights Outreach Project'. It was also a partner institution with CEERA, National Law School of India University for carrying out environment education for forest personnel, Tea Garden personnel and judicial officers.

The Department has published number of books as well as Booklets in Human Rights, Environment Legislations in Bengali and Nepali. It has a Legal Aid Clinic in collaboration with the State Legal Services Authorities. It runs a very successful NSS programme.

*Published by University of North Bengal,
Raja Rammohanspur, P.O. North Bengal University,
Dist. Darjeeling, West Bengal, India
Pin- 734013
Phone No.: (0353) 2776 307, 2776 310, 2776 325
Fax: (0353) 2776 307, 2699 001
Website: www.nbu.ac.in
email: nbulawdepartment@gmail.com*