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INDIAN JOURNAL OF LAW AND JUSTICE

Vol. 12 No. 01

March 2021

ISSN-0976:3570

CONTENTS

Editorial

Articles

Widow's Right to Property Under Hindu Law: A Comparative Analysis with Other Personal Laws in India

- *Anupama Ghosal and Sreeja Pal*1

Nuclear On-board: Prospects and challenges of Outer Space Exploration with Nuclear Power Sources

- *Durgambini Patel and Priyanka M. Jawale*11

Integrating the Right to be Forgotten in the Indian Legal Framework in the Light of Experiences from the European Union

- *Jyoti J. Mozika*39

The Menace of Female Foeticide in India: Current Scenario and Socio- Legal Implications

- *Subodh K. Singh*61

Problems of Migrant Workers in India: A Post Pandemic Scenario

- *Harunrashid A. Kadri*80

An Analytical Study of Women Empowerment in the Light of their Social Status, Political Participation and Attainment of Education- A Myth or Reality

- *Jayanta Baruah*92

Rights of Hawkers: A Study under the Indian Legal Framework

- *Sujit Kumar Biswas and Champa Mondal*109

Traversing the Pathways of Citizenship: A Voyage of Contemporary Legal Regime of India

- *Sonia B. Nagarale*132

Right to Information: A Quest for Constitutional Jurisprudence

- *Partha Pratim Paul and Biswajit Das*147

A Socio Legal Study of Community Policing in India with Special Reference to the State of Meghalaya

- *Arun Kumar Singh*174

Approach and Contribution of Justice Hidayatullah to the Freedom of Speech and Expression

- *Harish Chandra Pandey*190

Participatory Governance through Women's Representation in Gujarat: Assessing the Role and Relevance of Government Initiatives since 2000

- *Ahmed Raza*211

Finding the Ratio between Law as an Instrument of Social Change and Social Changes that Germinated Law: A Unique Indian Scenario

- *Biswajit Chatterjee and Bidisha Bandyopadhyay*220

A Critical Review on Indian Agricultural Policies with Special Reference to Women Farmers

- *Bhaswati Saha*248

Water and Women's Right in India: An Eco-Feminist Approach

- *Neelam Lama*263

Swachha Bharat Abhiyan and Affordable Housing for the Slumdweller and EWS: Legal Challenges

- *Leena Kumari*276

NOTES AND COMMENTS

Relevance of Consumer Protection Act, 2019 in E-Commerce

- *Chinmay Patra*291

Development of Sustainable Energy in India: Steps to be Taken

- *V Surya Narayana Raju*303

BOOK REVIEW

A PEOPLE'S CONSTITUTION- The Everyday Life of Law in the Indian Republic (2018) by Rohit De, Princeton University Press 41 William Street, Princeton, New Jersey 08540, pp.5 +296, Price ₹.699

- *Subhajit Bhattacharjee*314

EDITORIAL NOTE

As the world still reels with the global pandemic, the Indian Journal of Law and Justice (ISSN-0976: 3570) proudly steps in its eleventh year. Over the past ten years, the journal has strived to contribute to the academic discourse surrounding legal and multi-disciplinary issues in the Indian Sub-continent as well as globally by publishing articles by both students and established scholars, as well as domestic and international authors.

Already recognized by the UGC and included as a CARE-Listed Journal, the Indian Journal of Law and Justice, since 2019, has achieved the feat of being acknowledged by the internationally acclaimed online database and journal, HeinOnline. Anyone with a subscription of HeinOnline, now can access the Indian Journal of Law and Justice.

IJJLJ welcomes articles that promote a better understanding of legal phenomenon and legal decisions made by judges, courts or regulatory agencies. Theoretical papers are welcome, provided they have a strong basis in law and allied social issues. We also accept case studies as well as empirical analyses – including empirical investigations. While IJJLJ does not favour any particular topic, it does have a focus on new and emerging problems. Themes and issues based on Indian Sub-Continent as it is felt important to exploit the sub-continent's considerable institutional diversity in order to build a more robust body of theory and empirical evidence. However, we do not wish to confine ourselves to the above; the purpose of the journal is also to showcase the diversity of legal issues as supplied by an international mix of authors.

Turning to our recent journal issue, we again present a diverse selection of stimulating articles from authors and scholars. This Volume touches upon Women's Issues on 'Widow's Right of Property', 'Female Foeticide', 'Political Participation of Women', 'Participatory Governance through Women's Representation in Gujarat' and 'Indian Agricultural Policies with reference to Women Farmers'. Comprehensive analysis of 'Problems of Migrant Workers in the Post-Pandemic India' and 'Rights of Hawkers under the Indian Legal Framework' have been made. Special mention is due to the article on 'Prospects and Challenges of Outer Space Exploration with Nuclear Power Sources' examining the socio-economic and legal concerns of Nuclear Power Sources along with technical challenges at national and international level.

Research-based articles on two opposing facets of Right to Privacy, i.e., 'Right to be Forgotten' and 'Right to Information under Constitutional Jurisprudence' provide for engaging reads.

The article on 'Justice Hidayatullah's contribution to Freedom to Speech and Expression' makes a significant contribution that builds on previous research about Justice Hidayatullah. A very valuable review and critique of recent development in the field of citizenship law in India has been delivered in 'Traversing the Pathways of Citizenship: A Voyage of Contemporary Legal Regime of India'. Contributions on 'Community Policing in State of Meghalaya', 'Law as an Instrument of Social Change' and 'Swachha Bharat Abhiyan' are replete with informative material for researchers in the fields and are based on key contentions.

The volume also contains two Notes and Comments on 'Relevance of Consumer Protection Act in E-Commerce' and 'Development of Sustainable Energy in India' and a Book Review.

I thank all contributors for their submissions to this edition and their cooperation with the editorial team during the production phase. I would also like to express my gratitude to the entire Editorial Team whose commitment and perseverance made this publication possible.

Suggestions and opinions for the improvement of the journal is solicited.

With Best Wishes

Chief Editor

Widow's Right to Property Under Hindu Law: A Comparative Analysis with Other Personal Laws in India

*Dr. Anupama Ghosal¹
Sreeja Pal²*

Abstract

In the ancient Hindu society where widows were subjected to the inhuman practice of Sati, there was no discussion over giving them property rights, and they would be divested of their husbands' properties. With the advent of the British colonial rulers in India, the widow's rights started being recognized, first with the Bengal Sati Regulation, 1829 which abolished Sati, followed by the Hindu Widow's Remarriage Act, 1856. However, widows were still far from getting property rights. Before 1937, the widow of a Hindu governed by Mitakshara and as well as Dayabhaga law had only a right of maintenance in respect of coparcenary property in which the husband had interest. This Paper aims at tracing the evolution of widow's rights in property from the ancient rules of Hindu Law through the Hindu Women's Right to Property Act, 1937 of British India and the Hindu Succession Act, 1956 which came up post-Independence of India. The analysis will be augmented by discussions around the recent jurisprudential developments in this regard. Finally, the Paper entails a comparative analysis of widow's right to property under Hindu Law and other Personal Laws of India.

Key Words: *Widow's Property Rights, Women's Rights in India, Hindu Widows' Rights, Hindu Widow's Right to Property after Remarriage*

I. Introduction

Property is generally considered to be a source of power, societal prestige and financial independence. In the ancient Hindu society where widows were subjected to the inhuman practice of *Sati*, there was no discussion over giving

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them property rights, and they would be divested of their husbands' properties. With the advent of the British colonial rulers in India, the widow's rights started being recognized, first with the Bengal Sati Regulation, 1829³ which abolished Sati, followed by the Hindu Widow's Remarriage Act, 1856.⁴ However, widows were still far from getting property rights.

Before 1937, the widow of a Hindu governed by Mitakshara and as well as Dayabhaga law had only a right of maintenance in respect of coparcenary property in which the husband had interest.⁵ In respect of separate property left by her husband, she had only the right of maintenance when the husband had left a son, grandson, or great-grandson.⁶ This made the widow dependent on the surviving coparceners or the male lineal descendants for basis sustenance allowances. A widow would often be left uncared for, as the death of her husband would leave her property-less and a destitute at the mercy of the intestate's relatives.⁷

Such unfortunate state of the widow gradually improved with the enactment of the Hindu Women's Right to Property Act, 1937,⁸ which gave her a life interest in a share of her deceased husband's property, but subject to reversion on her death. This was followed by the Hindu Succession Act, 1956 which finally gave the widows their due right of ownership over her share of the husband's property.⁹

II. Evolution of Widow's Property Rights through Early Legislations – The Hindu Women's Right to Property Act, 1937

The Hindu Women's Right to Property Act passed in 1937 brought about significant change in the property rights of Hindu Widows. The Act applied to

³The Bengal Sati Regulation (1829).

⁴ The Hindu Widow's Remarriage Act (1856).

⁵J. RANGANATHMISHRA, MAYNE'S TREATISE ON HINDU LAW & USAGE 375-378 (15th ed., 2003)

⁶S.A. DESAI, MULLA : PRINCIPLES OF HINDU LAW, (21st ed., 2010)

⁷Saxena, J. N. "Widow's Right of Succession in India." THE AMERICAN JOURNAL OF COMPARATIVE LAW 574-585 (1962).

⁸The Hindu Women's Rights to Property Act (1937).

⁹The Hindu Succession Act (1956).

Hindus governed by both the Mitakshara and the Dayabhaga schools. The changes made by the Act accorded a legislative recognition of the right of a widow. It was a progressive step that emboldened her right to her husband's property. Though being a revolutionary change in the face of opposition from the orthodox members of the Hindu society, the act was far behind in according widow's absolute right over their husband's properties.¹⁰ It gave widows a life interest in the property of her deceased husband.¹¹ The act governed the devolution of both separate property, as well as the undivided share of the deceased husband in coparcenary property.

The position prior to this act was that, the widow succeeded to the separate property of her husband only on failure of his male issue. However, section 2 of the act expressly repealed the pre-act customs and rules of laws that were contrary to the provision of this Act.¹² Section 3 of the Act provided that, when a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son.¹³

When a Hindu governed by any school of Hindu Law other than the Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.¹⁴ Sub-section (3) stated that any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.¹⁵

¹⁰B. AGARWAL, A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA (1994).

¹¹S.A. DESAI, MULLA : PRINCIPLES OF HINDU LAW, (21st ed., 2010).

¹²The Hindu Women's Succession Act, §2 (1937).

¹³The Hindu Women's Succession Act, §3(1) (1937).

¹⁴The Hindu Women's Succession Act, § (3)(2)) (1937).

¹⁵The Hindu Women's Succession Act, § (3) (3)) (1937).

These provisions resulted in conferring on the widow a right similar to the right of a son in some respect, such as the right to claim partition of the coparcenary property. However, the difference between the rights of widow and her son lay in the fact that while the son took an absolute interest, the widow got a limited interest. This limited interest in the coparcenary property created an anomaly of sorts. As per Section 3(2) of the Act, the widow had, subject to the provision of limited interest under sub-section (3), had the same interest as her deceased husband had. However, such a substitution of the widow in the place of her deceased husband in the coparcenary did not make her a coparcener - her position was unique. The objective behind the Act was to protect the rights of widows, so that after the demise of her husband, a Hindu widow, should not have to be dependent on others for the sustenance out of her husband's property.¹⁶ Prior to the enactment of the act of 1937, it was an ironical situation where the widows were at the mercy of other relatives of the husband for maintenance out of the very property which she should have had a right upon. The Act aimed at making a widow economically strong, capable of looking after herself.

However, the drafters of the Act had left some ambiguity regarding the mode of acquisition of the share by the widow. The mode of devolution of the property in the widow's favour was later evolved, through various interpretations of the respective sections by the honorable High Courts. The provision only provided vaguely that the widow would be entitled to the 'same interest' that her deceased husband had had. According to the rule of coparcenary, it is a birth right that the coparcener gets in the property. The expression 'same interest he had' had to be interpreted to resolve the issues with respect to her status, the quantum of the interest since the husband's interest in the undivided coparcenary was a fluctuating interest.¹⁷ The judicial opinion in the case *Seethamma v. Veeranna*, the Madras High Court held that although she took the husband's interest, she could not be given the status of the coparcener but would be considered as a member of the joint family.¹⁸ The widow's share was a fluctuating interest, till she ascertained it by seeking partition. Thus, if she died without asking for partition, the interest would revert back to the surviving

¹⁶P. P. SAXENA, FAMILY LAW LECTURES : FAMILY LAW II, 331 (3rd ed., 2011).

¹⁷*Ibid.*

¹⁸*JonnagadlaSeethamma&Anr. v. JonnagadlaVeeranaChetty*, AIR 1950 Mad 785 (India).

members of the coparcenary by the rule of Survivorship.¹⁹ The issue regarding the quantum of share, the judicial view was that her share could be ascertained when she claimed partition.²⁰

Another point of ambiguity was the question of chastity of the widow as a ground for disqualification. Under classical Hindu law, an unchaste widow was disqualified from inheriting the property of her deceased husband. Mitakshara law relating to this bar is mentioned in Chapter II, section II, placitum 2, which states, "Let the widow succeed to her husband's wealth, provided she be chaste."²¹ The Act did not explicitly mention anything in this regard, and the courts interpreted section 2 of the act to come to form conflicting opinions. The point of contention was that it did not abrogate the entire pre-Act law relating to inheritance, but repealed the customs and rules that were contrary to the provisions of the act, so the position was uncertain as there was no provision in the first place on this issue of chastity in this act. The question that lay before the court was thus, whether in the absence of any express provision to the contrary, would an unchaste widow be entitled to inherit the separate property or an undivided share in the Mitakshara coparcenary? Stating the authority from Mayne's Hindu Law, the Bombay High court observed that, "*In the Hindu Women's Rights to Property Act, 1937, the bar of unchastity seems to have been removed even with regard to the widow inheriting her husband's property, because it says that its provisions shall apply notwithstanding any rule of Hindu law or custom to the contrary, and as observed in Mayne's Hindu Law, 10th edn., at p. 722, 'as the Act confers upon the widow a right of succession notwithstanding any rule of Hindu law, an unchaste widow will not be disqualified from inheritance.'*"²² Contrary to this view, the Madras High Court held that section 2 repealed only those rules of custom and of Hindu law, for which a contrary provision had been enacted under the 1937 Act.²³ The Court observed that, "*When the enactment is in the nature of an amending provision, that is to say, a provision which amends the general law on the subject in any particular it should not be interpreted so as to alter completely the character of*

¹⁹Inheritance and Succession, rights of women and daughters under personal laws

²⁰Kallian Rai v. Kashinath, ILR (1943) All 307 (India).

²¹AkobaLaxmanPawar v. Sai Genu LaxmanPawar, (1941) 43 BOMLR 338(India).

²²*Ibid.*

²³RamaiyaKonar v. MottayyaMudaliar, AIR 1951 Mad 954 (India).

the principal law, unless clear language is found indicating such intention.” Since the act was silent on the disqualification aspect, it meant that the general law relating to the disqualification of a widow were applicable even after 1937, and they disqualified an unchaste widow from inheriting the property of her deceased husband.²⁴

Due importance should be given to the fact that the Act applied to property other than agricultural and impartible estates.²⁵ Therefore, it should be seen to have replaced the widow’s right to maintenance with that of limited life interest in the property. Families where the only property available was either of the two exceptions, the widow retained her rights to claim maintenance.²⁶

III. Widow’s Right to Property Under the Hindu Succession Act of 1956 and the Recent Developments

The Hindu Women’s Right to Property Act, 1937 had many ambiguities and the interpretations arising out of these were difficult to reconcile. As pointed out by the Judicial Committee in *MoniramKolita v. Keri Kolitani*, “The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest.”²⁷ Apart from the ones mentioned above, the nature of the widow’s limited interest in the property of her husband created a problem not only for her and the coparcenary but also the creditors to whom her deceased husband owed debts. Under Hindu law, it was the pious obligation of the son to repay the debts of his father, but the wife was not bound by any such obligation. In addition to this, there was ambiguity regarding the widow’s right to alienate her interest in the property. Also, the law made the widows vulnerable to loss of the interest. All such anomalies were put to rest by the introduction of the Hindu Succession Act, 1956.

The Hindu Succession Act, 1956 enlarged the limited estate to an absolute estate and removed the impediments of moral conduct, chastity and to a limited degree

²⁴*Id.*, P. P. SAXENA, FAMILY LAW LECTURES : FAMILY LAW II, 339 (3rd ed., 2011).

²⁵*Kotaya v. Annapurnamma*, (1945) ILR Mad 777(India); *Udham Kaur v. Prakash Kaur*, AIR 1945 Lah 282 (India).

²⁶P. P. SAXENA, FAMILY LAW LECTURES : FAMILY LAW II, 339 (3rd ed., 2011).

²⁷*MoniramKolita v. Keri Kolitani*, ILR 5 Cal. 776 (India).

re-marriage, which improved the widow's condition. According to this Act, a widow is included in Class I of Schedule I, and she inherits the separate property of her husband as his primary heir and the quantum of her share are ascertained with respect to the presence of the son, daughter, or mother of the intestate, since the 2005 amendment to the Hindu Succession Act gave the daughter equal share as the son in the coparcenary as well as separate property. Most significantly, section 14 of the Hindu Succession Act, 1956 provided that, "*Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.*" The explanation to this section further clarifies that "property" includes those property acquired by a female Hindu by inheritance or devise, or at a partition or in lieu of maintenance or arrears of maintenance, among other modes of acquisition. This section removed the difference between a man's and a woman's estate and enabled the widow to acquire property as full owner which meant that they were handed over all interests in the property, life as well as vested interests, that included the power to alienate the property at her will. Hence, the widow's share of the property would no longer revert back to the surviving coparceners, but could be transmitted by her to her own heirs, thus abolishing the concept of reversionary.

With regard to the issue of re-marriage, this act had removed the disability of remarriage for the widow of the intestate but had a clause of remarriage reserved for some other categories of widows under section 24.²⁸ However, with the removal of Section 24 by the 2005 amendment to the Hindu Succession Act, the disability of remarriage has been removed completely from the acquisition of property by the Hindu widows.²⁹

In a recent judgment, the Supreme Court reiterated that the right to maintenance of a Hindu widow is not a mere formality but a spiritual and moral right which

²⁸AbhayNevagi Associates, *A Widow Who Remarries Has Rights In Her Former Husband's Properties*, THE LEGALLY India, <http://www.legallyindia.com/views/entry/a-widow-who-remarries-has-rights-in-her-former-husband-s-properties>

²⁹Kemi Gupta, *Section 24 Of The Hindu Succession Act, 1956: Consequences Of Its Deletion From The Statute Book*, IJLLS, <http://ijlls.in/section-24-of-the-hindu-succession-act-1956-consequences-of-its-deletion-from-the-statute-book-kemi-gupta-nalsar-university-of-law-hyderabad-ii-year-ba-llb-hons/>.

can be judicially enforced upon and went on to state that, “...in whatever form a limited interest is created in her favour who was having a pre-existing right of maintenance, the same has become an absolute right by the operation of Section 14(1) of the Hindu Succession Act.”³⁰

IV. Widow’s Right to Property under Hindu Law as Compared to Other Personal Laws

Widow’s right to property under Hindu law when compared to other personal laws brings forth some clear points of distinction. In India, Muslims are governed by the Sunni or the Shia laws, depending on the particular school they follow. The Indian Succession Act, 1925³¹ governs the succession rights of citizens apart from Hindus, Muslims, Buddhists, Sikhs or Jains. In other words, it governs the Christians, Parsis, Jews and those marrying under the Special Marriage Act 1954.

A Muslim widow, under both Sunni and Shia law of inheritance is considered as a Quranic sharer. Her share is one-fourth when the husband dies, leaving no child or child of a son how low so ever under Sunni law, or a lineal descendant under Shia law. Her share is reduced to one-eighth when there is a child or child of a son under Sunni law, or a lineal descendant of the husband under Shia law.³²

In the Indian Succession Act, 1925, Chapter II of Part V is applicable to all persons other than Parsis, while Chapter III is applicable to only Parsis.³³ In case of interstate succession other than a Parsi, when the intestate dies leaving behind him a widow, the widow gets one-third of the property if there are lineal descendants, or, one-half of the property in the absence of lineal descendants,

³⁰*JupudyPardhaSarathy v. Pentapati Rama Krishna &Ors*, (2016) 2 SCC 56; The Economic Times, *Widow can claim absolute right on 'maintenance' property: Supreme Court*, THE ECONOMIC TIMES, <http://economictimes.indiatimes.com/news/politics-and-nation/widow-can-claim-absolute-right-on-maintenance-property-supreme-court/articleshow/49770455.cms>.

³¹The Indian Succession Act, Part II, Section 4 (1925).

³²P. P. SAXENA, FAMILY LAW LECTURES : FAMILY LAW II, 519 & 543 (3rd ed., 2011).

I. MULLA, COMMENTARY ON MUHAMMEDAN LAW (2006).

³³The Indian Succession Act (1925).

the other half going to the distant kindred of the intestate.³⁴ Under the Act, when a male Parsi dies intestate leaving behind him a widow along with children, the share of the widow and the son shall be double the share of the daughters, if any.³⁵ If the intestate has no lineal descendants but some other heirs, the widow is entitled to inherit half of the property. In case he leaves behind no lineal descendant, but a widow of any lineal descendant, the widow of the intestate shall receive one third of the property.

Therefore, the above discussion reveals that the widows in other Personal laws inherited the property of their deceased husbands, unlike under Hindu law, where the widows only had right to maintenance. However, through legislative pronouncement, a widow's status of property inheritance has been brought at par with other personal laws, where she can exercise absolute right over the property.³⁶

The other primary difference that still remains is with respect to the quantum of the widow's share in the property. While Chapter II of the Indian Succession Act, 1925 allows a widow to inherit a fixed (one-third or one-half) and quite substantial share in the property of her husband, Parsi and Hindu law makes her share dependent on the number of lineal descendant and parents left behind by the intestate, and only in their absence is her share half under Parsi law and full under Hindu.³⁷ However, a Hindu widow's quantum is more favorable than that under Muslim Personal law, which fixes her share to one-fourth or one-eighth of the husband's property, as the case may be.³⁸

V. Conclusion

The widows were previously in a very deplorable condition, where they became near destitute over-night on the death of their husbands. However, the legislative

³⁴The Indian Succession Act, Part V, Chapter II(1925).

³⁵The Indian succession Act, Part V, Chapter III(1925).

³⁶JavedRazack, *Inheritance and Succession, Rights of Women and Daughters under Personal Laws*, Lexorates, <http://www.lexorates.com/articles/inheritance-and-succession-rights-of-women-and-daughters-under-personal-laws/>.

³⁷Saxena, J. N. "Widow's Right of Succession in India." *The American Journal of Comparative Law* (1962): 574-585.

³⁸*Ibid.*

reforms which came about most significantly with the Hindu Women's Right to Property Act, 1937 and the Hindu Succession Act, 1956 ameliorated the conditions of the widows. On a comparative analysis of a widow's rights to property in various Personal laws in India, it is observed that a widow is eligible for different shares in their husbands' property through intestate succession, fluctuating at varying degrees. On a note of similarity however, under the present legislations, widows under all the Personal Laws in India are entitled to absolute right over the share in their husband's separate as well as coparcenary property, which enables her to enjoy the life interest as well as the right to alienate it.

Nuclear On-board: Prospects and Challenges of Outer Space Exploration with Nuclear Power Sources

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Abstract

Since ancient times we have references to space/sky watching. After the Second World War, space exploration became the new frontier. The space-age began with the Soviet's first satellite, Sputnik 1 launch in 1957. Many space agencies of the world, including NASA (USA) and ISRO (India), are working for inspiring space missions. Powering the spacecraft/object is a major concern in space exploration. Solar power is not adequate for deep space missions. Nuclear power sources (NPS) are the most suitable options for going beyond Moon and Mars. Paper examines the socio-economic-legal concerns of NPS along with technical challenges at the national/international level.

Keywords: Nuclear Power Source, Space exploration, Law

I. Introduction

Humans always showed their love for space, the moon, stars, and celestial bodies. Astronomy/astrophysics is not a completely new or modern wing of study. Since ancient times we have references to space exploration, sky watching, and observation. During the Second World War airplanes started functioning and during this time Nazi Germany used long-distance rockets as a weapon. By that time technology, assured that humans can go against gravity and reach to the sky and go beyond to the Universe. After the end of the Second World War, space became the new frontier, and race to the outer space³

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³ As per the Outer Space Treaty, 1967, Outer space includes the moon and other celestial bodies, which has the legal status of 'res communis omnium' (It is characterized as a freedom of exploration and use).

exploration began. The whole cold war era was filled with space missions⁴. The space-age began on Oct. 4th, 1957; when the Soviets launched the first artificial Earth satellite, *Sputnik 1*⁵ into space. After this surprising achievement, U.S. responded and two months later it the United States tried to launch its first satellite but it failed⁶. The first failed attempt created panic and insecurity in the U.S. and lead the foundation for the successful space mission ahead with more focus work and allocation of huge financial budget. The U.S. launched its first successful satellite, *Explorer-1*⁷ on Jan. 31st, 1958.

The Russian Lt. Yuri Gagarin became the first human to orbit⁸ Earth in *Vostok 1* on April 12th, 1961⁹. In the same year (1961) Alan Shepard became the first

⁴ Dora Holland and Jack O. Burns, *The American Space Exploration Narrative from the Cold War through the Obama Administration*, 46 JSP 9-7 (2018). (both links last visited on Dec. 15, 2020) <https://arxiv.org/ftp/arxiv/papers/1803/1803.11181.pdf> and <https://www.sciencedirect.com/journal/space-policy/vol/46/suppl/C>.

⁵In Russian, the word 'Sputnik' means companion. *Sputnik-1* was launched from Baikonur Cosmodrome at Tyuratam in Kazakhstan, the earlier part of the former Soviet Union. (last visited on Dec. 11, 2020), <https://www.history.com/this-day-in-history/sputnik-launched>.

⁶ (last visited on Dec. 11, 2020), <https://www.space.com/38331-sputnik-satellite-fun-facts.html>.

⁷ (last visited on Dec. 11, 2020), <https://www.space.com/17825-explorer-1.html>. *Explorer-1* is a start of Space age in U.S. The *Explorer-1* Satellite was made by the NASA Jet Propulsion Laboratory; it carried a cosmic ray detector which led to the discovery of radiation belts around Earth held in place by the planet's magnetic field. (last visited on Dec. 14, 2020), <https://www.jpl.nasa.gov/missions/explorer-1/#:~:text=ABOUT%20THE%20MISSION,of%20the%20U.S.%20Space%20Age>.

⁸ An orbit means it is a regular, repeating path that one object (satellite or planet, etc.) in space takes around another one. For example, Earth orbits the Sun. Satellite orbit to the Earth.

⁹Lt. Yuri Gagarin's flight was for 108 minutes and he reached an altitude of 327 Kilometers (around 202 miles). The Vostok program was a Soviet space program and placed the first man in space, the first woman (Soviet Cosmonaut Valentina Tereshkova) in space through *Vostok 6*, and the first joint flight of two different crewed orbiters (last visited on Dec. 15, 2020), <https://www.space.com/vostok-program.html>.

American to fly into space and John Glenn with his flight on Feb. 20th, 1962 became the first American to orbit Earth¹⁰.

President John F. Kennedy is known for his iconic words in his celebrated '*We choose to go to the Moon*' speech¹¹. He quoted, "*We choose to go to the moon in this decade and do the other things, not because they are easy, but because they are hard, because that goal will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one which we intend to win. The growth of our science and education will be enriched by new knowledge of our universe and environment, by new techniques of learning and mapping and observation, by new tools and computers for industry, medicine, the home as well as the school*"¹².

This statement not only became the American dream but the whole world was hoping to achieve this goal. Later, the moon landing became the historical and globally celebrated achievement of mankind. Nuclear technology was the invention that created headlines during the Second World War and became the prime reason to end the war. After that, 'space' became the next happening thing to show dominance. The cold war era was full of space missions/experimentations, various nuclear tastings on Earth, underground, sea, and outer space. This necessitated having international consensus on limiting and prohibiting certain kinds of tastings with or without nuclear technology.

¹⁰ It was the Mercury-Atlas 6 mission. John Glenn during his almost five-hour flight, circled Earth three times and return home safely (last visited on Dec. 14, 2020), <https://aerospace.org/article/brief-history-space-exploration>.

¹¹ On Sept. 12, 1962, the 35th U.S. President John F. Kennedy (JFK) gave speech at the Rice University in Texas about going to the moon. This dream was accomplished through *Apollo-11* first crewed moon mission of the U. S. which landed on the Moon on July 20, 1969 but JFK was not alive by that time.

¹²(last visited on Dec. 14, 2020), <https://er.jsc.nasa.gov/seh/ricetalk.htm#:~:text=We%20choose%20to%20go%20to%20the%20moon%20in%20this%20decade,to%20postpone%2C%20and%20one%20which>.

Especially those scientific and technological advancements were proposed to limit which may hamper human existence and damage the environment¹³.

The whole international community was convinced with this idea to limit the inhuman and immoral experiments for military applications. The use of such scientific advancement for the betterment of humanity was then started giving priority. As a result, international institutions such as the United Nations and its specialized agencies started monitoring all such activities¹⁴. These institutions also created a strong international legal framework to prohibit illegal activities and observe developments in this domain¹⁵.

Since initial discoveries, space exploration has provided multiple benefits to mankind. The study of space and Earth observation has proven to be helpful in many areas of human life, such as remote sensing, weather updates, early warnings of disasters, mapping of the impact or foresee the effects or damage of upcoming natural and manmade activities, and many more. All space observation activities on Earth and in space require a power (electricity) supply. Satellites, rockets, and all outer space activities require an uninterrupted electric supply for their operation. The Near-Earth spacecraft go for photovoltaic solar cells linked with chemical storage batteries for power supply. The satellites equipped with solar energy sources are dependent on the positioning of the Sun. Solar power is suitable for limited space missions only. Deep space explorations, discovering lunar or interplanetary bases, manned space missions, sustaining human survival in the foreign atmosphere of space all necessitate high thrust, efficient propulsion systems. Nuclear power is the most suitable

¹³ ICJ REPORT, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep 226. <https://www.icj-cij.org/en/case/95> (last visited on Dec. 31, 2020).

¹⁴ For all areas of wellbeing and development, subject specific international organizations are created. For example, to monitor national and international developments in the field of nuclear technology, International Atomic Energy Agency (IAEA) is created. The outer space related activities are observed by the United Nations Office of Outer Space Affairs (UNOOSA), which has United Nations Committee on the Peaceful Uses of Outer Space (UNCOUPS).

¹⁵ Under United Nations guidance there are many International treaties, Conventions, Protocols, Resolutions, etc.

option amongst all available power sources for conducting all such experimentation and explorations.

II. Outer Space Exploration

The outer space investigation is no more just for the human fantasy, but it is for better understanding our own Earth and Universe. Space investigation promotes Earth science research, and it helps to understand remote sensing data and information captured by satellite and converts/transfers that information ahead of time. There are many international collaborations and joint partnership endeavors in this domain. International cooperation is evident in many areas of technology sharing for assisting in information allocation.

A. Space Exploration Activities at Global Outlook

Many countries do have their national space agency like India has its ISRO¹⁶ (Indian Space Research Organisation); Russian Federation has State Space Corporation (ROSCOSMOS¹⁷). NASA¹⁸ has divided their space exploration missions into Earth missions¹⁹ (these missions include atmosphere, climate, **Continental Drift and Geodynamics, Gravity, Hurricanes, Ice, Land and Vegetation, Oceans, Ozone, Sun and its Influence on Earth, Water Cycle, Weather, Wildfires**), **Humans in space missions**²⁰ (these missions include **International space station**²¹, **Commercial Resupply mission, Asteroid Redirect Initiative, Commercial Space, Orion Crew Vehicle, Space Launch**

¹⁶ (last visited on Dec. 15, 2020), Details can be found on www.isro.gov.in.

¹⁷ (last visited on Dec. 15, 2020), Details can be found on www.roscosmos.ru.

¹⁸ National Aeronautics and Space Administration (NASA) a primer United States space agency.

¹⁹ NASA'S Earth missions, (last visited on Dec. 15, 2020), <https://www.nasa.gov/content/earth-missions-list>.

²⁰ NASA'S human in space mission (last visited on Dec. 15, 2020), <https://www.nasa.gov/content/human-missions-list>.

²¹ Marcia S. Smith, Congressional Research Service, "NASA's Space Station Program: Evolution of its Rationale and Expected Uses" (Testimony before the subcommittee on Science and Space Committee on Commerce, Sciences and Transportation United States Senate) 1-17 (April 20, 2005).

System, Apollo, Gemini, Mercury, Skylab, Space shuttle mission), Solar system missions²² (these missions include Asteroid, comet, Jupiter, Mars, and all other planetary missions are in it), and Universe missions²³ (include Big Bang and cosmology mission, Black holes, **Gamma-Ray Bursts, Galaxies, Gravity, Interstellar Medium, Life in the Universe, Nebulae, Planets Beyond the Solar System, Stars, Supernovae**). There are also some regional space agencies got mentions at UNOOSA such as Asia Pacific Space Cooperation Organization²⁴ (APSCO), European Global Navigation Satellite System Agency (GSA), and European Space Agency²⁵ (ESA).

There are so many space-related activities and experiments going on all around the world. To maintain sustainable development and protect outer space from

²² NASA'S **Solar system missions** (last visited on Dec. 15, 2020), <https://www.nasa.gov/content/solar-missions-list>.

²³ NASA missions (last visited on Dec. 15, 2020), <https://www.nasa.gov/content/universe-missions-list>.

²⁴ In 1988 China, Pakistan and Thailand came with an idea to have cooperation in that Asia Pacific region, then in 1992, they came up with MOU, in 2005 the APSCO convention was signed by three Countries. APSCO has 8 member States (Bangladesh, China, Iran, Magnolia, Pakistan, Peru, Thailand, and Turkey). (last visited on Dec. 15, 2020), APSCO details are available on www.apsco.int. Asia region has two space agencies one is APSCO and (last visited on Dec. 15, 2020) another is APRSAF (The Asia-Pacific Regional Space Agency Forum) <https://www.aprsaf.org/>. APRSAF was established in 1993 to enhance space activities in the Asia-Pacific region under Japan's leadership and APSCO was established in 2008 under China's leadership. India is not a member of APSCO but takes active participation in APRSAF activities. The very existence of two regional agencies in the space domain shows the division of power and the strong geopolitical environment in the Asian region. See, "Asia in Space: Cooperation or conflict?" (last visited on Dec. 15, 2020), <https://www.orfonline.org/research/asia-in-space-cooperation-or-conflict-44890/> Also, read RajeswariRajagopalan, "the case for outer space cooperation in South Asia", *ORF* (Jan. 18, 2019) (last visited on Dec. 15, 2020), <https://www.orfonline.org/research/the-case-for-outer-space-cooperation-in-south-asia-47460/>.

²⁵ The ESA (est. in Paris, 1975) is an intergovernmental organization for space exploration with 22 member states.

hazardous activities, it is essential to have a log of all kinds of space activities. It is important to have data with maximum possible information about the goals/objectives of such missions with particulars of it. The United Nations maintains records and registration of objects launched into outer space since 1962. To date over 86% of all satellites, probes, landers, crewed spacecraft, and space station flight elements launched into Earth orbit and beyond have been registered with the Secretary-General of UNOOSA²⁶. The information on unregistered space object needs to be monitored. The space exploration activities are not only booming at the individual national fronts but there are also joint space collaboration activities between multiple countries and international/regional space agencies. Worldwide, the last decade has shown tremendous development in the space exploration sector and the future has much brighter expansion opportunities in this sector. At present almost every country has a satellite or uses a space-based technology for communication, weather updates, navigating details, and remote sensing.

B. India and Outer Space Exploration

On Feb. 16th, 1962, the Department of Atomic Energy (DAE), the Government of India formulated the Indian National Committee for Space Research (INCOSPAR), and later it established Thumba Equatorial Rocket Launching Station (TERLS) started. Almost a year later, TERLS launched the First sounding rocket on Nov. 21th, 1963. In 1965 Space Science & Technology Centre (SSTC) was established in Thumba, and in 1967 Satellite Telecommunication Earth Station was set up in Ahmedabad. In the early days, INCOSPAR advised the government of India on space policy. TERLS was dedicated to the United Nations on 2nd February 1968. On the historic day of 15th August 1969, the Indian Space Research Organization (ISRO) was formed under the Department of Atomic Energy and in later years its administrative control was given to the Department of Space. For many areas, the administrative model for space activities was similar to the atomic energy in India. There was an Atomic energy commission, Department of Atomic energy, and the Atomic Energy Establishment Trombay later it was renamed as a

²⁶ (last visited on Dec. 15, 2020), <https://www.unoosa.org/oosa/en/spaceobjectregister/index.html>.

Bhabha Atomic Research Centre (BARC). Since the emergence of atomic energy, India has the Atomic Energy Act 1948 (amended in 1962). The Atomic Energy Act 1962 defined the role and responsibility of the government in the nuclear power sector. Contrary to this, India didn't have any specific space law since the start of these space establishments.

The mission and vision statements have guided ISRO for its aims and objects so far. Finally, on June 1st, 1972 Space Commission and Department of Space (DOS) was set up, and ISRO then brought under DOS²⁷. On Apr 19th, 1975 'The *Aryabhata*²⁸ spacecraft' became India's first satellite²⁹. In 1984, *Rakesh Sharma*³⁰ the first Indian Astronaut³¹ flew in space on the Russian Space craft³².

²⁷ ISRO timeline, (last visited on Dec. 15, 2020), <https://www.isro.gov.in/about-isro/isros-timeline-1960s-to-today#7>.

²⁸ *Aryabhata* was a famous Indian astronomer. The *Aryabhata* spacecraft was completely designed and fabricated in India and launched by a Soviet Kosmos-3M rocket from Kapustin Yar. (last visited on Dec. 31, 2020), <https://www.isro.gov.in/Spacecraft/aryabhata-1>.

²⁹ (last visited on Dec. 15, 2020), <https://www.isro.gov.in/Spacecraft/aryabhata-1>.

³⁰ To date Rakesh Sharma is the first and only Indian Citizen who went to space, spending 7 days, 21 hours, and 40 minutes aboard the Salyut 7 orbital station. There was another Indian, the Kirti Chakra recipient, Air Commodore (Retd.) Ravish Malhotra, who was trained along with Rakesh Sharma as his backup astronaut for the Indo-Soviet space mission.

³¹ Two Indian origin astronauts have gone to space with NASA. *KalpanaChawla* who died onboard space shuttle *Columbia* (2003) was amongst the much-praised astronauts of NASA, she was born and raised in India but later she took US citizenship (last visited on Dec. 31, 2020), <https://www.space.com/17056-kalpana-chawla-biography.html>. Another astronaut, *SunitaWilliams* is the record holder of the longest spaceflight for a female space traveler along with the most spacewalking time by a woman. December 2020, NASA declared its upcoming Artemis Team for the next lunar missions and Raja Chari is going to be the 3rd Indian-American among 18 astronaut's team for a manned mission to the Moon and beyond. (last visited on Dec. 31, 2020), <https://indianexpress.com/article/technology/science/raja-chari-nasa-indian-astronauts-7102185/>.

³² On 3rd April 1984, Rakesh Sharma along with two Soviet cosmonauts, Yury Malyshev and Gennady Strekalov traveled to space to the space station Salyut 7. At present, the

The father of India's space program Dr. Vikram Sarabhai has said that India's space program is not for competing with the economically advanced nations but, we have the same purpose for this scientific advancement as they do have. To date India has 110 spacecraft missions, 78 Launch Missions, 10 students satellites, 328 Foreign satellites of 33 countries to its name; ranging its applications from Earth observation (LEO³³) experimentation, Communication (GSO³⁴) satellites, *Chandrayaan*³⁵ (Moon exploration under Planetary observation), Mission Mars, Climate and Environment observation, Disaster Management systems, etc³⁶. At present, India is preparing for its first manned space mission and ready to have many records to its name. So far, India has used three launch vehicles, 1) the ASLV³⁷, 2) the PSLV³⁸, and 3) GSLV³⁹ for

Gaganyaan team (four Indian Air Force pilots) is undergoing intense training at Russia's Gagarin Cosmonaut Training Center for India's, ISRO's very first manned mission '*Gaganyaan*' (2021-2022).

³³ LEO (Low Earth Orbit), as per the International Academy of Astronautics (IAA) a simple definition is '*orbit below about 2000 km above Earth surface*'. As per Merriam-Webster Online Dictionary LEO '*usually is circular orbit from about 90 to 600 miles (about 140 to 970 kilometers) above the earth*'. See, a guide to Space Law terms by Space Policy Institute (SPI), George Washington University and Secured World Foundation, (SWF) Pp77 (1-145) Dec. 2012. About different zones of orbit there is no fixed agreement yet. Some of the experts have four different zones of orbits (LEO, MEO (Medium Earth Orbit), GSO, and HEO (High Elliptical Orbit) and few experts for commercial interest categorizes five orbit zones such as NEO (Near Earth Orbit), LEO, MEO, GSO and HEO.

³⁴ GSO (Geosynchronous Orbit) as per the International Academy of Astronautics (IAA) a simple definition is '*An orbit with a period equal to the period of rotation of the Earth (23h 56m 04s) about its axis*'. A Geosynchronous satellite is '*An earth satellite whose period of revolution is equal to the period of rotation of the Earth about its axis*' (ITU Radio Regulation 1.188).

³⁵ ISRO's first Indian Moon Mission, called Chandrayaan-1 was approved in Nov. 2003 and was launched successfully on Oct. 22, 2008; (both links last visited on Dec. 31, 2020), <https://www.isro.gov.in/pslv-c11-chandrayaan-1> and <https://www.isro.gov.in/Spacecraft/chandrayaan-1>.

³⁶ (last visited on Dec. 31, 2020), <https://www.isro.gov.in/list-of-spacecrafts>.

³⁷ India uses the ASLV launch vehicle is for the Low Earth orbits.

³⁸ India uses the PSLV launch vehicle is for the polar orbits.

launching space objects. In 2003, India invited countries to participate in its robotic spacecraft mission to the Moon (planned for 2007). India has many international tie-ups and in the initial days India took the help of foreign commercial space launch facilities and service providers.

Following India's nuclear weapons test (Pokharan-II⁴⁰) in 1998 the United States had imposed sanctions on India. Those sanctions restricted resources and technology transfer in many scientific areas including nuclear and outer space⁴¹. Due to the pressure of international restrictions and US sanctions, the scientific and technical sector in India faced a crucial time in isolation and relied on their experimentations with limited resources⁴². This international non-cooperation impacted the speed and progress of India in these two vital areas of national interest. For decades India's space program has complete government control.

³⁹ India uses the new GSLV launch vehicle for the launches to geostationary orbit. GSLV is India's hope to use to enter into the commercial market of the space industry.

⁴⁰ **Amitabh Sinha, *Nuclear scientist Anil Kakodkar explains: How Pokhran happened*, THE INDIAN EXPRESS (May 11, 2018) (last visited on Dec. 31, 2020), <https://indianexpress.com/article/explained/how-pokhran-nuclear-tests-1998-happened-5172010/>.**

⁴¹ In the space sector particularly, after 1987 the Missile Technology Control Regime (MTCR), ISRO developed its launch vehicle technologies. ISRO faced sanctions by the United States in the early 1990s, after having an agreement with 'Glavkosmos' a Russian entity to acquire cryogenic engine technology. That time was so crucial with strict control on dual-use technology restricted access in many other areas. Gradually, in the space sector, India strengthened its export control mechanisms; leading ease on some of the sanctions on ISRO. Progressively, the situation changed in 2016 after India becoming a member of the MTCR, and later year the 'Wassenaar Arrangement' offered a bit of ease in business.

⁴² Even during the international sanctions, India was determined on its commitments to protect its national territory and interest from external aggression, particularly from its neighborhood. During that time, then India's President APJ Kalam and Prime Minister Atal Bihari Vajpayee offered strong support, and motivated the Indian scientists working in the nuclear and space sector with a sense of responsibility. Both the leaders not only aimed for robotic Moon mission (Chandrayan-1) but also aimed for human space flight to Mars. At the same time, India came up with a draft of nuclear doctrine stating no first use of nuclear weapons in the war.

Internationally there are some ambitious private space companies and entrepreneurs who are working in this field⁴³. India also wants to play an important role in the emerging commercialization of space. India is opening its doors for private players to work along with ISRO and the Department of Space. There are private players in the Indian space sector such as *TeamIndus*⁴⁴ and visible increase in participating commercialization of space is seen after establishment of *Antrix*⁴⁵ in 1992. To support these advancements India needs to have a robust legal framework and specific space law at the national level⁴⁶. Though India doesn't have national space legislation yet⁴⁷, India has some policies in space-related areas⁴⁸. Many industry experts feel that India lacks a comprehensive space policy⁴⁹. Recently Government of India has decided to

⁴³ Internationally many private players are working for space exploration, such as Elon Musk's Space X, Virgin Galactic, Orbital, Blue Origin, Boeing, Astra, Rocket Lab, Skyrora, Onespace, etc.

⁴⁴ There were 15 Indian private startup applicants for the space Tech solutions award 2020. Out of this, Karnataka state has a maximum (7) start-up in the space sector. Amongst all Skyroot Aerospace Private Ltd. is the winner. The Dhruva Space Private Ltd. and Bellatrix Aerospace Private Ltd. both were the co-winners. There are other private companies and startups in India like Agnikul Cosmos, etc. (last visited on Dec. 31, 2020), <https://www.startupindia.gov.in/content/dam/invest-india/nsa/National%20Startup%20Awards%202020.pdf>, National Startup award 2020, <https://www.startupindia.gov.in/nsa/>.

⁴⁵ Antrix Corporation Ltd. is a wholly own government of India company under administrative control of Department of Space (GOI). It is known to be commercial wing of ISRO helping marketing ISRO's products and services, coordinates with private sector (last visited on Dec. 31, 2020), <https://www.antrix.co.in/>.

⁴⁶ Rakesh Sood, *An Indian Space Law: Long Overdue*, ORF Issue Brief No. 309, (August 2019).

⁴⁷ India proposed a space legislation draft in 2017 but it was lapsed. Almost 28 countries are having their space legislations. (last visited on Dec. 31, 2020), <http://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/schematicoverview.html>.

⁴⁸ India has spacecom policy, remote sensing policy, telecom policy, etc.

⁴⁹ MunikrishnappaAnilkumar&ChetanSingai, *India needs a comprehensive space policy*, 118 (4) Current Science, 522-523 (Feb. 24, 2020) (last visited on July 17, 2019), <https://www.researchgate.net/publication/339445886>.

open the space sector to private companies. To allow the private players to take active participation in space exploration, the government decided to set-up IN-SPACE (Indian National Space Promotion and Authorization Centre). IN-SPACE will allow private companies to use India's (governmental) space infrastructure with ease of doing business and a friendly regulatory framework. This is seen as a boost to the private industry under make in India initiative and prevent Indian brain drain and encourage startups in India.

III. Genesis of Nuclear Power

Before going into the technicalities and challenges of using nuclear in space, it is important to understand the basic concept of nuclear power generation. A Physicist perspective to this field in simple words is nothing but the application of nuclear reactions⁵⁰ for various purposes. It is the form of nuclear reaction that naturally fuels the star including the Sun which supports the survival of life on an Earth. The study of nuclear (core an element) is the base for all kinds of research including the birth of a Universe. The major developments in this area occurred in the shadow of World War II starting from the Manhattan Project⁵¹ of the USA. After the end of war application of nuclear technology was promoted for the benefit of human survival and not particularly for military purposes like creating nuclear/Atomic Bombs or weapons of mass destruction. There are various uses of nuclear technology for a variety of purposes of human life, such as the health sector⁵², water purification techniques, deep-sea mining, advancements in food and agriculture, in environment protection like obtaining information of past and present conditions, mapping of the age of old

⁵⁰The reaction consequent to the fission or fusion of atoms (particularly Uranium). Nuclear weapons have destructive/ explosive power derived from uncontrolled nuclear reactions.

⁵¹ Manhattan Project was the code name for America's development of the atomic weapons program. It was the US response to the fear that German scientists were working on weapons creation using nuclear technology and Adolf Hitler was prepared to use that in the Second World War. <https://www.history.com/topics/world-war-ii/the-manhattan-project> and (last visited on Dec. 09, 2020), <https://www.ushistory.org/us/51f.asp>.

⁵² Nuclear technologies are helpful in cancer treatments, radiation therapy, with the help of X-ray diagnostic technologies, are supported for MRI, CAT Scans, etc.

monuments, and many more⁵³. A large amount of energy is generated through splitting (fissioning) the heavy nuclei of Uranium⁵⁴. The same technique is used for generating nuclear energy at the nuclear power plant to produce billions of watts of electrical power by just consuming a few tons of Uranium in a year. On the other hand, to produce the same amount of electricity from other conventional (non-nuclear) sources, will require a huge amount of fuel like Coal.

Nuclear technology has many advantages and disadvantages. Nuclear energy provides a clean, reliable, and affordable source of electricity and also helps in mitigating the impacts of climate change. At present there are over 400 nuclear reactors working in 30 countries globally, providing about 11 percent of the world's electricity⁵⁵. France is always cited as an example of a nuclear power generating country, which earlier has recorded more than 80 % of electricity supply through nuclear energy. Nuclear power plants were largely got momentum in 1970-the 1980s. This sector has always seen growth and decline with the changing social environment. Apart from the use of nuclear bombs on Hiroshima and Nagasaki nuclear power has shown harmful radiation effects in various nuclear power plant accidents⁵⁶. The use of nuclear

⁵³ Benefits of nuclear energy, (last visited on Dec. 09, 2020), <https://www.rusatom-overseas.com/nuclear-energy/benefits-of-nuclear-energy/>. See, world Nuclear Association on "Many uses of nuclear technology" (last visited on Dec. 09, 2020), <https://www.world-nuclear.org/information-library/non-power-nuclear-applications/overview/the-many-uses-of-nuclear-technology.aspx>, also read "Nuclear power: pros and cons" (last visited on Dec. 09, 2020), <https://www.power-technology.com/features/nuclear-power-pros-cons/>.

⁵⁴Uranium is a naturally radioactive element with an atomic number of 92 and is considered a heavy metal. Uranium-235 is the only isotope (an isotope is a version of the element with a differing number of neutrons in its nucleus) capable of sustaining a nuclear fission reaction. French physicist Henri Becquerel (1897) discovered some sort of emissions from the uranium salts while doing research this leads to him sharing a Noble Prize with Marie and Pierre Curie in 1903 for the discovery. (last visited on Dec. 09, 2020), <https://www.livescience.com/39773-facts-about-uranium.html>.

⁵⁵ (last visited on Dec. 09, 2020), <https://www.iaea.org/topics/nuclear-power-reactors>.

⁵⁶ The general public became aware of nuclear energy through nuclear bombings first and later discovered civilian use through nuclear power generation. The Three Mile

technology/fuel/resources/power sources is not as easy as compared to other ordinary energy sources like coal. The use of nuclear sources needs extra care and vigilance in handling. The use of nuclear for military purposes is a global worry, leading to the issue of proliferation of nuclear weapons and the acquisition of these weapons of mass destruction by the terrorist⁵⁷ groups. Nuclear is an important component of every State's national security policy to decide on the use of nuclear in defense or deterrence matters⁵⁸.

IV. Nuclear Power in Space- Facts and Prospects

As compared to other power sources, using nuclear power for deep space investigation is the most suitable option at present. Nuclear power allows having minimum weight and size of a power generating equipment, also has the ability to operate in high temperature and it can provide long term reliable power supply in a natural and perturbed environment of outer space. Space exploration is not possible without an uninterrupted power supply. Space power systems have three main patterns, 1) ground-based systems⁵⁹, 2) nonnuclear space power

Island Accident (the USA in 1979), The Chernobyl Accident (Ukraine in earlier USSR in 1986), and the recent Fukushima nuclear plant (Japan in 2011) accident have shown long-lasting dangerous effects of radiation on human health and the environment.

⁵⁷ MATTHEW BUNN, MARTIN B. MALIN, et.al., *Preventing Nuclear Terrorism: CONTINUOUS IMPROVEMENT OR DANGEROUS DECLINE?*(Cambridge, MA: Project on Managing the Atom, BelferCenter for Science and International Affairs) Harvard Kennedy School (March 2016).

⁵⁸ For strategic decisions, India has come with Draft Indian Nuclear Doctrine in 1999. See, Rajesh Basrur, "Nuclear India at the Crossroads", 33 (7) *Arms Control Today* 7-11 (Sept. 2003). Draft report of National Security Advisory Board on Indian Nuclear Doctrine, Ministry of External Affairs, GOI (last visited on Dec. 09, 2020), <https://mea.gov.in/in-focus/article.htm?18916/Draft+Report+of+National+Security+Advisory+Board+on+Indian+Nuclear+Doctrine>.

⁵⁹ Ground-based power systems require microwave beam to the Orbit and it includes utility grid, ground-based nuclear power (either by Fission considering military

systems⁶⁰, and 3) nuclear space power systems⁶¹. The electrical power supply has certain operational requirements and similar are with the nuclear power supply. Many things such as controlling nuclear reactions, safe heat transfer or rejection, power conversion by using nuclear source, electricity/energy storage, power transmission, etc. need to be considered while operating nuclear power plants on Earth or on the ground. All the scientific-technological equipment require power to allow them smooth working. All over the world scientist are working on options for developing advanced high-power systems to support space-based studies. Solar power-based systems are used for many civilian space activities⁶².

Near-Earth Orbit⁶³ missions generally get sufficient power through solar energy. But many long-term space missions such as establishing and maintaining Space Station, establishing Lunar base, Mars mission, deep-space exploration, or interplanetary missions requires a huge power supply, and space nuclear reactor is the probable solution for it. It is not a feasible and economic option to take orbital material back on Earth and do its processing and analysis. NASA decided to have space-based material processing facility in the near future. All these objectives are not achievable without an uninterrupted power supply in stormy conditions of space. Since 1965, the United States is using Radioisotope Thermoelectric Generators (RTGs) in space exploration and it has not used nuclear reactors except for some short-term tests/projects⁶⁴. The former USSR

requirements or fusion), Conventional power systems like Coal, gas; oil and chemical (non-nuclear MHD) power options.

⁶⁰ Non-nuclear space power systems include solar photovoltaic (conversion of solar radiation into electric power) systems, solar dynamic systems, and chemical systems (including magneto-hydrodynamic).

⁶¹ For orbital nuclear power systems require a high-end inbuilt safety mechanisms and they include Radioisotope Thermoelectric Generators (RTGs), Dynamic Isotope Power Sources (DIPS), and nuclear reactor systems.

⁶² Solar Power Satellites convert solar energy into electricity and then transmitting it to Earth.

⁶³ Near-Earth Orbit (NEO) is another different category of orbit. As per *Sa'id Mosteshar*, NEO is between 150-450 kilometers above the Earth.

⁶⁴ By 2010, USA had almost 21 satellite launches involving nuclear power sources, out of these three launches faced problems and ended in a crash. These failures are proving that it is not easy to handle radioactive sources in space exploration. In 1978,

has successfully developed and deployed nuclear fission reactor systems in various space assets like satellites and space craft's. During the early days of drafting the Outer Space Treaty (OST), there was so much concern about adding provisions prohibiting the use of nuclear in space for military purposes. Many United States Senators were skeptical of Moscow's approach and their adherence to International law. At the threshold of the Cold War Deputy Secretary of State *Cyrus Vance* assured that '*whilst the Soviets could orbit a small number of nuclear weapons without American knowledge, such a small contingent of weapons would not constitute a significant threat*⁶⁵'. The United States in 1963-1965 launched 12 Vela satellites designed to detect nuclear detonations. Recently NASA's Mars rover was equipped with nuclear power induced technology, which allowed the Mars rover detectors to analyze the composition of Martian rocks.

All these aspects of electricity are extra challenging when we have to operate in completely unfamiliar surroundings of outer space. Nuclear on board of a spacecraft is a challenge especially for radiation safety, controlling reactor (nuclear) fuels, shielding, and protecting nuclear substances/sources in turbulent conditions of space. These concerns are not new and experts from all corners of the world have already raised issues, concerning legality and challenges associated with the use of nuclear power sources in space exploration. The prominent subject expert *Gorbiel*⁶⁶ had identified four areas associated with this subject and they are, 1) information concerning the use of nuclear sources, 2) notification prior to re-entry, 3) assistance to states in an emergency, 4)

the Russian (then USSR) satellite COSMOS-954 was crashed into the Canadian spreading radiation. This incident leads the discussions at the forum of UNCOPOUS. The use of nuclear power sources was also discussed earlier at the UN platform while discussing/negotiating the convention on liability for damages caused by space objects.
⁶⁵ STEPHEN BUONO, "MERELY A 'SCRAP OF PAPER'? THE OUTER SPACE TREATY IN HISTORICAL PERSPECTIVE", 31:2 *Diplomacy & Statecraft*, 364, 350-372 (June 2020) <https://doi.org/10.1080/09592296.2020.1760038>.

⁶⁶ A. GORBIEL, SOME COMMENTS ON THE PROPOSAL CONCERNING THE ELABORATION OF NEW LEGAL NORMS GOVERNING NUCLEAR POWER SOURCES USE IN OUTER SPACE, 131-139 *Proceedings 22nd Colloquium (Munich, 1979)*. Also refer, I.H.Ph. DIEDERICKS-VERSCHOOR and V. KOPAL, AN INTRODUCTION TO SPACE LAW, 101 (*Kluwer Law International*, 3rd end. 2010).

Radiation exposure levels. These are the broader areas of concern that still need deep deliberations.

V. Assessment of Legal Framework

This domain of work needs the approval of two legal systems, one is domestic and another is international. Any kind of space activity in the State (Country) needs to have clearance from the national/local government and regulatory authority. At the same time, the government needs to assure that, their approval or authorization for conducting any kind of space activity should not violate any international standard or norms. The silent feature of space law as a whole is that it generally refers to the conventional law, includes international treaties, conventions, etc. The international space law expert 'Kopal' mentions in his work that, '*national laws as well as activities of private entities performing them under the jurisdiction of individual states, should remain in full harmony with international obligations arising from the international law of outer space which should be respected as the base of all space law*⁶⁷'.

A. National Legal Framework

The space exploration activities are governed by United Nations Treaties, Conventions, and resolutions. At the national level State has to adhere to international norms while conducting any space-related activity. To have uniformity throughout the world, there are international guiding documents on framing national space legislation⁶⁸. The need for national space law is very much immediate as it impacts the growth in the sector. The regulatory framework is an essential part of progress in every field. National law is essential to have sustainable development and promote private players (non-governmental entities) participation. India is a party to significant space law treaties and conventions. India is a member of the UN Committee on Peaceful Uses of Outer Space (UNCOPUOS) of the United Nations Office of Outer

⁶⁷ "Workshop of Space Law in the Twenty-first Century" 11-19 UNISPACE III Technical Forum (July 1999) [Doc. A/CONF 194/7].

⁶⁸ Many countries have referred to the "Sofia guidelines for a Model Law on National Space Legislation" (2013) while drafting national space legislation. (last visited on Dec. 02, 2021), https://www.unoosa.org/pdf/limited/c2/AC105_C2_2013_CRP06E.pdf.

Space Affairs (UNOOSA) set up by UNGA to govern the peaceful exploration of outer space for the benefit of all.

Articles 51 and 253 of the Constitution of India have laid down the responsibility to implement international treaties at the national level. Since 1960 with the initiation of space program India has space-related policies in tune with the international norms as and when necessary. The Department of Space (DOS), Government of India (GOI) is the main policy-making and administrative body to take decisions in this domain⁶⁹. The Department of Space, GOI along with ISRO has formulated many policies and standard operating procedures (SOPs) for this sector. The majority of the policy framework is on the areas of satellite communication (1997), remote sensing data policy (2011), using space-based assets for disaster management and security purposes, and so on. In 2017, the Department of Space, GOI came up with the Draft Space Activities Bill 2017⁷⁰ but nothing happened ahead. For effective and efficient working DOS came with draft spacecom policy 2020 and soon we can expect concrete policy framework in this area. To participate at the international level, get the maximum benefit out of space exploration, regulate private players, and promote growth and competitive environment in this area India needs to have a robust legal framework. Industry experts demand speedy decision-making in matters relating to registration and authorization in this sector and steps to overcome this hurdle are already taken into consideration by the governmental agencies.

B. International Legal Framework

The fundamental principles of International law guarantee the peaceful development of all nations. All States do have the right to development irrespective of their social-economic limitation or not so good geopolitical situations. The United Nations treaties and conventions provide a basic legal

⁶⁹ The Government of India (Allocation of Business) Rules (1961) gives powers to the Department of Space (DOS), Government of India in matters relating to space exploration. (last visited on Jan 02, 2021), https://cabsec.gov.in/writereaddata/allocationbusinessrule/completeaobrules/english/1_Upload_1800.pdf.

⁷⁰ (last visited on Jan 02, 2021), <https://www.prsindia.org/billtrack/draft-space-activities-bill-2017>.

framework for all the areas of national and international coexistence. The United Nations has provided an international legal framework which is also applicable to outer space. As per Article 2 (4) of the UN Charter⁷¹ the use of force is prohibited in outer space. For peaceful uses and exploration of outer space the United Nations General Assembly (UNGA) under the leadership and guidance of specialized agency United Nations Office of Outer Space Affairs (UNOOSA) has passed more than a hundred resolutions since 1958⁷². The international space law consists of five basic fundamental United Nations treaties⁷³ and has five important principles⁷⁴ adopted by the General Assembly of the UN. The legal subcommittee of UNCOPOUS has discussed this area on many occasions.

There are concerns on notification of nuclear incidents, re-entry of nuclear power sources in the earth's environment/ maybe in a different territory than the launching State has been long discussed on many UN platforms. The two conventions were adopted by the UN in 1986 namely⁷⁵, 1) the Convention on Early Notification of a Nuclear Accident and 2) the Convention on the

⁷¹ UN Charter, 1945, (last visited on Jan 02, 2021), <https://www.un.org/en/sections/un-charter/un-charter-full-text/>.

⁷² (last visited on Jan 02, 2021), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/resolutions.html>.

⁷³ Five Fundamental Treaties are, 1) The Outer Space Treaty (1967), 2) Agreement on the Rescue of Astronauts, the return of Astronauts and the return of Objects Launched into Outer Space (Rescue Agreement 1968), 3) Convention on International Liability for Damage Caused by Space Objects (Liability Convention 1972), 4) Convention on Registration of Objects Launched into Outer Space (Registration Convention 1975), 5) Agreement governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement 1979).

⁷⁴The five principles are,1) Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space(1963), 2) Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting (1982), 3) Principles Relating to Remote Sensing of the Earth from Outer Space (1986), 4) Principles Relevant to the Use of Nuclear Power Sources in Outer Space (1992), 5) Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries (1996).

⁷⁵ Doc. INFCIRG/335-336 (1986).

assistance in the case of a nuclear accident or radiological emergency. The concern of radiation protection while using nuclear power sources (NPS) has always received much discussion. NPS in space should be only in priority missions where other power sources are not feasible. The International Commission on Radiological Protection has also given directions on radiation protection in space exposure.

Outer Space Treaty (OST)

Treaty (OST⁷⁶) obligates signatory States to proceed for the peaceful purposes⁷⁷ and beneficial uses of the space. OST solicits to avoid military or non-peaceful conduct in the space environment. The Outer Space Treaty laid down a legal regime on celestial bodies by declaring them a demilitarized zone, and bans the stationing of weapons of mass destruction in outer space. The Outer Space Treaty (OST) is the first formal international diplomatic agreement that prohibited nuclear weapons in outer space as well as forbidden military purposes and nuclear weapons installations on the moon and other celestial bodies' declaring the cosmos a special zone of the common heritage of mankind free for all.

Despite some inadequacies in OST, many have seen it as a durable and successful tool for controlling the arms race in outer space⁷⁸. In absence of a concrete legal framework on explicit prohibitions on military uses of outer space, we can take the help of customary international rules to protect the environment and space environment/biosphere⁷⁹. The OST in its Article IV

⁷⁶Treaty on Principles governing the activities of State in the exploration and Use of Outer Space, Including the moon and other celestial Bodies (The Outer Space Treaty), 1967.

⁷⁷ MARTINA SMUCLEROVA, USE OF OUTER SPACE FOR PEACEFUL PURPOSES, the Oxford Research Encyclopedia, Planetary Science (oxfordre.com/planetariscience). (DOI: 10.1093/acrefore/9780190647926.013.38) Oxford University Press, USA, 2019.

⁷⁸ Stephen Buono, *Merely a 'Scrap of Paper'? The Outer Space Treaty in Historical Perspective*, 31:2 *Diplomacy & Statecraft* 350-372 (June 2020), <https://doi.org/10.1080/09592296.2020.1760038>.

⁷⁹ Tare Brisibe, *Customary International law, arms control and the environment in Outer space*, 8 (2) *Chinese JIL* 375–393 (2009).

deals with the deployment of weapons in outer space. The provision laid down under Article IV mentioned that, none of the States Parties to the Treaty should *'place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner'*. This provision has its basis in the, 'Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963'. This treaty prohibits and put restrictions on nuclear weapons testing, its explosions or any other explosions at any place under State's or control, or within its jurisdiction under the atmosphere, and beyond its limits including outer space. The OST in its Article IV also clarifies that, the moon and other celestial bodies shall be exclusively used only for the peaceful purposes. This provision also forbids the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies. But the treaty is silent on the prohibition of use of any equipment or facility or deployment of military personnel for scientific research or any other peaceful purposes.

So far in many space exploration activities and manned space flights, military personnel were chosen. Many equipment's which has dual use of technology (technology can be used for dual purposes like civilian and military, either or both) are employed on moon and other celestial bodies and there are no clear-cut restrictions on such uses is found. The most important provision Article III of the Outer Space Treaty provides that to maintain international cooperation, peace and security, States should carry on all the activities in outer space including the moon and other celestial bodies, per the international law (by following Charter of the United Nations).

OST is main legal document, considered as a hard law principle. It is quite easy to convince world leaders to follow treaty obligations and respect the international norms. It is always possible to achieve objectives as treaties are backed by signature and ratification by the States. Adherence to international space law is possible only when maximum States will become party to maximum treaties/Conventions. This will be bring uniformity in exploration and will assure common heritage of mankind will be preserved for generations.

Principles Relevant to the Use of Nuclear Power Sources in Outer Space (1992)

The NPS (Nuclear Power Sources) Principle⁸⁰ has eleven Principles. The Principles on NPS are addressed to all the states irrespective of their status with Outer Space Treaty (OST). The most important Principle 3 gives guidelines and criteria for the safe use of NPSs. Principle 3 stressed that it intends to minimize the quantity of the radioactive material in space and the risk associated with it, the use of NPS should only be allowed in those missions who are not possible with non-nuclear energy sources. The nuclear reactors may be used in space mission particularly in interplanetary mission, in high orbits, in low earth orbit if they are stored in high orbit after an operational part of the mission⁸¹.

This NPS Principle in its various provisions deals with the regulatory obligation of the State, notification/communication of re-entry of such space object, consultation, and additional information for the States. The use of NPS in a spacecraft attracts the provisions of Article VII of the Outer Space Treaty concerning responsibility, liability, and compensation. The allocation of Compensation should be as per the Liability Convention. NPS Principle 10 also speaks about negotiation and peaceful settlement of the dispute.

These Principles are like guidelines to be followed by the States, while conducting any Space activity. These are like soft law. States may not take it seriously in their conduct as they are not compulsory and the State is not duty bound to follow such principles. Non adherence to such principles is no where clear signal as a breach of international space law, so it lacks deterrence. With advancements in the science and technology, these principles should be updated from time to time.

IAEA and Scientific and Technical Sub-committee (STSC)

During the 1992 NPS Principles preparation, it was decided to discuss this topic first in the Scientific and Technical Subcommittee (STSC) of UNCOPUS. Finally, from 2003 to 2007 a plan was prepared with a working group on this area. In 2007 they submitted a report which was then endorsed by the

⁸⁰47/68, Principles Relevant to The Use of Nuclear Power Sources in Outer Space (1992), (last visited on Jan. 02, 2021), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/nps-principles.html>.

⁸¹ Principle 3, Principles Relevant to the Use of Nuclear Power Sources in Outer Space (1992),

subcommittee⁸². The report suggested a partnership between International Atomic Energy Agency (IAEA) and STSC to prepare and publish a safety framework⁸³ for NPS application in space⁸⁴. The safety framework has discussed vital areas such as safety, guidance to the governments on safety policy, justifications for space NPS applications, mission launch authorization issues, emergency preparedness, and response. Technical guidance is provided by the governments on using NPS for space activities, especially for safety in designing and development, risk assessment, accident consequence mitigation, and so on.

VI. Dimensions and Challenges

A. Environment and Biosphere Risk

Construction of nuclear power plants and use of nuclear energy for power generation is still a hot topic of debate on Earth and at the same time choosing nuclear power as an energy source in outer space activities poses an altogether different argument. Irrespective of location (Earth or space) nuclear power generation necessitates significant safety framework and poses a multifold risk. The radiation hazards in the atmosphere are beyond human control. The concerns of the regulatory framework, waste fuel management; spent fuel management at the nuclear power plant on Earth is still a major challenge for the nuclear industry. Setting up a Nuclear power plant on the moon or on any other celestial body raises similar concerns; even it may be for a future human colony. The re-entry of the satellite with nuclear on its board is a worry for all the nations. You cannot immediately guess where exactly the radiation may spread and how much area it might contaminate. All we can do is, respond to the nuclear emergency. Considering the use of nuclear power sources in space

⁸² Draft Report of the legal subcommittee on its 2007 session, UN Doc. A/AC.105/C.2/L.268/Add. 4, pp. 9-10.

⁸³ Safety Framework for Nuclear Power Source Applications in Outer Space, UN COPOUS STSC, and IAEA, Vienna, 2009 A/AC.105/934, (last visited on Jan. 02, 2021), <https://www.unoosa.org/pdf/publications/iaea-nps-sfrmwrkE.pdf>.

⁸⁴ (last visited on Jan. 02, 2021), <https://www.unoosa.org/oosa/en/ourwork/copuos/stsc/nps/index.html>.

exploration or any orbital services we should revisit the National Environmental Policies and time and again.

B. Public Acceptance

The use of nuclear in space exploration not only has scientific and technical challenges but also has socio-legal-economic issues. The operator of a spacecraft with NPS onboard has to reassure paramount safety mechanism and assure that even in case of misfortune or an accident in the space biosphere, it will be at extremely low risk of radioactive contamination. This kind of practice and approach is not the sole condition to have public acceptance but it will at least minimize the opposition. The general public is not open-heartedly ready to accept nuclear power plants on Earth. By showing commercial benefits, we can't expect public consent on space exploration with NPS in space. Another major concern is about finance. Space exploration demands more funds.

The use of NPS for space exploration needs more concrete study and understanding which demands more investment of money and best minds to work on these projects. The socialist believes that if such a huge amount is utilized for the basic needs and welfare of the common people then it is more beneficial than the fulfilling the fantasy of the modern competitive world of politics. Day by day all countries are investing in space exploration with a huge financial budget. It should be kept in mind that; money should be utilized for the righteous purpose. This field of study needs more research for developing safer, efficient, reliable, and cost-effective materials and techniques. More investments are required for R&D (Research and Development) in this area.

C. Defense and Security

In 2020, the US government announced to have a space force, an armed force wing for space-based defensive measures. For decades superpowers are working on finding ways to achieve the power requirements of the space-based Strategic Defense Initiative (SDI). Not only SDI missions but civil space missions of NASA⁸⁵ also faced this challenge of power supply for longer duration missions.

Under security perspective, space-based defensive assets have the capability to operate with beam weapons which are also referred to as a direct energy

⁸⁵ National Aeronautics and Space Administration (NASA)

weapon. Such weapons have unprecedented power requirements for the preparation of war and during the actual war⁸⁶. There are two potential energy sources for SDIs include chemical and nuclear. In space-based defensive assets⁸⁷ there are alert modes and bust mode. In alert mode technologies solar and chemical power sources can be used but for the bust mode, nuclear (nuclear reactor power system) is the potential option to supply multi-megawatt space power. Utmost care is a must in all space endeavors. Technology should not be deployed with an objective of destruction and deterrence. Technology should be used for sustainable development. World leaders should give priority to have a safe and vigilant regulatory framework in this domain.

D. Disarmament

Article IV of the Outer Space Treaty, based on the philosophy of ‘Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water⁸⁸’ (Test Ban Treaty). The OST bans only a few forms of weapons, particularly those of mass destruction. Ballistic missiles and rockets are not banned in the treaty. The Moon agreement says that the celestial body should be explored for peaceful purposes by all the countries. The term peaceful purposes have another interpretation, which is non-military or non-aggressive. The verification process of a spacecraft assures the safety and the possible use of it for peaceful purposes. Nowadays, verification of the spacecraft has become a concern; States are hesitant in declaring their intention of launching a space mission.

Verification and registration leads to transparency, which help restrict misuse of space object for military purpose. Article 12 of the Anti- Ballistic Missile

⁸⁶National Research Council, “Advanced Power Sources for Space Missions”, the National Academies Press, Washington, DC. (1989) <https://doi.org/10.17226/1320>.

⁸⁷ Space-based defensive assets not only focus on SDI but it includes sensor systems, weapon systems, ground-based free-electron lasers, space-based lasers, chemical lasers, radar systems, light, weight and length detecting measure systems, etc. All this equipment requires a continuous power supply and every time solar power cannot supply it.

⁸⁸ (last visited on Jan. 02, 2021), <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801313d9>.

Treaty⁸⁹ (1972) assures compliance with the verification provision. Prohibition of the militarization of outer space is one of the aims of the space law framework. Disarmament at the national and international level is most important for human survival. Arms race in outer space must be restricted at any cost.

E. Health Hazard

For lengthier space missions like going to Mars and beyond needs an appropriate power supply and conventional power sources are inadequate to support it. Nuclear technology is a must for longer space missions, and to reduce the weight of a spacecraft. Outer space already has radiation, and astronaut's exposure to such radiation is already a concern. NASA considers a 3% increased risk of fatal cancer as an acceptable career limit for its astronauts currently operating in Low-Earth orbit (LEO). As per the assessment of the *Curiosity rover*⁹⁰, the rover was exposed to an average of 1.8 mSv of radiation per day. Considering this data, the astronaut traveling in conventional spacecraft would receive a dose of about 660 mSv during a round-trip to the planet, which is nearby to the current limit specified by NASA. It means the accumulated radiation dose is like getting a whole-body CT scan once every five or six days. The nuclear power source may be an economic and feasible option but it certainly raises health concerns for the manned space missions.

F. Legality

Already astronauts are dealing with various levels of radiation exposure during the space mission as outer space itself has radiation and in addition to it, the nuclear rocket doubled such exposure from inside out. The International Court of Justice (ICJ) in the Nuclear Weapons Advisory Opinion Case gave paramount importance to the various aspects of human life and also advised to protect the environment in all possible manners as a sacrosanct duty even during military activities or in case of war. We cannot find a single legal text or international Treaty or Convention which allows or permits the use of nuclear

⁸⁹ (last visited on Jan. 02, 2021), <https://treaties.un.org/doc/Publication/UNTS/Volume%20944/volume-944-I-13446-English.pdf>.

⁹⁰ The Curiosity rover is a mission of a 36-week journey to Mars.

for military purposes (not on space nor Earth). All the permitted fields of using nuclear energy are for the betterment of mankind. World leaders are considering nuclear as a tool for demonstrating strength in the geopolitical environment. The USA has announced to have a space force soon. In the name of progress, we should not lead our world towards insecurity. Even India conducted ASAT test (*Mission Shakti*), while many considered it as a mean for self defence to guard India's assets in space, while some blame it for creation of space debris. Though government of India justified the testing and said that India has not violated any international space law, everyone has equal right of exploration and India is a responsible State. Globalization has allowed us to get connected and come closer but at the same time world is becoming more and more insecure and spending a lot on militarization. It's a conscious responsible of all to follow rule of law and conduct each and every activity by adhering to legal, moral and ethical norms.

VII. Concluding Remark

With advancements in this sector, serious attention requires in: reducing radiation risk in outer space, analyzing the environmental impact on the earth and in orbit, improve systems reliability in minimizing chances of nuclear accidents and find out long-term sustainable options that are cost-effective. Space exploration must adhere to all the fundamental principles of sustainable development goals (SDGs). The use of NPS in space exploration needs more financial support to develop a full proof safety mechanism. Without the government's support and systematic plan of an investment, the NPS for space exploration won't be an easy/affordable option for powering the spacecraft. Increased curiosity in the commercialization of space attracts more private players in this sector. Business-minded/profit-making attitude should be controlled by following ethical guidelines and a robust regulatory framework. The dual-use techniques are inbuilt in some equipment's and it's completely on the willingness of a State/operator, to decide what objective is to be achieved. It is difficult to hold State's and world leader's accountable merely on moral and ethical grounds. Strong regulation backed by hard law sources is must. International cooperation and commitment for peaceful exploration of outer space is an absolute need to avoid uncontrolled, unethical, unorganized, commercial activities, and expansion in space. At the national and international level, there should be awareness programs on scientific development for the

general public. Public should be made aware of the choices of using NPS for space exploration and related matters. The well-informed public will lead to more transparency and will make the State governments more accountable.

Integrating the Right to be Forgotten in the Indian Legal Framework in the Light of Experiences from the European Union

Dr. Jyoti J. Mozika¹

Abstract

The right to be forgotten was brought under the spotlight in the Google Spain case, which held that individuals have the right to seek erasure or delinking of certain information about them. However, its apparent conflicting nature vis-à-vis the right to freedom of speech and expression has created a hindrance in its acceptance and development across the world. This Article outlines the development of this right, traces the practical legal issues vis-à-vis the freedom of speech and expression that have arisen during its implementation, and proposes a test that may be helpful in overcoming this barrier. The article also examines the recognition of the right in the Indian context.

Key words: Privacy, Data Protection, Right to be Forgotten.

I. Introduction

Advancements in technology have rendered information on the internet ubiquitous and permanent. This has drastically altered the way in which people remember and recall information about other people. However, the internet, being decentralized, cannot be regulated, and this leads to the publication of various types of information about people. This information may be outdated, false, or no longer relevant due to changed circumstances, but permanently remain on the internet and only a click away. This may cause harm to individuals and threaten their dignity and autonomy.

The “right to be forgotten” is a remedy that enables individuals to demand search engines to de-list or erase information about them which appears when a search of their name is conducted. It is aimed at giving individuals a right to determine for themselves the extent to which information about them can be published or retained on the internet. The right to be forgotten, which is a part of the right to privacy, was brought under the spotlight by the decision of the Court

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of Justice of the European Union in the Google Spain case,² where it concretised a (limited) right of individuals to erase, limit, delink, delete, or correct personal information on the internet that is misleading, embarrassing, irrelevant, or anachronistic. Although the direct impact of this decision was limited to countries belonging to the European Union, it was realized that this “right” has existed in many forms around the world.

The right, however, has faced key underlying policy considerations as well as practical difficulties in implementation. In particular, its apparent conflicting nature vis-à-vis the right to freedom of speech and expression has created a hindrance in its acceptance and development across the world. Courts have been asked multiple times to balance privacy rights with those of free speech, and there is no uniform approach being followed across countries. Civil law jurisdictions give greater weight to privacy concerns in striking this balance, while common-law jurisdictions tend to give greater weight to the freedom of expression.

II. Privacy

The right to privacy is, in its most simple sense, a right “to be let alone”.³ Broadly, the idea of privacy consists in the right to prevent access to our person.⁴ It has been invoked to seek protection against unauthorized circulation of portraits of private persons,⁵ invasion of privacy by newspapers, and unreasonable searches and seizures. As far back as in 1890, Samuel Warren and Louis Brandeis advocated it as “the right to protect one’s self from pen portraiture”.⁶ They argued that the law should recognize the right to an “inviolable personality,” deriving the idea of a right “to be let alone” from an

²Google Spain SL v. Agencia Espanola de Proteccion de Datos, Case-131/12 (CJEU, May 13, 2014) [hereinafter “Google Spain”].

³ Judith Jarvis Thomson, “The Right to Privacy” 4(4) *Philosophy & Public Affairs* 295 (1975).

⁴ Mark Alfino and G. Randolph Mayes, “Reconstructing the Right to Privacy” 29(1) *Social Theory and Practice* 4 (2003).

⁵ K. Gormley, “One Hundred Years of Privacy” 92 *Wis L Rev* 1335 (1992).

⁶ Samuel D. Warren And Louis D. Brandeis, “*The Right To Privacy*” 4(5) *HARVARD LAW REVIEW* 1 (1890).

English common law case called *Prince Albert v. Strange*.⁷ While the case revolved around the law of confidentiality, rather than privacy, Warren and Brandeis argued that the law of privacy already existed, and that they had not invented but merely discovered the right. Legal commentator Nicole Moreham describes privacy as control over “desired inaccess” or freedom from the “unwanted access” of others to oneself or one’s personal information.⁸ It has also been referred to as a right to quietly congregate in public places and enjoy one’s own reflections and the conversation of one’s friends.⁹

Thus, the phrase has amassed different meanings in different contexts.¹⁰ However, what is common between all these uses is that the right ultimately helps to protect an individual against unwarranted intrusion upon a sphere of life.¹¹ Privacy is a broad concept that deals with the protection of individual autonomy, and the relationship of an individual with other individuals, companies, and governments. It is considered essential in protecting an individual’s ability to develop ideas and personal relationships. In today’s digital age, the right to privacy has progressed to address issues relating to the collection, use, and dissemination of personal data in information systems.¹²

The right to privacy is seen as a core right that reinforces the dignity of humans and other values such as the freedom of expression.¹³ It has been recognised in several international human rights treaties¹⁴ and almost every national

⁷ *Prince Albert v. Strange*, (1849) 47 ER 1302.

⁸ Nicole Moreham, “*Privacy in Public Places*” 65 CLJ 617 (2006).

⁹ Howard B. White, “*The Right to Privacy*” 18(2) Social Research 171 (1951).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² G.A. Res. 68/167, ¶4 (Jan. 21, 2014).

¹³ Human Rights Committee, General Comment No. 16 to Article 17, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, HRI/GEN/1/Rev.9 (Vol. I) (Apr. 8, 1988); Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (SR on HR and countering terrorism), A/HRC/13/37 (Dec. 28, 2009).

¹⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 17 (1966);

constitution,¹⁵ and has also been legally protected through provisions in national civil and criminal codes.¹⁶ However, the right to privacy is not an absolute right. It is subject to the three-part test of legality, necessity, and proportionality.¹⁷

III. The Right to be Forgotten

Soon after the right to privacy was recognized, the need was felt to enhance and liberalize its interpretation so as to afford citizens protection of a wider import. One such subset of the right to privacy is the right to be forgotten. The right to be forgotten refers to the right of an individual to erase, limit, or alter past records that can be deceptive, redundant, outdated, disconcerting, or contain irrelevant data associated with the person, so that those past records do not continue to hamper present-day perceptions of that individual.¹⁸ Under the law of human rights, the idea of the right to be forgotten is commonly positioned within the realm of the right to privacy.¹⁹

Behind the inception of the idea of such a right lies the enormous expansion in the availability and accessibility of information in the digital world of the internet.²⁰ Because of the permanent nature of information availability in the

European Convention on Human Rights and Fundamental Freedoms, ETS 5, art. 8 (1950).

¹⁵ US Department of State, 2010 Country Reports on Human Rights Practices (April 2011).

¹⁶ US Department of State, 2010 Human Rights Report; Charles J. Glasser Jr. (ed.), *International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers* (Bloomberg Press, New Jersey, 3rd edn.).

¹⁷ *Handyside v. the United Kingdom*, Appl. No. 5493/72, ¶ 48-49 (ECtHR, Dec. 7, 1976).

¹⁸ Cecile De Terwangne, "The Right to be Forgotten and Informational Autonomy in the Digital Environment", in AlessiaGhezzi et al. (eds.), *The Ethics of Memory in a Digital Age: Interrogating the Right to be Forgotten* 83-84 (2014).

¹⁹ Xanthoulis, "The Right to Oblivion in the Information Age: A Human Rights Based Approach" 10 *US-CHINA LAW REVIEW* 84 (2013).

²⁰ La Rue, Report of the Human Rights Council's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27 (May 16, 2011).

digital age, memory has become infinite.²¹ Thus, how an individual is perceived based on this information has also become permanent. This is aggravated by the fact that the internet is decentralized, and cannot, therefore, be effectively or meaningfully regulated.²² This led to the advocacy of a right to control such information. The right guarantees an individual the authority “in principle to decide for himself whether or not his personal data should be divulged or processed”²³ and thus allows their protection against data processing entities, such as advertisers, insurers, big pharma, and data brokers.

The idea of a right to be forgotten is not, however, new. In Europe, the idea of the right to be forgotten can be found in French law, which recognizes *le droit à l’oubli*—or the “right of oblivion”. This refers to a right granted to a convicted criminal who has been rehabilitated to object to the publication of the facts of his conviction and imprisonment. In fact, several countries in their domestic laws recognise that after a period of time, criminal records of offenders should be expunged in order to enable their reintegration into society.²⁴

European courts have long recognised a right of citizens to informational self-determination.²⁵ This term was first used by the German Federal Constitutional Court in the context of unwanted collection of personal information as part of the national census.²⁶ The Court here held:

²¹ Viktor Mayer-Schonberger, *Delete- The Virtue of Forgetting in the Digital Age* (Princeton University Press, Oxfordshire, 2013).

²² M. E. Price & S. Verhulst, “*The concept of self-regulation and the internet,*” in J. Waltermann & M. Machill (eds.), *Protecting our children on the internet: Towards a new culture of responsibility* 133 (2000).

²³ Eibe Riedel, “*New Bearings in German Data Protection-Census Act 1983 Partially Unconstitutional*” 5 HUMAN RIGHTS L. J. 69 (1984).

²⁴ Article 19, “*The “Right to be Forgotten”*: Remembering Freedom of Expression (2016) available at https://www.article19.org/data/files/The_right_to_be_forgotten_A5_ehh_hyperlinks.pdf (visited on 8 July, 2020).

²⁵ Giancarlo F. Frosio, “*The Right to Be Forgotten: Much Ado about Nothing*” 15 Colo. Tech. L.J. 313 (2017).

²⁶ BVerfGE 65, 1 vom 15.12.1983 (Volkszählungs-Urteil); Gerrit Hornung & Christoph Schnabel, “*Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-determination*” 25(1) Comput. Law & Security Review 84 (2009).

*“[...] in the context of modern data processing, the protection of the individual against unlimited collection, storage, use and disclosure of his/her personal data is encompassed by the general personal rights of the German constitution. This basic right warrants in this respect the capacity of the individual to determine in principle the disclosure and use of his/her personal data. Limitations to this informational self-determination are allowed only in case of overriding public interest.”*²⁷

Legislation incorporating the right to be forgotten can be traced back to the year 1995, when the European Union enacted Directive 95/46/EC. Although the Directive did not expressly codify this right, a combined reading of Article 6(1)(e) and Article 12(b) produced an inference of the right to be forgotten. Article 6(1)(e) required that member states keep personal data *“in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.”*²⁸ Article 12(b) provided the data subject the right to rectify, erase or block the processing of personal data if the same is not in line with the Directive, *“in particular because of the incomplete or inaccurate nature of the data.”*²⁹

Today, the law relating to privacy is well developed in the European Union than in any other part of the world. Article 7 of the Charter of Fundamental Rights of the European Union states that *“[e]veryone has the right to respect for his or her private and family life, home and communications,”*³⁰ and Article 8 states that *“[e]veryone has the right to the protection of personal data concerning him or her,”* and that *“[s]uch data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.”*³¹ Further, the

²⁷ BVerfGE 65, 1.

²⁸ Council Directive 95/46/EC, art. 6(1)(e), 1995 O.J. (L 281) 31.

²⁹ Council Directive 95/46/EC, art. 12(b), 1995 O.J. (L 281) 31.

³⁰ Charter of Fundamental Rights of the European Union, art. 7, 2010 O.J. (C 83/02).

³¹ Charter of Fundamental Rights of the European Union, art. 8, 2010 O.J. (C 83/02).

first legally binding treaty addressing data privacy is the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, known as the Council of Europe Convention on Privacy.³² It requires signatory nations to enact legislation that offers safeguards for processing personal information that fulfil the minimum levels of protection specified in the convention.³³ Most important, however, is Article 8 of the European Convention on Human Rights which states that everyone has the right to private family life, and prohibits a public authority from interfering with this right except for reasons in accordance with the law and necessary in a democratic society that pertain to national security, public safety, the country's economy, criminal and public health purposes, or for protecting the rights and freedoms of others.³⁴

In 2014, the right to be forgotten was recognised as a right in Europe after the CJEU in the case of *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*³⁵ asked Google to remove an unfavorable link concerning Mr. González from its search results. Proposals for the adoption of a similar right have emerged in several jurisdictions, including Argentina,³⁶ Brazil,³⁷ Colombia,³⁸ Mexico,³⁹ and Hong

³² Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, E.T.S. No. 108, Jan. 28, 1981.

³³ Daniel J. Solove & Paul M. Schwartz, *Privacy Law Fundamentals* 255-56 (International Association of Privacy Professionals, 4th edn., 2017).

³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5 (Nov. 4, 1950).

³⁵ *Google Spain*.

³⁶ *Rodriguez Maria Belen c/Google y Otro s/ dafios y perjuicios*, Oct. 29, 2014, Suprema de Justicia de la Nacion (Arg.); Edward L. Carter, "Argentina's Right to Be Forgotten" 27 *Emory Int'l L. Rev.* 23 (2013).

³⁷ Brazilian Congressman Introduces Right to Be Forgotten Bill, Hunton & Williams: Privacy & Info. Security Law Blog (Oct. 23, 2014), available at <https://www.huntonprivacyblog.com/2014/10/articles/brazilian-congressman-introduces-right-forgotten-bill> (visited on 6 July, 2020); Draft Bill 215/2015, Infanticide to the Newly-Born Digital Rights in Brazil, Dig. Rights (Oct. 27, 2015), available at <http://www.digitalrightslac.net/en/proyecto-de-ley-2152015-infanticidio-contra-los-recien-nacidos-derechos-digitales-en-brasil> (visited on 8 July, 2020).

Kong.⁴⁰ Most notably, in 2015, Russia became the first country to codify the right to be forgotten into legislation.⁴¹ With certain exceptions, this law imposes an obligation on search engines to remove search results listing information on individuals where such information is unlawfully disseminated, untrustworthy, outdated, or irrelevant.⁴² In Spain, courts have recognized as a right the ability of citizens to remove irrelevant and outdated information.⁴³ This covers information that is not relevant to the circumstances for which it is sought or is no longer true. The Court went on to declare that a person has a “fundamental right” to privacy that extends to the removal of information about herself.⁴⁴

A. Google Spain Sland Google Inc. V. Agencia Española De Protección De Datos (AEPD) And Mario Costeja González

*Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*⁴⁵ is the case that gave birth to a concrete right to be forgotten in the European Union. It laid down for the first time that there exists a right to be forgotten online. The case arose out of a complaint made by Mr. González where he alleged that his privacy had been infringed because newspaper reports relating to an auction had been made available on the public domain and appeared in search results despite the event having been resolved and thereby becoming irrelevant. He filed a complaint against the newspaper La Vanguardia Ediciones SL, Google Spain, and Google Inc. with Agencia Española de Protección de Datos (the Spanish Data Protection Agency), to have the reports about him as well as related search results appearing on Google deleted or altered. While AEPD did not agree to his

³⁸ Sala Primera de Revision, Sentencia T-277/15, Corte Constitucional [Constitutional Court] May 12, 2015 (Colom.)

³⁹ Derecho de Olvidarte, Instituto Federal de Acceso a la Informacion y Proteccion de Datos [IFAI], Google Mexico, S. de R.L. de C.V., Expediente PPD.0094/14 (Mex.).

⁴⁰ David Webb v. Privacy Commissioner for Personal Data, [2015] No. 54/2014 (Hong Kong Administrative Appeal Board).

⁴¹ Grazhdanski Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] No. 264-FZ (Russ.)

⁴² *Ibid.*

⁴³ Google Spain.

⁴⁴ *Id.*

⁴⁵ Google Spain.

demand to have newspaper reports altered, it ordered Google Spain and Google, Inc. to remove the links in question from their search results. The case was brought in appeal before the Spanish High Court, which referred the matter to the CJEU.

Mr. González requested the Court to order La Vanguardia either to remove or alter the pages in question and Google Spain and Google Inc. to remove or conceal the data so that it no longer appeared in the search results. In essence, therefore, the Court was required to decide whether individual citizens have the right to make their personal information untraceable, even if the publication is lawful and the content remains available on the web pages containing it.

In a judgment having far reaching implications, the CJEU held that individuals have the right to request search engines to remove links with personal information about them where the information is “*inaccurate, inadequate, irrelevant or excessive.*” The Court outlined this right in the following words:

“[I]f it is found, following a request by the data subject pursuant to Article 12(b) of Directive 95/46, that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased.”⁴⁶

The Court went on to hold that it is not necessary “*that the inclusion of the information in question in the list of results causes prejudice to the data subject.*”⁴⁷ On facts, the Court held that Mr. González had established that the information was sensitive, had been first published several years ago, and was no longer relevant. Having regard to this, the Court held that he had a right that

⁴⁶*Ibid*, ¶ 94.

⁴⁷*Ibid*, ¶ 96.

that information should no longer be linked to his name.”⁴⁸ The Court recognized that search engines, by assembling links to articles containing sensitive information about people, have enormous power to create a “detailed profile” of people, which permanently remains on the internet.⁴⁹ Finally, the Court noted that the “*data subject’s rights [...] override, as a general rule, that interest of internet users,*” although “*that balance may however depend [...] on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information*”. Therefore, Google was asked to remove the links to the articles in question from the list of results appearing for Mr. González’s name. The implication of this landmark decision is that Google is no longer the sole decider of people’s profiles in searches of their names; people in the European Union now have a right to seek the removal of certain links from searches of their names.

In 2019, the CJEU further delineated the scope of the right to be forgotten in the context of search engines through two opinions. In *Google Inc. v. Commission nationale de l’informatique et des libertés (CNIL)*,⁵⁰ the Court had to determine the territorial scope of the right to be forgotten. It established a general rule of EU-wide de-referencing in connection with measures preventing or at least seriously discouraging access to non-EU search results. The second case, *GC and others v. Commission nationale de l’informatique et des libertés (CNIL)*,⁵¹ addresses the processing of sensitive data by search engine operators and the de-referencing of such data. This is an area where interference with the data subject’s rights to privacy and protection of personal data is liable to be particularly serious due to the sensitivity of such data. The Court held that:

“the provisions of Article 8(1) and (5) of Directive 95/46 must be interpreted as meaning that the prohibition or restrictions relating to the processing of special categories of personal data, mentioned in those provisions, apply also, subject to the exceptions provided for by the directive, to the operator of a

⁴⁸ *Ibid*, ¶ 98.

⁴⁹ *Ibid*, ¶ 98.

⁵⁰ *Google Inc. v. Commission nationale de l’informatique et des libertés (CNIL)*, Case C-507/17 (CJEU, Sept. 24, 2019).

⁵¹ *Ibid*.

search engine in the context of his responsibilities, powers and capabilities as the controller of the processing carried out in connection with the activity of the search engine, on the occasion of a verification performed by that operator, under the supervision of the competent national authorities, following a request by the data subject.”

These decisions provide guidance on the relationship between the right to be forgotten and the freedom of information.

IV. General Data Protection Regulation

In 2012, the European Commission decided to overhaul the existing data protection regime, to make it conform to the needs of the digital age. To this end, the Commission came up with the General Data Protection Regulation (GDPR). The most prominent feature of the GDPR is that it is designed to give European Union citizens more control over their personal data. It also aims to simplify the regulatory environment for business so that citizens as well as businesses in the European Union can benefit from the digital economy.

The GDPR supersedes the Data Protection Directive which was established in 1995. Under the Directive, each EU member country implemented its own data privacy laws.⁵² This resulted in a patchwork of divergent privacy protections. Further, the Directive could not cater to the change that the world saw in the technological domain. Therefore, the GDPR was established, which is the first regulation that tries to implement a global initiative to bring laws relating to personal data in line with the current technological developments. Issues of consent, control and the possibilities to secure deletion are central issues covered by it. The GDPR also aims to “harmonize” privacy laws in the EU by providing the same strong data protections for the entire region.⁵³

The GDPR provides for a right to be forgotten under Article 17 in the form of a right to erasure. Under this provision, a data subject has the right to request the

⁵² Christopher Kuner, “Data Protection Law and International Jurisdiction on the Internet (Part I)” 18 INT’L J.L. & Info. Tech. 179-80 (2010).

⁵³ Simone Fischer-Hbner and Stefan Berthold, “Privacy-Enhancing Technologies” in John R. Vacca (ed.) Computer and Information Security Handbook (Morgan Kaufmann, Cambridge, 3rd edn., 2017).

erasure of personal data related to them on any one of several prescribed grounds within 30 days. However, to avail this right, the individual must establish one of the following four grounds:⁵⁴ (i) the data is no longer necessary in relation to the purposes for which it was collected, (ii) the data subject has withdrawn consent, (iii) the data subject objects to the data processing, and (iv) the processing does not comply with the GDPR. Upon such request being made by an individual, the internet service provider/ data controller is obligated to “carry out the erasure without delay,”⁵⁵ unless the retention of the data is “necessary” for exercising “the right of freedom of expression,” as defined by member states in their local laws. The Regulation also provides an exemption from the duty to remove data for “the processing of personal data solely for journalistic purposes, or for the purposes of artistic or literary expression.”⁵⁶

In addition, according to Article 18 of the GDPR, known as the “restriction right,” the data subject “shall have the right to obtain from the controller restriction of the processing” of personal data.⁵⁷ When processing is restricted, data controllers are permitted to store the personal data, but not to process it further. In such a scenario, the controller renders the data inaccessible, instead of fully deleting it as in the case of the right to be forgotten. The data subject is entitled to erasure when, *inter alia*, “the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed.”⁵⁸ By contrast, the restriction right applies more narrowly, for instance, to cases where “the accuracy of the data is contested by the data subject.”⁵⁹

V. Position in India

⁵⁴ Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), at 2, COM (2012) 11 final (Jan. 25, 2012).

⁵⁵ General Data Protection Regulation, art. 17.

⁵⁶ General Data Protection Regulation, art. 17(3).

⁵⁷ General Data Protection Regulation, art. 18.

⁵⁸ General Data Protection Regulation, art. 17(a).

⁵⁹ General Data Protection Regulation, art. 18(a).

Indian privacy and data protection laws are insufficiently developed, unlike those of the European Union. There is no legislative or constitutional provision that expressly provides for the right to privacy. However, in 2017, the Indian Supreme Court declared the right to privacy as being a fundamental right in the case of *Justice K. S. Puttaswamy v. Union of India*.⁶⁰ The Supreme Court, in this very case, also discussed the right to be forgotten. In the concurring opinion delivered by Justice S K Kaul, the Court identified the right to be forgotten as being a part of the larger umbrella of informational privacy. The Court noted that this right provides an individual control of the information that they put out, and also the power to seek removal of data concerning them. Justice Kaul stated that the “*right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the Internet.*”⁶¹ The Court recognized that mistakes made in the past should not be held against people throughout their lives *via* the digital footprint left behind. Their ability to evolve and reform should not be hindered. The Court also added that the public does not have a claim to access all truthful information relating to others.

However, the absence of a data protection law is bound to create deterrence in the proper enforcement and resolution of these concerns. The primary issue is that there is currently no delineation of the ambit of the right to be forgotten, and this task will inevitably have to be taken up by judicial authorities. Courts are entrusted with ad-hoc resolution of a probable ‘right’ whose content is nebulous.⁶² This has led to varied outcomes.

In *Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd. and Ors.*,⁶³ the Delhi High Court recognized the plaintiff’s right to be forgotten. The issue arose out of the publication of articles containing harassment allegations against the plaintiff during the #MeToo campaign by the respondent. The court directed the respondent to take down these

⁶⁰ (2017) 10 SCC 1.

⁶¹ (2017) 10 SCC 1, ¶ 629.

⁶² Sohini Chatterjee, In India’s Right to Privacy, a Glimpse of a Right to be Forgotten, *The Wire* (28 Aug. 2017), <https://thewire.in/law/right-to-privacy-a-glimpse-of-a-right-to-be-forgotten>(visited on 9 July, 2020).

⁶³ CS (OS) 642/2018, decided on 9 May, 2019.

articles from the internet as they might cause massive injury to the plaintiff. The court also held that the 'right to be forgotten' and the 'right to be left alone' are integral facets of the right to privacy.

On the other hand, the Gujarat High Court, in *Dharamraj Bhanushankar Dave v. State of Gujarat*,⁶⁴ rejected a request for erasure of a judgment, pointing out that the petitioner had failed to establish which provisions of law were attracted and how the uploading of the concerned judgment constituted a violation of Article 21 of the Constitution. In this case, the petitioner, through a writ petition under Article 226, prayed before the court for restricting the disclosure of a court judgment published by the respondent on the internet despite the fact that the said judgment was non-reportable. The petitioner alleged that it had been hampering his personal and professional life. Referring to its rules, the Gujarat High Court held that copies of the judgment of High Court can be given to any party by the order of Assistant Registrar. Further, the court also held that the petitioner had failed to prove any violation of Article 21. Therefore, the Court did not recognise the right to be forgotten. Even though Section 69A of the IT Act and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 hold relevance, there is a dearth of clarity about the parameters of an individual's right to be forgotten and what restrictions can be imposed on the same.

Again, in *Sri Vasunathan v. The Registrar General & Ors.*,⁶⁵ the Karnataka High Court ordered erasure only of copies of the order yielded on an internet search but did not extend the relief to certified copies of the order on the High Court website. Here, the prayer of the petitioner was to direct removal of his daughter's name from an order published in the digital records maintained by the respondent. The said order was in line with an FIR filed by the petitioner's daughter against a man for offences relating to compelling her for marriage, forgery, etc. Subsequently, the parties entered into a settlement and the FIR was quashed. Recognising a right to be forgotten, the Karnataka High Court directed the respondent to mask the name of the petitioner's daughter. The Court noted that this:

⁶⁴ 2015 SCC OnLineGuj 2019.

⁶⁵ 2017 SCC OnLineKar 424.

“would be in line with the trend in the Western countries where they follow this as a matter of rule “Right to be Forgotten” in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned.”⁶⁶

A. The Right to be Forgotten in the Personal Data Protection Bill, 2019

The discussion around the law of data protection in India reached a crescendo in the case of *Justice Puttaswamyv. Union of India*.⁶⁷ On the directions of the Supreme Court, the government set up an expert committee to formulate a comprehensive data protection framework for India. The Committee, headed by Justice B N Srikrishna, submitted a report entitled “A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians”, which contained a draft Personal Data Protection Bill. The Data Protection Bill seeks to shape the regulation governing today’s increasingly data-driven geopolitical landscape by developing a comprehensive data governance framework.

The currently existing data protection framework, which comprises of the Information Technology Act, 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 does not contain a right to be forgotten. The newly proposed Bill seeks to introduce this right. Under Section 20, the Bill provides that every data principal shall have the right to restrict or prevent continuing disclosure of personal data relating to him by any data fiduciary if such disclosure meets one of three given conditions. These are that the disclosure of personal data: (i) has served the purpose for which it was made or is no longer necessary; or (ii) was made on the basis of the data principal’s consent and such consent has since been withdrawn; or (iii) was made contrary to the provisions of the new Data Protection Act or any other law in force.⁶⁸

However, there is a vast difference between the proposed right to be forgotten in India and that envisaged under the General Data Protection Regulation. Unlike

⁶⁶ 2017 SCC OnLineKar 424, ¶ 9.

⁶⁷ (2017) 10 SCC 1.

⁶⁸ The Personal Data Protection Bill, No. 373 of 2019.

the GDPR, the proposed Indian right does not include a right to seek complete erasure of the collected data by an individual, known as the data principal, but only to prevent continuing disclosure of personal data. Additionally, to exercise the right envisaged under the Personal Data Protection Bill, the individual has to file an application before the Adjudicating Officer. This is not required to be done by the data principal while exercising any other right under the Bill. Under the GDPR as well, an individual, known as the data subject, can exercise the right to erasure by simply asking the data controller to erase or remove his/her personal data.⁶⁹

B. Balancing the Right to be Forgotten and the Freedom of Expression

The landmark decision of the CJEU, declaring a right to be forgotten, invited large criticism from proponents of free speech.⁷⁰ They argued that granting people the right to seek erasure of information about them from Google searches amounted to blatant censorship and was at odds with the freedom of speech and expression.⁷¹ They based this criticism on the fact that the freedom of speech and expression, which grants the right to impart ideas, opinions, and information, also includes the right to receive information.⁷² In fact, some

⁶⁹ General Data Protection Regulation, art. 17.

⁷⁰ Craig Timberg & Sarah Halzack, *Right to Be Forgotten v. Free Speech*, Wash. Post (May 14, 2014) available at

http://www.washingtonpost.com/business/technology/right-to-be-forgottensvsfreespeech/2014/05/14/53c9154c-db9d-11e3-bda1-9b46b2066796_story.html (visited on 9 July, 2020);

Lisa Fleisher, *Google Ruling: Freedom of Speech v. The Right to Be Forgotten*, Wall St. J. (May 13, 2014) available at <http://blogs.wsj.com/digits/2014/05/13/eu-court-google-decision-freedomof-speech-vs-right-to-be-forgotten/> (visited on 8 July, 2020).

⁷¹ Marcus Wohlsen, *For Google, the 'Right to Be Forgotten' Is an Unforgettable Fiasco*, Wired (July 3, 2014), available at <http://www.wired.com/2014/07/google-right-to-beforgotten-censorship-is-an-unforgettable-fiasco/> (visited on 9 July, 2020); Jane Yakowitz, "More Bad Ideas from the E.U." *Forbes* (Jan. 25, 2012) available at <http://www.forbes.com/sites/kashmirhill/2012/01/25/more-bad-ideas-from-the-e-u> (visited on 6 July, 2020).

⁷² *Handyside v. the United Kingdom*, Appl. No. 5493/72, ¶ 49 (ECtHR, Dec. 7, 1976).

scholars argued that the Court “forgot” about freedom of expression while delivering its decision in *Google Spain*.⁷³

The right to freedom of expression has been recognized in almost every national constitution and in several international human rights treaties, including the Universal Declaration of Human Rights,⁷⁴ the International Covenant on Civil and Political Rights,⁷⁵ the African Charter on Human and Peoples’ Rights,⁷⁶ and the European Convention on Human Rights.⁷⁷ The UN Human Rights Committee in General Comment No. 34 has confirmed that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all electronic modes of expression.⁷⁸ This means that the freedom of expression extends to the online sphere as well as the offline sphere.

However, the criticisms are not well-founded. For one, according to a report compiling aggregate data on the right to be forgotten, Google has denied 75 percent of erasure requests in the last two years.⁷⁹ On the theoretical front as well, the construction of the decision does not support the argument that the right to freedom of speech and expression was completely disregarded. According to the Court, the two rights have equal weight and which right should prevail would depend on the circumstances of a case. The Court stated that a person’s right to privacy generally overrides “*as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject’s*

⁷³ Stefan Kulk and Frederik J. ZuiderveenBorgesius, “Google Spain v. Gonzalez: Did the Court Forget About Freedom of Expression?” 5(3) Eur. J. of Risk Reg. 389 (2014).

⁷⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19 (1948).

⁷⁵ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 19 (1966).

⁷⁶ African Charter on Human and Peoples’ Rights, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, art. 9 (1982).

⁷⁷ European Convention on Human Rights and Fundamental Freedoms, ETS 5, art. 10 (1950).

⁷⁸ Human Rights Committee, General Comment No.34, CCPR/C/GC/34, Sept. 12, 2011, ¶ 12.

⁷⁹ Google Transparency Report, available at <https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en> (visited on 5 July, 2020).

name.”⁸⁰ In saying so, it highlighted that privacy defines the boundaries of freedom of expression, and not vice versa.⁸¹

A notable case in which the relationship between the right to be forgotten and the freedom of expression was discussed was *Olivier G v. Le Soir*.⁸² In 2008, the Belgian newspaper *Le Soir* made its entire archive freely available online,⁸³ thereby making public a 1994 article reporting a car accident with the full name of the driver. The driver requested *Le Soir* to remove his name or delete the article, as he had been duly convicted and declared “rehabilitated”. The Belgian Cour de Cassation decided that the right to privacy might under specific circumstances justify the limitation of *Le Soir*’s right to freedom of expression.⁸⁴ This could be the case where there has been a lapse of a significant amount of time, or the lack of actual interest in communicating the name of the driver.⁸⁵ Here, the Court deemed that the maintenance of the online article several years after the events described disproportionately damaged the petitioner’s privacy interest compared to the benefit received by the newspaper in respecting its right to free expression. The court noted that this conclusion was bolstered by the fact that the petitioner was not a public figure. Therefore, *Le Soir* was required to remove the name of the applicant from the article contained in its database.

Subsequently, in 2016, an Italian court remarked that the public’s right to information expires “just like milk.”⁸⁶ In this case, like *Google Spain* and *Olivier G*, the petitioner had filed a request to seek the removal of an article regarding a past transgression from the website of a news outlet, *Primadanoi*. He claimed that the site would appear whenever a search using his or his company’s name was made. However, unlike *Google Spain*, the article in question was relatively recent and thus could be more impactful. The court evaluated the

⁸⁰ *Google Spain*, ¶ 81.

⁸¹ Giancarlo F. Frosio, “The Right to Be Forgotten: Much Ado about Nothing” 15 *Colo. Tech. L.J.* 315 (2017).

⁸² *P.H. v. O.G.*, Cour de Cassation Belgique, Apr. 29, 2016, N° C.15.0052.F (Bel.).

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Cass., n. 13161/16 (June 24, 2016) (It.).

petitioner's right to privacy with the public's interest in accessing information and the newspaper's freedom of expression, and held that the latter expired after two years. Therefore, the court fined Primadanoi €10,000 for the six-month delay in taking down the article.⁸⁷

On the other end of the spectrum are countries that have afforded greater importance to the protection of the freedom of speech and expression. In the United States of America, for example, any right to be forgotten order issued against a media house would almost certainly violate the First Amendment. Although the Supreme Court has acknowledged the significance of an individual's right to privacy, it has also remarked that "*privacy concerns give way when balanced against the interest in publishing matters of public importance.*"⁸⁸ The restrictions of the freedom of expression in the United States are extremely narrow, extending only to "grave and immediate danger to interests which the state may lawfully protect."⁸⁹ The law also protects the publication of "lawfully obtain[ed] truthful information about a matter of public significance" unless there is a need "of the highest order."⁹⁰ A full analysis of this issue would depend on the facts of a particular case, but given the primacy of the freedom of expression in the United States of America, it is unlikely that an order requiring a newspaper to alter its content or archived material would be construed as consistent with freedom of the press.⁹¹

A Dutch court in 2015 followed this approach while refusing a right to be forgotten petition against a victims' rights website, holding that the freedom of

⁸⁷ Athalie Matthews, How Italian Courts Used the Right to be Forgotten to Put an Expiry Date on News, Guardian (Sept. 20, 2016), available at <https://www.theguardian.com/media/2016/sep/20/how-italian-courts-used-the-right-to-be-forgotten-to-put-an-expiry-date-onnews> (visited on 9 July, 2020).

⁸⁸ Bartnicki v. Vopper, 532 U.S. 514, 533 (2001).

⁸⁹ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

⁹⁰ Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979).

⁹¹ Eric Posner, We All Have the Right to be Forgotten, Slate (May 14, 2014), available at http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/the_european_right_to_be_forgotten_is_just_what_the_internet_needs.html (visited on 9 July, 2020); Robert G. Larson III, "Forgetting the First Amendment" 18 Comm. L. & Pol'y 91 (2013).

expression could only be restricted in “exceptional cases.”⁹² The following year, the French Court of Cassation held that even with regard to personal information under a right to be forgotten request, requiring a newspaper to remove content would impermissibly infringe upon freedom of press.⁹³

Therefore, what seems clear is that in each case, a balance between an asserted freedom of expression and the right to privacy would be involved. International standards as well as domestic legislations make it clear that both the freedom of expression and the right to privacy are qualified rights,⁹⁴ subject to limitations that comply with the three tests of legitimacy, proportionality, and necessity.

C. Proposed Tests

The tensions between right to respect for privacy and the freedom of expression are easy to identify, but difficult to resolve.⁹⁵ What courts and other adjudicatory bodies must keep in mind while balancing freedom of expression and the right to be forgotten is that both the rights are fundamental, and yet qualified. Therefore, both the rights must be balanced in a fair and proportionate manner without giving precedence to one over the other.⁹⁶ The ideal method is to adopt a case-by-case analysis, considering in each situation whether there was a reasonable expectation of privacy, whether there was a reasonable expectation of a duty of confidence, how the information was collected, and whether an individual is personally identifiable using the collected information. This test would give courts a consistent approach to analyze the case and arrive at a decision.

The first assessment that courts must make is whether the information is private and should be afforded protection. Individuals claiming the right to be forgotten

⁹² Case No. C/19/103209/HA ZA 14-029 (Rechtbank Noord-Nederland, May 1, 2015) (Neth.).

⁹³ Cour de Cassation, Case No. 15-17729, May 12, 2016 (Fr.).

⁹⁴ David Anderson, *A Question of Trust*, 28 (Williams Lea Group, London, 2015).

⁹⁵ Haya Yaish, “*Forget Me, Forget Me Not: Elements of Erasure to Determine the Sufficiency of a GDPR Article 17 Request*” 10(1) JOURNAL OF LAW, TECHNOLOGY & THE INTERNET 17 (2019).

⁹⁶ *MGN Ltd. v. the United Kingdom*, App. No. 39401/04, ¶142 (ECtHR, Jan. 18, 2011).

must establish that they had a reasonable expectation that the information would remain private. Whether the actions were conducted in public and whether they concern private and family life, as outlined in Article 8 of the ECHR, are included within this element. This category of information may include information about their health, bank or payment accounts details, contact or identification information, racial or ethnic origin, among others. In all such cases, there must be an evaluation of whether there exists an overriding public interest in the information resulting in its need to remain accessible on the internet. The public interest is a broad concept that encompasses information relating to public officials and public figures which is important to matters of public concern.⁹⁷ This includes matters associated with public health and safety, law enforcement, consumer and social interests, among others. All the same, intimate details of a person's private life may also be in the public interest if it involves a public figure or if that person is in a position of trust.

The next assessment is whether the person applying for erasure has suffered substantial harm due to the existence of the information at issue in the public domain.⁹⁸ The threshold for this is high – actual harm must be established by the person and the depiction of mere embarrassment or discomfort is not sufficient. This test also includes within its ambit an assessment of whether an individual is personally identifiable using the information. This component ensures that the freedom of expression is not muffled due to privacy concerns. With minimal effort like blurring faces or hiding names, the media can report stories while respecting individuals' privacy.

VI. Conclusion

The right to be forgotten first materialised in Europe, but has since been accepted by several other nations including India. Although the right is limited and is still nascent, it has been hailed as a pertinent right that every individual must be entitled to. The right was recognised in India in the *Puttaswamy* case and an attempt has been made to make a provision for this right in the Personal

⁹⁷TshabalalaMsimang & Another v. Makhanya and Others (18656/07) [2007] ZAGPHC 161 (S. Afr.).

⁹⁸Axel Springer AG v. Germany (No. 2), App. No. 48311/10 (ECtHR, July 10, 2014).

Data Protection Bill, 2019 which is yet to see the light of day. However, a mere proclamation of the right will not suffice; it is pertinent to develop comprehensive regulations and guidelines that delineate how the right will be implemented. Along with such regulations, accountability mechanisms and audit procedures must be established.⁹⁹ In India, the legislature has failed to give ample attention to the codification of a much-needed data protection framework. As such, the implementation of the right has been fraught with uncertainty and non-uniformity. Universal experience depicts that as the digital age advances, it is imperative that a law be developed that can meet every challenge, and provide for solutions.

⁹⁹ Colin J. Bennett and Charles D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* 29 (MIT Press, Cambridge, 2ndedn., 2006).

The Menace of Female Foeticide in India: Current Scenario and Socio- Legal Implications

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Abstract

The advent of modern reproductive and sex selection techniques is providing worldwide ample opportunity to the female foeticide. Now –a –days the world population is significantly passing through gender imbalances due to different available sex selection methods. The menace of Female foeticide was invented, touted and sold by the medical profession, and it operates with the complete consent of our society. In the United States, sex selection is becoming a multimillion-dollar industry. During the last few decades, Indian society had also been facing female foeticide as a burning social problem. In strongly patriarchal society Parents prefer sons and availability of these techniques, has led to deterioration of female sex-ratio and is eliminating girls from the social scenario by misusing the technique which is basically meant to detect the foetal abnormalities. Even the law is a powerful instrument of social change but law alone cannot dismantle out this social problem from Indian society. The real challenge before Indian society and government authorities is to remove loopholes in The Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002. It is pertinent to note that until and unless this menace is controlled, the country will be heading for a grave gender imbalance, which in turn would adversely affect the nation's economic progress. A concrete and meticulous effort by the medical fraternity, the law, political leaders, NGOs, women's group, the mass media, teachers and the community itself is the need of the hour. This review article is an attempt to draw attention towards Current Scenario of female foeticide in India and its socio-legal implications.

Keywords: Gender, Sex ratio, Female foeticide, Sex selection techniques, Ultrasonography, Diagnostic Laboratories, sex selective abortion.

I. Introduction

“That society should not want a girl child; that efforts should be made to prevent the birth of a girl child and that society should give preference to a male

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child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A (e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection.” -- Hon'ble J. Smt. Ranjana Desai².

Female foeticide is a burning social problem which has been plaguing Indian progress since a very long time. It is nothing but cold-blooded murder. The Indian society considers the birth of a girl child as a bad investment for future, which is very disgraceful. Killing of female child has been a phenomenal characteristic of Indian society under the rule of patriarchy since ancient days. The Atharvaveda says, “The birth of a daughter, grant it elsewhere, here grant a son”. This saying in the Holy Scripture sums up the Indian attitude towards female children who are subjected to multifarious travails inflicted by the society on them³. ^[2]The girl children in India have been the most vulnerable to the insults of deprivation as well as discrimination for centuries and, are even today. The practice first dubbed as female foeticide came into vogue due to the lack of scientific discovery and unavailability of modern and progressive technology and sophisticated sex determining instruments. With sufficient availability and extensive supply of such sophisticated sex determination techniques in the health institutions and clinics, there have been hundreds of incidences of female foeticide surfacing and hence assuming an alarming proportion across the country at present. It seems the sex determination test leading to identification of the sex of unborn child has made the practice of killing the female child unnoticed and easier than before⁴.

²*Vijay Sharma v. Union of India*, A.I.R. 2008 Bom. 29 (India).

³ MARY SCARIA, *WOMAN, AN ENDANGERED SPECIES?* 219, MEDIA HOUSE DELHI (2006).

⁴ JENA, K., *FEMALE FOETICIDE IN INDIA: A SERIOUS CHALLENGE FOR THE SOCIETY*, 15, ORISSA REVIEW, (2008).

In contemporary Indian society, the belief that the higher incidence of female foeticide was committed among the rural uneducated and poor people and those unable to pay the dowry been proved wrong. The practice of female foeticide now is seen rapidly proliferating from the country's rural, poor and uneducated to the urban, affluent and educated classes as well⁵. It seems to be showing a moving trend and rather getting further escalated even in the rise living standard of the average of India's population, with the growth in per capita income, improvement in the rational thinking and development in the educational level of the society.

From past to the present society, enormous efforts had been undertaken by the social thinkers, reformers and philanthropists to put an end to the practice of killing of the female child, either in the form of female infanticide or female foeticide. In spite of all their efforts the practice has been continued and posing a big threat to the mankind by creating unendurable imbalance in male female population of the country. The laws are not adequate and effective to curb the menace created by the practice of female foeticide. Even the law enforcing agencies are seen as ineffective and weak as the law itself to check the growing practice of female foeticide in the country.

With judiciary's professed commitment to eradicate female foeticide by punishing all those responsible for the heinous crime the rise of this crime has remained unabated. Selective abortions of the female foetuses have become a common trend and led to disturb the male-female ratio in the country over a period of time, which is a matter of grave concern. The drop in sex ratio against the females is expected to show further decline with the sex determination techniques reaching to the doorsteps of all hospitals and even PHCs in rural communities and being misused for wrong intention. Female foeticide in 21st century the India is a biggest challenge against the laws of the land in general and women's empowerment in particular. Eradication of this practice is the

⁵ NEELIMA DESHMUKH, *FEMALE FOETICIDE : IT'S SOCIO LEGAL IMPLICATIONS IN INDIA WITH REFERENCE TO MAHARASHTRA STATE*, RTM NAGPUR UNIVERSITY.

urgent need of the hour and thus has become a genuine concern of each one of us⁶.

II. Child Sex Ratio in India

The decline in India's sex ratio during the 20th century has been the subject of much discussion in recent years. Sex- selective abortion of the female foetus following a prenatal diagnostic test is widely believed to be the major contributor to this phenomenon⁷. The child sex ratio is calculated as number of girls per 1000 boys in the age group 0-6 years. In many states of India, there are several evidences that indicate a widespread practice of using female birth intervention. As a result, an alarmingly lowest ever sex ratio in the age group 0-6 has been reported by the 2001 census. The 1991 Census reported a child sex ratio of 945 girls per 1000 boys compared to 976 in 1961, which further declined to 927 according to 2001 census⁸. Census, 2011 has pegged the population of India at 1.21 billion (up 17.4% from 2001) and has indicated that only 914.23 girls were born compared with 927.31 for every 1,000 boys in the 2001 Census⁹. The current overall sex ratio of the nation stands at 943 females for every 1,000 males¹⁰. The overall sex ratio of 933 according to census 2001 figures is lower as compared to the child sex ratio in other developing countries like China (944), Pakistan (938), Bangladesh (953) and Nigeria (1016)¹¹.

The provisional census 2011 and the recent news reports data indicate a grim demographic picture of declining female to male ratios. Surprisingly the most

⁶ ARITRA GHOSE, *FEMALE FOETICIDE AND GENDER INEQUALITY IN INDIA*, 4, JOURNAL OF RADIX INTERNATIONAL EDUCATIONAL AND RESEARCH CONSORTIUM, (2013) Volume 2, pp. 1-11.

⁷ According to latest estimates, five lakh female fetuses are aborted illegally annually. UNICEF, in a recent report, said that India has lost over one crore girls since 2007. <http://www.dailymail.co.uk/indiahome/indianews/article-2696488/Supreme-Court-orders-status-report-femalefoeticide.html>. visited on 15 march 2016.

⁸ OFFICE OF THE REGISTRAR GENERAL AND CENSUS COMMISSIONER, India.

⁹ Booklet On (Missing Girl), www.censusindia.gov.in/2011census/missing.pdf

¹⁰ SOUMO GHOSH, *CHILD SEX RATIO SHOWS DRASTIC DECLINE IN INDIA, COULD LEAD TO MORE RAPES: UN REPORT*, AUGUST 22, (2015), INTERNATIONAL BUSINESS TIMES .

¹¹ SAMIR DASGUPTA(ED.) *SOCIAL DEMOGRAPHY*, 166, Dorling Kindersley (India) Pvt. Ltd.

affected states are progressive states like Punjab, Haryana, Delhi and Gujarat. In 2011 Census, an improvement in the child sex ratio has been noted only in the state of Kerala and the two Union Territories of Lakshadweep and Pondicherry¹². India has yet a long way to go for fight against pre-birth elimination of females. Time is quickly ticking away. A shortage of girls would lead to a shortage of eligible brides thus making the girl a "scarce commodity". According to UNFPA projection, by the year 2025 a significant share of men above 30 would still be single, and that many will never be able to marry at all¹³. Men in the states of Haryana and Punjab are already experiencing a nearly 20% deficit of marriageable women¹⁴. This phenomenon, in turn, drives such practices as the kidnapping and trafficking of women, who are sold to men who cannot find wives. A report by the United Nations Office on Drugs and Crime¹⁵, says the following: "With skewed sex ratios (Punjab-893, Haryana-877 females per 1,000 males) it is impossible to find a bride for each man, and 'importing a bride' has become the only solution. The demographic situation of these states has become so skewed that it will take many years to stabilise the situation. The demand for "marriageable age" girls is so intense that organised trafficking rackets have started operating in Haryana, Punjab and Uttar Pradesh."

On the PIL filed after a large number of female foetuses were found in a well at a doctor's house In Punjab, the Supreme Court has sought detailed affidavits from all states and the Centre on steps taken by them to curb female foeticide. On May 6, 2015, the apex court had passed a slew of directions on the issue of female foeticide including the need to form a statutory board for strict implementation of law prohibiting sex determination¹⁶.

¹² MARGARET GANGTE, *SKewed SEX RATIO: GENDER POVERTY ALLEVIATION IN INDIA*, 55, *Global Jour. of Hum. Soc. Science*, (Dec 2011)

¹³ GUILMOTO CZ. *CHARACTERISTICS OF SEX RATIO IMBALANCE IN INDIA AND FUTURE SCENARIOS*, Paper for the 4th Asia Pacific Conference on Reproductive and Sexual Health and Rights. Hyderabad, India: , (2007 October).

¹⁴ MARY SCARIA, *WOMAN, AN ENDANGERED SPECIES?*

20, www.hindustantimes.com/StoryPage/StoryPage.

¹⁵ United National Office on Drugs and Crime (UNODC)(2013).

¹⁶ <http://indianexpress.com/article/india/india-others/scraps-centre-for-not-publicising-order-on-femalefoeticide/#sthash.necmQcxx.dpuf>

III. Factors Responsible for Female Foeticide

Causes of female foeticide in India are embedded deep in the edifice of society. It is necessary to change the mindset of people and enable them to throw off the yoke of unhealthy and inhuman traditions. Here, they are required to liberate themselves from ruthless and detrimental traditional bonds and develop humane qualities in the true sense¹⁷. People are under constant social pressure that impels them to commit this type of acts. There are several reasons for that:

A. Proliferation of Advance Technology

Increased availability of advanced technologies, especially ultrasonography (USG), has been the single most important factor responsible for decreasing in sex ratios and increasing in female foeticide. In India over 25000 prenatal units have been registered. Facilities of sex determination through "clinic next door" are now conveniently available with the families willing to dish out any amount that is demanded of them. The easy availability of mobile scanning machines has translated into brisk business for doctors. Sex selection techniques became popular in the western and north western states in the late 70s and early 80s whilst they are become popular in the South now¹⁸. Beside this, there are several other factors that have a bearing upon the child sex ratio.

¹⁷ Apex Court observed. "It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of the daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problem faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticides whereby female baby was done away with, after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately developed medical sciences are misused to get rid of a girl before birth. Knowing fully well that it is immoral and unethical and it may amount to an offence foetus of a girl child is aborted by qualified and unqualified doctors or compounders that has affected over all sex ratio in the various States where female infanticides is prevailing without any hindrance". Centers for Inquiry into Health and Allied Themes and others (CEHAT) Vs. Union of India, AIR 2003 SC 3309:

¹⁸GEORGE SM, *SEX SELECTION/DETERMINATION IN INDIA: CONTEMPORARY DEVELOPMENTS*, 186, REPRO'D HEALTH MATTERS, (2002).

B.Desire for Male Child

Indian society gives preferential treatment to a male child. It cannot be denied that in India there is strong bias in favour of a male child. Various causes have led to this preference. Male children are preferred because (i) they have a higher wage-earning capacity, especially in agrarian economies like India; (ii) they carry the name of the family forward; (iii) only son can perform religious rites at the time of cremation of the parents; (iv) They are said to provide support in the old age; and (v) they are generally the recipients of a family's inheritance¹⁹. Girls are often considered an economic burden because of the dowry system, and after marriage they typically become members of the husband's family, ceasing to have responsibility for their parents in illness and old age. Several socio-economic and cultural factors are responsible for this craving for a son. It is unfortunate that people are still being under the influence of such outdated notions. As long as such notions exist, the girl child will always be unwanted because it is felt that she brings with her the burden of dowry. In Hinduism, the birth of a son is essential because he has to perform the last rites of the father by which his father can attain salvation²⁰.

C. Dowry

Female feticide is driven by many factors, but primarily by the prospect of having to pay a dowry to the future bridegroom of a daughter. The evil practice of dowry is widely prevalent in India. As a result, daughters are considered to be an economic liability, and this anti-female bias is exploited by Diagnostic teams

¹⁹ ELISABETH J. CROLL, *FERTILITY DECLINE, FAMILY SIZE AND FEMALE DISCRIMINATION: A STUDY OF REPRODUCTIVE MANAGEMENT IN EAST AND SOUTH ASIA*, 17 *Asia-Pacific Population J.* 11, 21 (June 2002), <http://www.unescap.org/esid/psis/population/journal/articles/2002/v17n2a2.pdf> ("blessings, status and good fortune are defined not in terms of daughters or children but of sons"); Vibhuti Patel, *A Cultural Deficit*, *India Together*, Aug. 2003, at <http://www.indiatogether.org/2003/aug/wom-sexratio.htm> ("The birth of a son is perceived as an opportunity for upward mobility while the birth of a daughter is believed to result in downward economic mobility.")

²⁰ JAMIL FAROOQUI, *FEMALE FOETICIDE: A SOCIAL MENACE*, *Radiance views weekly web edition*, <http://www.radianceweekly.com/184/4656/femalefoeticide-a-curse-of-society/2009-12-27/cover-story/story-detail/>

with ultrasound scanners which detect the sex of a child advertise with catch lines such as spend 600 rupees now and save 50,000 rupees later. The dowry system is more rigid in the northern states of India which is likely to contribute to the lesser child sex ratio. Women have little control over economic resources and the best way for a young north Indian bride to gain domestic power mainly comes from her ability to produce children, in particular, sons²¹. Most often in South Indian communities, marriages are not exogamous (but often consanguineous), and married daughters usually stay close socially and geographically to their original family. Until recently, dowries were unheard of and benefits of inheritance for the daughters were not ruled out²². In the Muslim community, paying of high dowry is not a prevalent practice. Also consanguineous marriages are highly prevalent and women are entitled to a portion of parental inheritance²³.

D. Gender Discrimination

The bias against females in India is grounded in cultural, economic and religious roots. Sons are expected to work in the fields, provide greater income and look after parents in old age. In this way, sons are looked upon as a type of insurance. In addition, in a patriarchal society, sons are responsible for "preservation" of the family name. Also, as per Hindu belief, lighting the funeral pyre by a son is considered necessary for salvation of the spirit²⁴. Such a strong preference for sons which results in a life- endangering deprivation of daughters is not considered abhorrent culturally and socially²⁵. In north India, girls currently constitute about 60% of the unwanted births and the elimination of

²¹ DYSON T. & MOORE M., *ON KINSHIP STRUCTURE, FEMALE AUTONOMY AND DEMOGRAPHIC BEHAVIOR IN INDIA*, Popul Dev Rev (1983).

²² GUILMOTO CZ. *CHARACTERISTICS OF SEX RATIO IMBALANCE IN INDIA AND FUTURE SCENARIOS*, Paper for the 4th Asia Pacific Conference on Reproductive and Sexual Health and Rights. Hyderabad, India: , (2007 October).

²³ BANDYOPADHYAY S& SINGH A., *HISTORY OF SON PREFERENCE AND SEX SELECTION IN INDIA AND IN THE WEST*, BULL INDIAN INSTHIST MED HYDERABA, (2003).

²⁴ NASSIR R & KALLA A.K..*KINSHIP SYSTEM, FERTILITY AND SON PREFERENCE AMONG MUSLIMS: A REVIEW*, ANTHROPOLOGIS, (2006).

²⁵ MILLER B.,*THE ENDANGERED SEX: NEGLECT OF FEMALE CHILDREN IN RURAL NORTH INDIA*, ITHACA, NEW YORK AND LONDON: Cornell Univ. Press; (1981).

unwanted fertility in this manner has the potential to raise the sex ratio at birth to 130 boys per 100 girls²⁶.

Gender discrimination manifests itself in the form of delay in seeking medical care, seeking care from less qualified doctors and spending lesser money on medicines when a daughter is sick²⁷. The extreme disappointment of a mother as a result of a daughter's birth can adversely affect her ability to breastfeed the girl child, which leads to poor nutritional status. It is no wonder that the prevalence of malnutrition and stunting is higher in girls than boys²⁸.

IV. Legal Provisions

Female infanticide had been prohibited through legislation in the pro-independence period. In the late 18th century, infanticide was initially documented by British Official who recorded it in their diaries during their travels. The scope of the problem of infanticide became clear in 1871 in the setting of India's first census survey²⁹. At that time, it was noted that there was a significantly abnormal sex ratio of 940 women to 1000 men. This prompted the British to pass The Infanticide Act in 1870, making it illegal. But the Act was difficult to be enforced in a country where most birth took place in the home and registration was hardly done. As such the legislation sadly remained toothless with few or no conviction under the law. Certain provisions were also included

²⁶ International Institute for Population Sciences (IIPS) and Macro International. National Family Health Survey (NFHS-2), 1998-99, India: Key Findings. Mumbai: IIPS; 2000.

²⁷ M. A REPORT ON INDIAN WOMEN FROM BIRTH TO TWENTY, New Delhi: National Institute of Public Cooperation and Child Development; 1990.

²⁸ JATRANA S., *EXPLAINING GENDER DISPARITY IN CHILD HEALTH IN HARYANA STATE OF INDIA*, Asian Metacenter Research Paper Series No. 16. Asian Meta center for Population and Sustainable Development Analysis Singapore, (2003).

²⁹ PATEL R., *THE PRACTICE OF SEX SELECTIVE ABORTION IN INDIA: MAY YOU BE THE MOTHER OF HUNDRED SONS*, 7, Center for Global Initiatives: International Health Papers, (1996), http://cgi.unc.edu/uploads/media_items/the-practice-of-sex-selective-abortion-in-india-may-you-be-the-mother-of-a-hundred-sons.original.pdf

in the Indian Penal Code 1860 punishing causing of miscarriage and other like offences but unfortunately these provisions were rarely resorted to³⁰.

The Indian Penal Code, 1860 permitted 'legal abortions' committed with bona fide intention in the interest of mother's health or such other circumstances that nullifies presence of any criminal intent. Where an offence with requisite *mens rea* is committed, the offence is made punishable. The offence takes aggravated forms if it is done without the consent of the mother or when the mother is 'quick with the child'. Hence in the former case, the absence of consent of mother makes the offence a more serious one while in the latter the stage of pregnancy being that which has passed few weeks, thereby making the mother's pregnancy stage as "quick with child" makes the offence a more serious one. A mother who consents to such an offence is also made an accused thereby treating an unborn child a 'legal person' under the presumption of law. However application of the entire relevant provisions of the code depends on a condition, that is, that the women must be pregnant. Committing an act with an intention of

³⁰ Indian Penal Code, No. 45 of 1860, PEN. CODE (2019). Section 312 of Indian Penal Code - Causing miscarriage :Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; Section 313- Causing miscarriage without woman's consent Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.; Section 314- Death caused by act done with intent to cause miscarriage Whoever, with intent to cause the miscarriage of woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term may extend to ten years, and shall also be liable to fine. And if the act is done without the consent of the woman, shall be punished either with imprisonment for life or with the punishment above mentioned. It is not essential to this offence that the offender should know that the act is likely to cause death. 750 Nagarathna et al., Int J Med Res Health Sci. 2015;4(4):744-748

killing the child in womb however if results in the death of child immediately after its death makes the offence a culpable homicide under IPC.

The Medical Termination of Pregnancy Act was passed in July 1971, which came into force in April 1972. This law was conceived as a tool to let the pregnant women decide on the number and frequency of children. It further gave them the right to decide on having or not having the child. However, this good intentioned step was being used to force women to abort the female child. In order to do away with lacunae inherent in previous legislation, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (PNDT Act) had to be passed in 1994, which came into force in January 1996. The Act prohibited determination of sex of the foetus and stated punishment for the violation of the provisions. It also provided for mandatory registration of genetic counselling canter, clinics, hospitals, nursing homes, etc. Thus both these laws were meant to protect the childbearing function of the woman and legitimise the purpose for which pre-natal tests and abortions could be carried out. However, in practice we find that these provisions have been misused and are proving against the interest of the females.

Sex determination techniques have been in use in India since 1975 primarily for the determination of genetic abnormalities³¹. However, these techniques were widely misused to determine the sex of the foetus and subsequent abortions if the foetus was found to be female. Invariably the person who seeks the illegal service and the service provider, both are in agreement to defeat and circumvent the provisions of the law. Unlike in other cases, both the parties are gainers in this matter. On the one hand, the people are able to get rid of the foetus of unwanted sex and on the other, the service providers are benefited financially. Non-availability of evidence and witness is therefore the main hindrance in the way of punishing errant doctors unless they are caught red-handed.

These pathetic situations were also taken note by Supreme Court in case *CEHAT and Ors. v. Union of India*³² where it was observed that amendments to the PNDT Act were necessary. After detailed deliberations the Act has been

³¹ [https://www.iria.in/pndt/PNDT%20FAQ%20for%20Publi c.pdf](https://www.iria.in/pndt/PNDT%20FAQ%20for%20Publi%20c.pdf); Amniocentesis was first introduced in India in 1975 by the All-India Institute of Medical Sciences (AIIMS), New Delhi, for detecting congenital deformities in fetuses.

³² (2003) 8 S.C.C. 412 (India).

amended. The main purpose has been to ban the use of sex selection techniques before or after conception as well as the misuse of Pre Natal Diagnostic Techniques for sex selective abortions and to regulate such techniques. To make this clear, the long title of the Act has been suitably amended to read:

“An Act to provide for the prohibition of sex selection, before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.”

Again, in 2003, in *Centre for Enquiry Into Health v. Union of India and others*³³, the Supreme Court while expressing concern in the matter held that for effective implementation of the Act, information in this regard should be published by way of advertisements as well as on electronic media and suggested many other steps for continuing monitoring. Consequent to the concern expressed by the Supreme Court, the Parliament took the necessary step by amending the law. The said Act has since been amended with effect from 14.2.2003 to make it more comprehensive and renamed as “Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) at the same time certain amendments have also been brought about in the Rules of 1996 to ensure effective implementation of the Act and in view of the observations of the Supreme Court. The amended Rules have come into effect from 14th of February, 2003. The Act defines the terms used therein, lays down when the use of Pre-Natal Diagnostic Techniques is prohibited and where it is regulated, it has provisions for bodies which are responsible for policy making under the Act, and those which are responsible for the implementation of the Act. The penalties for various offences, how and by whom cognizance of complaints is to be taken are also elaborated. Now, it would be expedient to refer here few relevant provisions of the Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.

Use of ultrasound machines has also been brought within the purview of the Act more explicitly so as to curb its misuse for detection and subsequent disclosure of sex of the foetus test it should lead to female foeticide. In 2003, the

³³ A.I.R. 2003 S.C. 3309 (India).

administrative rules implementing the 1994 Act were amended to regulate the sale of ultrasound machines. Amended Act, prohibited the distribution of any ultrasound or other machine capable of “detecting the sex of the foetus” to any laboratory, clinic, or other person unless the recipient is registered under the Act³⁴.

A new section 22 was inserted by amended act to deal prohibition of advertisements related to pre-natal determination of sex and provides punishment for its contravention³⁵. In *Sabu George v. Union of India*, the Supreme Court is looking at the constitutionality of sex- selection ads appearing on search engines. In its order of 28 January 2015, the Supreme Court has

³⁴ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, (2002). Section 3(B)

³⁵ The Pre- Natal Diagnostic Techniques (Regulation And Prevention Of Misuse) Amendment Act, (2002) Substitution of new section for section 22.- For section 22 of the principal Act, the following section shall be substituted, namely:-' 22. Prohibition of advertisement relating to pre- conception and pre- natal determination of sex and punishment for contravention.- (1) No person, organisation, Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic including clinic, laboratory or center having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of the foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form, including internet, regarding facilities of pre- natal determination of sex or sex selection before conception available at such Centre, Laboratory, Clinic or at any other place. (2) No person or organisation including Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre- natal determination or pre- conception selection of sex by any means whatsoever, scientific or otherwise.(3) Any person who contravenes the provisions of sub- section (1) or sub- section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees. Explanation.- For the purposes of this section," advertisement" includes any notice, circular, label, wrapper or any other document including advertisement through internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall- painting, signal, light, sound, smoke or gas.'

directed that, as an interim measure, “Google, yahoo and Micro Soft shall not advertise or sponsor any advertisement which would violate Section 22 of the PCPNDT Act, 1994. If any advertisement is there on any search engine, the same shall be withdrawn forthwith by the respondents”. The Court plans to hear arguments on the “total blocking of items that have been suggested by the Union of India³⁶”.

The maintenance and preservation of records particularly in case of pregnant women undergoing ultrasonography, under the pain of heavy penalties, was part of a strategy to curb the misuse of diagnostic techniques and without such compulsion to keep the records in the prescribed manner, it would be well-nigh impossible to trace and prove the offences under the Act. The requirement of maintaining the records was itself an effective check against commission of other offences³⁷.^[36]

The offences under the Act have been made cognizable, non-bailable and non-compoundable³⁸. Section 23 of the Act, deals with offences and penalties and from a bare reading of Section, it is apparent that the actual determination or an agreement to determine the sex of a foetus is punishable under the Act. The penalties for the offence have been increased where the punishment will be for the term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with

³⁶ <http://cis-india.org/internet-governance/blog/search-engine-and-prenatal-sex-determination>.

³⁷ Maintenance of records; (1) All records, charts, forms, reports, consent letters and all other documents required to be maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed: Provided that, if any criminal or other proceedings are instituted against any Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings. (2). All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf.

³⁸ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, (2002). Section 27 of The PNDT Act, 1994; Offence to be cognizable, non-bailable and non-compoundable.-Every offence under this Act shall be cognizable, non-bailable and non-compoundable.

imprisonment which may extend to five years and with fine which may extend to one lakh rupees³⁹. One of the other demands of the women's movements was to situate critically of the law in favour of women's far as penalties under the act are concerned. The amended Act clearly supports this when its provide in section 24 that "Presumption in the case of conduct of pre-natal diagnostic techniques, Notwithstanding anything in the Indian Evidence Act, 1872 (1 of 1872), the court shall presume unless the contrary is proved that the pregnant woman has been compelled by her husband or the relative to undergo prenatal diagnostic technique for the purposes other than specified in the Act"⁴⁰.

³⁹ The Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994; Section 23 offences and penalties.- (1) Any medical geneticist, gynecologist, registered medical practitioner or any person who owns a Genetic Counseling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees. (2) The name of the registered medical practitioner who has been convicted by the court under subsection (1), shall be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence. (3) Any person who seeks the aid of a Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic or of a medical geneticist, gynecologist or registered medical practitioner for conducting prenatal diagnostic techniques on any pregnant woman (including such woman unless she was compelled to undergo such diagnostic techniques) for purposes other than those specified in clause (2) of section 4, shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

⁴⁰ Ministry of Health and Family Welfare(2006) Handbook on Pre-Conception and Pre-Natal Diagnostics Techniques Act, 1994 and rules with amendments , Governments of India at p.76

Lawyers and legal institutions regularly face technological changes. In the midst of a genetic revolution in medicine, Assisted Reproductive Technology (ART) has become a well-established technique to help infertile women achieve pregnancy. But many women are now turning to ART not just to circumvent infertility, but consciously to shape their families by determining the sex of their children. Many patriarchal cultures have a gender preference for males and to date have used technological advances in reproductive medicine to predetermine the sex of the child being born⁴¹.

If prior to conception by choosing male or female chromosome sex of the child is allowed to be determined and fertilized egg is allowed to be inserted in the mother's womb that would again give scope to choose male child over female child. In such cases, even if it is assumed that there is no female foeticide, indirectly the same result is achieved. The whole idea behind sex selection before pre-conception is to go against the nature and secure conception of a child of one's choice. It can prevent birth of a female child. It is as bad as foeticide. It will also result in imbalance in male to female ratio⁴². The techniques of pre-conception sex selection have been brought within the ambit of the Act⁴³ so as to pre-empt the use of such technologies, which significantly contribute to the declining sex ratio⁴⁴.

⁴¹ MONICA SHARMA, *TWENTY -FIRST CENTURY PINK OR BLUE: HOW SEX SELECTION TECHNOLOGY FACILITATES GENDERCIDE AND WHAT WE CAN DO ABOUT IT*, 198, family Court Review, (2008), V. Vijay Sharma and Mrs. Kirti v Union of India, A.I.R. 2008 Bombay 29.

⁴²The Pre- Natal Diagnostic Techniques (Regulation And Prevention Of Misuse) Amendment Act, 2002, Amendment of section 6.- In section 6 of the principal Act, after clause (b), the following clause shall be inserted, namely:-" (c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception."

⁴³ PATEL T. *SEX-SELECTIVE ABORTION IN INDIA: GENDER, SOCIETY AND THE NEW REPRODUCTIVE TECHNOLOGIES*, Sage Publications (2007).

⁴⁴ KALPANA SHARMA, *NO GIRLS, PLEASE, WE'RE INDIAN*, The Hindu, (August 29, 2004), at <http://www.hindu.com/mag/2004/08/29/stories/2004082900130100.htm>. 751 Nagarathna et al., *Int J Med Res Health Sci*. 2015;4(4):744-748

A conjoint reading of the above provisions would clearly indicate a well-knit legislative scheme for ensuring a strict and vigilant enforcement of the provisions of the PNDT Act directed against female foeticide and misuse of pre-natal diagnostic techniques. In fact, the use of those techniques is restricted to the purpose of detection of any of the abnormalities or diseases enumerated in sub-section (2) of section 4 of the Act. There is now substantial data that reveals that private as well as government facilities are used for sex-selective abortions despite the law that prohibits it⁴⁵.^[44] Over 300 doctors have been prosecuted for violating the law, but few convictions have resulted, and the medical community has pressured the government not to prosecute doctors who reveal the sex of the fetus to the mother.^[45] In a 2003 ruling on a lawsuit brought to demand more rigorous enforcement of the Pre-Natal Diagnostic Techniques legislation, the Indian Supreme Court acknowledged its poor implementation, but its ruling only called for local governments to enforce it more strictly.^[46]

V. Conclusion and Suggestions

The preference for a male child in large sections of Indian society even in highly educated groups is the root cause of female foeticide in India. The menace of Female foeticide was invented, touted and sold by the medical profession, and it operates with the complete consent of our society. Even the law is a powerful instrument of social change but law alone cannot dismantle out this social problem from Indian society. The Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 is a step towards the right direction. In view of the skewed female to male sex ratio in our country, this Act is an initiative for protection of the unborn girl child. Strict interpretation and implementation of the Act is helping create a positive trend with respect to the female child sex ratio in several districts of the country, but it is also putting doctors under constant pressure. The scope to misuse the technology is very real. The real challenge before Indian society and government authorities are to remove loopholes in The Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002. It is pertaining to note that until and unless this menace is controlled, the country is

⁴⁵ ASHLEY BUMGARNER, *A RIGHT TO CHOOSE: SEX SELECTION IN THE INTERNATIONAL CONTEXT*, 14 Duke J. Gender L. & Pol'y (2007).

heading for a grave gender imbalance, which in turn would adversely affect the nation's economic progress. So, there is a need to plug the loopholes. Registration procedures should be made tougher and clinics run by technicians and unqualified personnel should be registered and better regulated. Use of ingenious ways to convey the sex of the fetus should also be curbed through greater use of surprise checks and dummy patients.

Merely enforcing a ban on the use of medical technology for sex selection has been no solution to female foeticide. The issue is a social one wherein the age-old prejudices and traditions are the main culprits which promote the practice of female infanticide (killing of new-born female child). With availability of ultrasonography (USG) a shift has occurred from infanticide to female foeticide (killing of the female foetus). Without cultural change, legal measures will continue to be undermined and ineffective. But the link between the technology and gendercide is so clear that nations must find the will and means decisively to implement such laws. At the same time, it is imperative that nations marshal the resources to reverse the culture of degrading women which sex-selection technology has exacerbated. The dream of a world of sons is a global nightmare with untold consequences. Neither nations nor cultures can afford to rest in the face of Female foeticide. Female foeticide can only by a combination of monitoring, education campaigns, and effective legal implementation that the deep-seated attitudes and practices against female can be eroded from the society. The Government of India launched "*BalikaSamriddhiYojana*" in 1997 as a major initiative to raise the overall status of the girl child. It intends to change family and community attitudes towards girl child. In the same manner, the Government has recently launched "Save the Girl Child Campaign". One of its main objectives is to lessen the preference for a son by highlighting the achievements of young girls. To achieve the long-term vision, efforts are afloat to create an environment where sons and daughters are equally valued. Role of medical colleges and professional bodies would be very important in curbing menace of female foeticide. Many medical practitioners have joined campaigns against the misuse of these technologies. The mass media must be involved in promoting a positive image of women. However, this should be combined with highlighting the issue and dangers of female foeticide and skewed gender ratio. Various Non- Governmental Organizations (NGOs) are already taking an active lead in this area. It must be emphasized that involvement of community leaders

as well as influential persons would go a long way in assuring success in such campaigns. Now, we want to sum up this review article with these beautiful lines:

“ekcheekhraatko cheer kemaakehirdayetakaayiAureknanhisiawaaz sun kemaatohbahutroiMaamujhe mat maro, mat maronanhiisijaankojanam se pehelehi matmaro Isnanhisijaanko.....”

Problems of Migrant Workers in India: A Post Pandemic Scenario

Dr. Harunrashid A. Kadri¹

Abstract

Migrant workers are seen to be the most vulnerable members of the communities in which they live and work. They leave one place for another in search of employment, better wages, a decent living, or to be close to family or friends. Many suffer severe violations of their human rights, including ill-treatment by law enforcement authorities, abusive or exploitative working conditions, low wages, lack of fundamental workplace rights and protections, limited access to social security, systemic discrimination and wide-spread xenophobia and prejudice. During the post pandemic lockdown, they confronted with most severe sufferings of their life and history. The present paper is to discuss and analyse the problems of inter-state & intra-state migrant workers' in India post declaration of nationwide lockdown by the Central Government due to the Covid-19 pandemic. This paper concludes that the existing laws to protect the migrant workers have become lifeless. In the last 40 years, neither has it been effectively enforced nor any steps have been taken for its revival. Proactive measures are required to pour life into it. These laws may be made effective by requiring the establishment to submit all the details of migrant workers to the appropriate authority. The Government should ensure safe and healthy living, good working conditions along with just and fair wages to migrant workers.

Key Words: Rights of Migrant Workers, Post Pandemic Impact on Migrants Rights, Problems of Migrant Workers in India.

I. Introduction

Since ancient times, migration is one of the preferable natural human responses to hunger, deprivation, persecution, or natural disaster. Migrants leave one place for another in search of employment, better wages, a decent living, or to be close to family or friends. Many suffer severe violations of their human rights, including ill-treatment by law enforcement authorities, abusive or exploitative working conditions, low wages, lack of fundamental workplace rights and

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protections, limited access to social security, systemic discrimination and widespread xenophobia and prejudice. Migrant workers are the most vulnerable members of the communities in which they live and work. The post-Covid 19 scenario is the evidence of their vulnerability, sufferings, agony and miserable life. The present paper discusses and analyses inter-state & intra-state migrant workers' problems in India post declaration of nationwide lockdown by the Central Government due to the Covid-19 pandemic.

II. Who are Migrant Workers?

There are several definitions of “migrant worker” given in the international instruments. According to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, the term “migrant worker” refers to “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.² UNESCO Glossary defines a migrant as “any person who lives temporarily or permanently in a country where he or she was not born and has acquired some significant social ties to this country”.³ According to the International Organization for Migration, a migrant is a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. In short, a migrant is any person who lives temporarily or permanently in a country where he or she was not born.⁴

The above definitions indicate that the term ‘migrants’ does not include refugees, displaced persons or other persons forced to leave their permanent homes. Migrants are those people who voluntarily decide or choose to leave one place and settle at the other place, maybe for employment & subsistence, although sometimes the choices may be extremely constrained. Migration may

²https://treaties.un.org/doc/Treaties/1990/12/19901218%2008-12%20AM/Ch_IV_13p.pdf

³<https://wayback.archive-it.org/10611/20171126022441/http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/migrant/>

⁴<https://www.iom.int/who-is-a-migrant>

also occur due to marriage, transfer, environmental issues, etc. In this chapter, we are concerned mainly with the migration for work, employment, or other means of subsistence.

We are concerned more with inter-state and Intra-state workers within India and not foreign migrants. Hence, a reference to National instruments becomes essential. According to the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, “inter-State migrant workman” means any person who is recruited by or through a contractor in one State under an agreement or other arrangement for employment in an establishment in another State, whether with or without the knowledge of the principal employer of such establishment.⁵ This definition does not include workers who are not appointed by contractors, daily wagers and workers engaged in the un-organised or informal sector such as small traders, street vendors, hawkers, vendors at railway stations and bus stops, etc. who are equally vulnerable.

III. Demographics of Migrant Workers

Let us take a quick review of demographics migrant workers based on the Census of India 2001. India’s total population in 2001 was 1.03 billion, out of which about 30% (307 million) were reported as migrants from the place of birth. It is pertinent to note that, Maharashtra state received the highest number of migrants (7.9 million) from other states and other countries, followed by Delhi (5.6 million) and West Bengal (5.5 million). The number of migrants in India rose by 32.9% in the decade 1991-2001 compared to the previous decade. The data from the Census of 2011 shows that the total number of internal migrants in India was 45.36 crore which is 37% of the country’s total population.⁶

In the absence of official data regarding the number of migrant workers in the year 2020, we may consider Professor Amitabh Kundu’s estimation. He states that there are a total 65 million inter-state migrants in India, of which 33% are

⁵ See Section 2(1) (e) of the Act.

⁶ https://censusindia.gov.in/Data_Products/Data_Highlights/Data_Highlights_link/data_highlights_D1D2D3.pdf See also https://censusindia.gov.in/Census_And_You/migrations.aspx

workers, 30% are casual workers and another 30% work on the regular basis in the informal sector. If street vendors (which are not covered by the workers' data) are added to this, 12 to 18 million people are residing outside the states of their origin and are at risk of losing their source of income due to lockdown. According to him, out of the total inter-state migrants, 25% belong to Uttar Pradesh alone, 14% belong to Bihar, 6% Rajasthan & 5% belong to Madhya Pradesh.⁷

A study conducted jointly by the Centre for the Study of Developing Societies (CSDS) and Azim Premji University in the year 2019 shows that almost 29% of the total population of mega cities in India is of daily wage earners, and this is the actual figure of migrants willing to travel back to their native states.⁸

It means that around 4-6 million people would have wanted to return to Uttar Pradesh, and 1.8-2.8 million to Bihar, 700,000 to 1 million to Rajasthan and 600,000-900,000 to Madhya Pradesh. This data should have been used and considered by the Central Government while deciding the Nationwide lockdown to foresee the issues relating to livelihood, transport, loss of employment, etc. However, the Government completely ignored it and took a hasty & impulsive decision that impacted millions' lives.

A. A Migrant Worker's Monthly Household Income

A Survey conducted by the CSDS from 2017-19 published in Indian Express e-paper dated 27 May 2020, found that, of the total migrant workers, 22% earn Rs. 2,000; 32% earn between Rs. 2,000 and 5,000; 25% earn between Rs. 5,000 and 10,000; 13% earn between Rs. 10,000 and 20,000 and only 8% earn more than Rs.20,000 per month.⁹ It shows their poor economic condition and unsustainability, particularly during the lockdown.

⁷<https://www.livemint.com/opinion/online-views/opinion-the-lockdown-and-our-crisis-of-interstate-migrants-11585560071429.html>

⁸<https://www.thequint.com/voices/opinion/salman-khurshid-congress-leadership-migrant-labourers-economic-crisis-covid-modi-govt-inequality>

⁹ Politics and Society Between Elections Survey' conducted by the CSDS published in Indian Express e paper dt. 27 May 2020), available at <https://indianexpress.com/article/explained/coronavirus-india-lockdown-migrant-workers-mass-exodus-6348834/>

B. The Inter-State Migrant Workmen Act, 1979

Before the Act of 1979, the employment system in India was mostly exploitative for inter-state migrant labourers. In Orissa, the contractors or agents used to send the workers to other states in large construction projects, but the employers never honoured their promise about the wages and timely payment. Wages given were much less than those promised, and there was a delay in settling the payments also. The abuse began with unlimited working hours, compelling them to work without weekly holiday and in worst working conditions.¹⁰ That led to the adoption of abusive practices by employers and contractors. To overcome this, the Parliament of India enacted Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (hereinafter referred as the Act of 1979) to regulate employment inter-State migrant workers and to provide for their conditions of service. This Act applies to all the establishments who employ five or more workers from other states and applicable to all contractors who engage five or more inter-State workers. The Act of 1979 provides for registration of establishments who employ migrant workers and requires the contractors to get the licences from the State from where they are willing to employ the workers.¹¹ Each contractor is required to maintain complete details of all the migrant workers and submit it to the registering authority within 15 days of hire. It is also mandatory for the contractors to maintain a register of all the migrant workers and issue them a passbook containing their employment details.¹² The inter-state migrant workers are entitled to get from the establishments the displacement allowance, journey allowance, accommodation, health and other facilities. Migrant workers are also entitled to regular payment of wages, equal pay for equal work, suitable work conditions, residential accommodation, free medical facilities, protective clothing, etc. When any fatal accident or serious bodily injury caused to any such workman, the establishments are required to report it to the specified authorities of both the States and the next of kin of the workman¹³

¹⁰ https://en.wikipedia.org/wiki/Inter-State_Migrant_Workmen_Act,_1979

¹¹ See Sections 3-6.

¹² See Sections 7-11.

¹³ See sections 13-19.

The employer is also liable for the payment of wages and other responsibilities. Establishments are prevented from employing any migrant workers without the registration. State governments are empowered to appoint inspectors to ensure the implementation of this Act. Inspector may conduct inspections and record testimonies of migrant workers. Any obstruction to their work is punishable with imprisonment for a term which may extend to 2 years or fine up to Rs 2000 or both.

If implemented, these provisions would have also helped the administration determine the numbers and keep track of the total migrant workers and their essential needs during lockdown and transport facility required for their comfortable journey to their home towns.

Although there is a considerable increase in migrant workers after 1990, the implementation of the law has been completely ignored, and it became deadwood. It came into the discussion only when the present Central Government proposed to repeal the above Act and enact Occupational Safety Health & Working Conditions Code (OSHWC) 2019, which incorporates into it only a few provisions from the Act of 1979.¹⁴ This move of Central Government has been severely criticised by many including CITU.¹⁵

IV. Problems of Migrant Workers - Post Covid-19 Lockdown

Millions of migrant workers were working in metro cities like Mumbai, New Delhi, Ahmedabad, Surat and other cities of India. However, in December 2019, Covid-19 virus outbreak occurred in China and reached India at the end of January 2020. Slowly cases of Covid-19 infection started increasing in India, but the Government could not do much towards prevention of Covid-19 until a one fine day ‘Janata Curfew’ was declared on 22 March 2020.¹⁶ After a gap of one day, suddenly on 24 March 2020 evening, a nationwide lockdown was

¹⁴<https://www.hindustantimes.com/india-news/explainer-migrant-workers-to-get-social-security-in-the-new-avatar-of-1979-law-that-was-not-so-effective/story-PNqSZnxtBCGIBQgjsVtpJ.html>

¹⁵<https://economictimes.indiatimes.com/news/economy/policy/citu-appeals-to-pm-to-not-repeal-inter-state-migrant-workers-act/articleshow/75536865.cms>

¹⁶<https://www.thehindu.com/news/national/narendra-modi-speech-live-updates-coronavirus/article31108793.ece>

announced by the Honourable Prime Minister Narendra Modi which was to be implemented from midnight, and he appealed all to stay wherever they were.¹⁷ The movement of people had been banned, all the Industrial enterprises except the essential goods & services were ordered to stop working. Shopping malls, markets, religious places, restaurants were completely shut down.¹⁸

The sudden and uninformed lockdown with the notice of just four hours for preparation, rendered millions of migrant workers, daily wagers and street vendors jobless, and they were got stranded in the cities where they worked. They lost their source of income and became captives in their home. Small and temporary housing made them breathless; restricted movement and the workless-ness coupled with homesickness had a significant physical and psychological impact on their health. Daily earners could not sustain for more time as they could not fulfil their basic needs. Fear of spreading Corona virus in slums, loss of employment and inability to afford the day to day expenditure forced them to leave the place. Support from the Government was very meagre and insufficient for survival. The transport facilities like trains & buses were withdrawn entirely, which compelled them to start a journey towards their native State by whatever means and modes. Many fell ill, the elderly, small children and women were forced to walk or travel by bicycle, cycle-rickshaw, bullock cart etc. A 15-year-old girl Ms Jyoti Kumari cycled 1200 km carrying her ill father, many walked for 1800-2000 km to reach their home,¹⁹ many died on the railway tracks and many on the road, thousands walked without water, food and footwear, many of them died due to dehydration & other health issues.²⁰ Thousands suffered severe injuries on their legs, soles and toes; thousands walked without food since no restaurants were open, they had to beg and eat²¹, compromising their most fundamental right to dignity.²² Women had

¹⁷<https://www.thehindu.com/news/national/pm-announces-21-day-lockdown-as-covid-19-toll-touches-10/article31156691.ece>

¹⁸<https://www.bbc.com/news/world-asia-india-52024239>

¹⁹<https://thewire.in/rights/jyoti-kumari-bihar-gurgaon-cycle-covid-19-lockdown>

²⁰https://en.wikipedia.org/wiki/Indian_migrant_workers_during_the_COVID-19_pandemic

²¹<https://www.ft.com/content/dec12470-894b-11ea-9dcb-fe6871f4145a>

²²<https://www.thehindu.com/news/national/india-coronavirus-lockdown-migrant-workers-and-their-long-march-to-uncertainty/article31251952.ece> ; See also

to walk thousands of kilometres even when they were pregnant²³, carrying luggage and kids.²⁴ The visual of a man pulling a bullock cart alongside a bull became viral with a cause.²⁵ In another heartbreaking story, an 11-year-old boy Mohammad Tabarak took his parents from Varanasi to their village Araria in Bihar in a tricycle, pedalling for almost 600 kilometres.²⁶ Lakhs of migrants reached their home in absolute precarious health or some died even before they reached.²⁷ The Government became silent spectator when this was happening for months together.²⁸

V. Human Rights Violations of Migrant Workers

Migrant workers are entitled to all the human rights that a normal human being has and the rights conferred by different international instruments and national laws. The most fundamental among these are life, liberty, equality and dignity, and the right to fair working conditions and minimum wages. However, intentionally or unintentionally, their rights have been completely ignored for

https://www.washingtonpost.com/world/asia_pacific/india-coronavirus-lockdown-migrant-workers/2020/03/27/a62df166-6f7d-11ea-a156-0048b62cdb51_story.html

²³<https://www.indiatoday.in/image-of-the-day/video/images-of-the-day-man-pulls-cart-for-650-km-with-pregnant-wife-on-it-mother-and-son-pull-a-bullock-cart-1677740-2020-05-13>

²⁴<https://mumbaimirror.indiatimes.com/coronavirus/news/covid19-latest-live-updates-dharavi-crosses-1000-mark-35000-cases-in-mumbai-by-june-3-thane-mira-bhayander-kalyan-nirmala-sitharaman-tax/migrant-worker-drags-exhausted-child-on-her-luggage-as-they-walk-from-punjab-to-jhansi-in-up/videoshow/75734334.cms>

²⁵<https://timesofindia.indiatimes.com/city/indore/indore-labourer-yokes-himself-to-cart-pulls-family-25km-home/articleshow/75729323.cms>

²⁶<https://thewire.in/rights/lockdown-tricycle-cart-boy-parents-home>

²⁷<https://www.thehindu.com/opinion/op-ed/no-relief-for-the-nowhere-people/article31495460.ece> ; See also <https://timesofindia.indiatimes.com/india/lockdown-deaths-of-those-who-never-reached-home/articleshow/75505407.cms>

²⁸<https://www.thehindu.com/opinion/op-ed/no-relief-for-the-nowhere-people/article31495460.ece>

the last 40 years. They were subjected to arbitrary action, paid much less than the minimum wages and had been given very inhuman treatment.²⁹

During the lockdown, the Government of India managed to bring back around 9 lakh people who were stranded throughout the world (till 24 July 2020)³⁰ by arranging special flights, whereas, millions of migrant workers who were stranded at mega cities like Mumbai, Pune, New Delhi etc, they were asked to stay where they were and prevented from moving back to their homes within India. When trains and buses were withdrawn with immediate effect, there remained no option for their journey. Shortage of food, money and difficulty in residing at very small houses or compartments and fear of spreading corona in slum areas, made them undertake their tedious walk home. Many street dwellers who were prevented from using the public place for sleeping and utility, also joined this route. However, instead of arranging transport facilities for them, the state authorities took punitive action such as lathi charge against them for violating lockdown rules.

On the one hand, aeroplanes were arranged for rich Indians stranded outside India, on the other hand, poor workers were denied basic facilities like food, transport, etc. and were beaten up when they attempted to reach their home town. The whole world has witnessed the sufferings of migrant workers while walking for thousands of kilometres to reach their near & dear ones. Unfortunately, the Central Government and also the state governments remained silent spectators; however, civil society and lakhs of private individuals came forward to help by whatever possible means. The role of civil society during lockdown was commendable.³¹ Most surprisingly, the most active organ of

²⁹<https://www.thehindu.com/news/national/over-878-lakh-indians-have-returned-from-abroad-under-vande-bharat-mission-mea/article32237013.ece>

³⁰<https://www.hindustantimes.com/andhra-pradesh/police-lathi-charge-migrant-workers-in-west-godavari-seeking-to-return-home/story-R93TjQ7udRpFgbKcMyzsqM.html> ; See also <https://www.thehindu.com/news/cities/Vijayawada/covid-19-lockdown-police-beat-up-migrant-workers-send-them-to-shelter-homes-later/article31599485.ece>

³¹<https://www.livelaw.in/top-stories/sc-refuses-to-entertain-plea-for-migrants-on-road-156803>; See also <https://kanooniyat.com/2020/05/supreme-court-refuses-to-entertain-plea-for-migrants-on-road/>

democracy, the honourable Supreme Court of India also turned a blind eye to these sufferings. A bench of Justice L Nageswara Rao, Justices S K Kaul and B R Gavai refused to entertain an application seeking directions to the Centre to ask all district magistrates to identify stranded migrants and provide them food, shelter and free transportation. The Supreme Court found itself helpless in directing the Government to arrange for food, shelter and transport.³² On the contrary, the High Courts were found taking proactive steps in providing relief to poor migrant workers.³³

A. What made Them Travel Back?

In the initial days of the lockdown, migrant workers were expecting that lockdown would be withdrawn after 21 days, but when the lockdown was extended further, they could not continue their stay in the metro cities owing to the loss of employment & income and also because there was no hope for re-employment in the near future. Those in the low-income group, could not sustain for a longer time, daily wage earners did not have stocks of food grains or bank balance; many were undergoing starvation.³⁴ The Poor public distribution system³⁵, increasing threat of coronavirus arising from crowded slums & use of public toilets, suffocation due to small & congested housing or temporary sheds, mental stress, psychological impact, homesickness and the urge to be with the family in difficult times, lack of hopes of support from the Government and intact village-based ethnic ties with the natives could have

³²<https://theleaflet.in/a-proding-judiciary-in-times-of-emergencies/#>

³³<https://www.thehindubusinessline.com/opinion/the-hunger-challenge-of-the-lockdown/article31480844.ece> ; See also <https://thewire.in/labour/covid-19-poverty-migrant-workers>

³⁴<https://www.thehindubusinessline.com/opinion/the-hunger-challenge-of-the-lockdown/article31480844.ece> ; See also <https://thewire.in/labour/covid-19-poverty-migrant-workers>

³⁵<https://thewire.in/rights/one-nation-one-ration-card-migrant-workers> ; See also <https://www.livemint.com/news/india/no-ration-cards-no-food-supplies-hunger-stalks-rural-india-11586197320697.html> See <https://www.downtoearth.org.in/news/governance/old-data-kept-those-in-need-away-from-pds-amid-covid-19-lockdown-report-72024>

forced them to walk thousands of kilometres once their source of livelihood was taken away.

B. Why are Migrants Ignored?

Many families from Uttar Pradesh, Bihar, West Bengal, etc. suffer abject poverty and decide to migrate to industrialised cities of other cities like Mumbai, New Delhi, Ahmadabad, Surat, Hyderabad, etc. Either they migrate with a limited household, or only the working member/members migrate, and the remaining members stay at their native place. Most of them work in the unorganised sector or start their small shop for trading. They are from low-income families, are less educated and unorganised. They are a voiceless community and remain vulnerable to any abuses. They being voiceless, never get the attention of media or politicians as it does not affect party leaders' political career. Apathy towards the poor, inefficient administration, overpopulation, weak opposition, lack of coordination between the governments, conflict of political interests between Centre & State govt, conflict of political interests between Centre & State, a complete failure of state machinery, weak opposition, failure of opposition parties to compel governments to take steps, election manifesto filled with religious commitments rather than justice to the poor, etc. could be the reasons for lack of proactive steps towards implementation and strengthening of this OSHWC Code.

VI. Conclusion

Migrant workers are real wheels of any economy, and they must be the first to be cared for and protected. Almost all the developments and top infrastructures in the world are built by the efforts of workers. They play a crucial role in the development of the nation. However, the unplanned, unthoughtful, arbitrary, impulsive and hasty decision of countrywide lockdown took the lives of hundreds³⁶ and resulted in the loss of livelihood of millions of migrant workers.³⁷ As a guardian of its citizens, the State failed miserably in protecting

³⁶<https://www.thehindu.com/news/national/activists-say-over-300-deaths-related-to-lockdown-troubles/article31491525.ece>

³⁷<https://www.thehindubusinessline.com/opinion/the-hunger-challenge-of-the-lockdown/article31480844.ece> ; See also <https://thewire.in/labour/covid-19-poverty-migrant-workers>

migrant workers' rights, and the top court also missed an opportunity to correct the wrongdoings and restore their rights. The faith and confidence of the migrant workers in the system have been shaken to such an extent that it may take decades to restore it. It is also unclear when these workers will return to work and whether they will return at all? The existing laws to protect the migrant workers have become lifeless. In the last 40 years, neither has it been effectively enforced nor any steps taken for its revival. Proactive measures are required to pour life into it. These laws may be made effective by requiring the establishment to submit all the details of migrant workers to the appropriate authority. The Government should ensure safe and healthy living, good working conditions along with just and fair wages to migrant workers. India's dream of becoming \$3 trillion is useless if our poor migrant workers are sleeping hungry or compelled to walk 2000 kilometres to reach their homes.

An Analytical Study of Women Empowerment in the Light of their Social Status, Political Participation and Attainment of Education- A Myth or Reality

Dr. Jayanta Baruah¹

Abstract

Since time immemorial women have been deprived of their fundamental rights and liberty. Resulting they are still remain backward. It has been realised that ignoring women participation in politics our democratic government cannot be successful. Hence, women empowerment must get top priority in contemporary time. The Government of India is taking some positive steps for women empowerment. So question arises about women empowerment whether it is myth or reality? In this paper the author will try to examine the status of women in society, attainment of Education, especially higher education and their participation in politics to examine their level of empowerment.

Key Words: Empowerment, Discrimination, Participation, Responsibilities.

I. Introduction

Antrobus rightly states that empowerment is a process that enables a powerless woman to develop autonomy, self-control and confidence with a group of women and men in a situation of oppressive social condition.² Thus, empowerment is a support to help women to accomplish equal opportunity with men or to reduce the gap between men and women. Women play a very strategic role in the development of society in particular and development of economy in general. Women also play multiple roles in the society. Though the nature has given the genetic power of reproduction to women, the socio-economic status of women is so poor and in most of the society they live a pathetic life. It is realised that by ignoring the importance of women a society cannot enjoy the fruits of development. So, it becomes necessary to aware women community about their rights and responsibilities which will finally

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encourage them to take equal and active part in the society and in politics with their male counterpart i.e., women empowerment in its real sense.

II. Methodology

Historical and analytical approach is used in this research paper. To make our research a success we have collected data from various secondary sources. Different official documents, relevant published and unpublished works, Journals, News Papers and all other information and web sites were used from different sources.

III. Hypothesis

The main hypothesis of the study is to find out the actual position of women in the society and their political involvement. The author will try to find out the reality of empowerment of women in the male dominated society and will make an analysis whether “Women Empowerment” is myth or reality.

IV. Understanding Women Empowerment

The word women empowerment is one which is widely and commonly used in society. It is an active, multi- dimensional process which encompasses several multi reinforcing components that begin with and supported by economic independence. In the words of Lucy Lazo empowerment is a process of acquiring, providing, bestowing the resources and the means or enabling the access to a control over such means and resources.³ Mrs. VibhaParthasarthy, Chairman, National Commission for Women, in her inaugural speech of the women’s 7th Political Empowerment Day celebration on April 24th and 25th 2000 at Delhi defined empowerment, after all, is not position or status. Empowerment is that which gives a person opportunity, to work and we all are in search of this opportunity. We want to be empowered, we all are in search of this opportunity, and it may be Political, Economic or Social.⁴

Thus, the above discussion has cleared that the empowerment is probably the totality of the following or similar capabilities:

² Rhoda Reddock, *Peggy Antrobus*, Vol.37, ResearchGate, p.1365-1377, 2006.

³Carolyn Medel-Anonuevo, *Women, Education and Empowerment: Pathways Towards Autonomy*, UNESCO Institute for Education, Hamsberg, p.8, 1996.

⁴Dr.MaramiGoswami, Babita Das, *Emancipating Women*, p.52-69, First Edition, 2016.

- ❖ Self decision making power.
- ❖ Having access to information and resources for taking proper decision.
- ❖ Ability to exercise assertiveness in collective decision making.
- ❖ Having positive thinking on the ability to make change.
- ❖ Ability to learn skills for improving one's personal or group power.
- ❖ Ability to change others' perceptions by democratic means.
- ❖ Involving in the growth process and changes that is never ending and self-initiated and
- ❖ Increasing one's positive self-image and overcoming stigma.

The contribution of women community of India towards all spheres is praise worthy at present and their contribution was also seen during the freedom movement of India. When crisis arises they come forward to save their mother land with their male counter parts. Their sacrifices cannot be forgotten. But it is a matter of great resentment that even after 73rd years of India's independence they still remain a marginalised in every field. They are always underestimated by the male dominated society of India. The patriarchal society of India deprives the community in every concern such as social, political, economic and education etc. Though the constitution of India provides Right to Equality to establish Social, Economic and Political Justice among every citizen but in reality there is a big disparity among men and women in Indian society. Since 1980's the Government of India has shown increasing concern for women's issues through a variety of legislation promoting the education and political participation of women.⁵ International organizations like the World Bank and United Nations have focused on women's issues especially the empowerment of poor women in rural areas. The late 1980s and early 1990s, non-governmental organizations (NGOs) have also taken on an increased role in the area of women's empowerment.⁶ It is worth mentioning that women comprises 48% of the India's population, comprise 11% workers with 26% work participation.⁷

⁵Dr.BiplabTripathy, SubhechyaRaha, Comparative Study of Women Empowerment in India,p.52, First Edition, 2020.

⁶RAMESH CHANDRA MISHRA, WOMEN IN INDIA: TOWARDS GENDER EQUALITY, p.128, (First Edition, 2006).

⁷ Aditi Rahato, *Promoting Female Participation in Urban India's Labour Force*, Observation Research Foundation, 2020.

The intensity of exploitation and subjugation varies from society to society. But there is no such society which has eliminated the exploitation and subjugation. The patriarchal system has confined the women to specific areas such as kitchen and the bed room and fixed gender roles like bearing and rearing children, cooking and cleaning. In most of the time woman is viewed as property and not a human being. Her like or dislike is neglected. It is to be noted that the Government of India declared 2001 as the Year of Women's Empowerment. The National Policy for the empowerment of women was passed in 2001. But still the desired goal has not been achieved.

V. Social Status of Women

The worth of civilisation of a society can be evaluated from the position that it gives to women. India's ancient culture is honoured as the greatest culture as Indian women enjoyed a prestigious position at that time. Famous ancient Indian philosopher Manu said long ago, 'where women are honoured there reside the gods'. It has been written in Ancient Hindu scriptures that no religious rites can be performed with perfection by a man without the participation of his wife. Her participation is essential to any religious rites. On the occasion of various important festivals married men along with their wives were allowed to perform sacred rites. Hence, wives are regarded 'Ardhangani' (betterhalf). They were given important and equal position with men in society. It is important to note that according to the Cultural History of India women were described or equated with the status of 'DEVI' in the religious texts of Hindus in ancient India. But in real practice they were enjoyed lower position in the society as compare to man. No rights were enjoyed by women in ancient India. The position of women deteriorated more in the later period under Muslim influence. They were compelled to keep themselves within the four walls of their houses with a long *borkha*(veil) on their faces. During British rule social reformer like Raja Ram Mohan Roy, Eswar Chandra Vidyasagar raise their voice against the injustices and pressurized the British administration to enact laws to eradicate social evils like *Satti*, *Child Marriage and Dowry*. Mahatma Gandhi's contribution would be worth remembering towards the upliftment of women in the society. Gandhiji appealed and encouraged women to come out of their homes and to participate in the freedom movement of India. Responding to his clarion call women came

out from their houses in huge numbers and participated in all stages of freedom movement in India with men.⁸

In post- Independence period, statesmen of our nation were interested to give women equal status with men. The reason behind this noble thinking was that most our statesmen were educated with western education and philosophy and the realization of the contribution made by our women community in the freedom movement of India. Hence they were interested to give equal rights to women. But it was too difficult to change the position of women from a utter degradation to a position of equality in a very short period. Though it was a challenging task of uplift the status of women, many legislations pertaining to women were enacted in post- independence period. Laws enacted in this time mainly related to marriage, divorce, inheritance of property and employment. Though the legislations and many other actions that had been taken by the social reformers to uplift the status of women in India but still much has to be done for the cause of the upliftment of status of women in India.

Some of the positive steps that has been taken by the governments of post-independence era which put men and women on equal footings from the point of view of legislative measures are age of marriage without parents' consent has been increased to 21 for boys and 18 for girls, monogamy along with facility of judicial separation, nullity and divorce (even on mutual consent), inheritance (equal share in paternal property), and adoption, widow remarriage and sati abolition etc. However, due a numbers of reasons social legislations have not been very effective in India. The best example in this context can be cited that most of the women are not aware of the measures adopted by the state for their upliftment. Again, if aware they do not want to use these because of the old social values that are still persisting in the society. So, these old traditions and values of the society inhibit them to take any revolutionary steps.

It is pertinent to mention here that Legal or legislative sanctions alone cannot bring any substantial change in the downtrodden position of women unless there is a marked change in the attitude and consciousness of men and women both. The high rate of illiteracy of Indians can be cited as one of the great hindrances in this regard. According to 2001 and 2011 Census, 45.84 per cent and 34 per

⁸Dr.SubhangiRathi, *Role of Mahatma Gandhi in Women's political Participation*, Bombay Sarvodaya Mandal and Gandhi Research Foundation website.

cent women in India are illiterate. Even literate women also do not exercise their right of equality wherever it is required.

Thus in theory, the status of women has been raised in the eyes of law, but practically they are still far from equal to men in every sphere of life. Therefore, in their real life they continue to suffer discrimination, harassment, humiliation and exploitation in and outside home.

The authority of a family in Indian society and the power to govern the home still rests in the hands of the father - male head of the household. The authoritative father model is still continuing in most of the middle and lower class families. Leaving aside a few, in the so-called modern families women have not become equal partners to men even if they are well-educated or more educated as compared to men.

It is a matter of great concern that the violence against women begins at home. Women have to play multifarious roles in their life. They have to play the role of daughters, sisters, mothers and finally the mother -in -law. The role played by women in society is invaluable in all the times but they are considered as hurdle in every society in the world when it comes to extension of political, legal, and economic rights to them. It has already been mentioned that home is the place where violence against women begins and manifestations of violence include physical aggression, such as blows of varying intensity, burns, attempted hanging, sexual abuse and rape, psychological violence through insults, humiliation, coercion, blackmail, economic or emotional threats, and control over speech and actions. In extreme, but not unknown cases, result is the death.⁹ Such kinds of violence take place in a man-woman relationship within the family, state and society. There are various reasons; some are hidden also for domestic aggression towards women and girls. Social and Cultural factors are interlinked with the development and propagation of these violent behavior. With different socialization process that men and women undergo, men take up stereotyped gender roles of domination and control, whereas women take up that of submission, dependence and respect for authority. A girl child always grows up with a constant sense of being weak and in need of protection- physical,

⁹ Violence Against women (Definition and Scope of the Problem), World Health Organisation, 1997.

social or economic. This helplessness has led to her exploitation at almost every stage of life.

The report of 2011 census has revealed an improvement sex ratio between men and women which has shown 940 women to 1000 men as compared to the previous report of 2001 census. The sex ratio of men and women in 2001 census showed 933 women to 1000 men.¹⁰ However, India still has one of the lowest sex ratios in the world with approximately 35 million women "missing". The north-western states of Punjab, Rajasthan and Haryana of India are the states where the highest number women missing at birth. Research has reflected a dismal picture that 12 percent of this gap is found at birth which is increased to 25 percent in childhood. Some of the main causes of this missing number are sex-selective abortion and possible neglect of young girls during infancy indicating a high preference for male children rather than female children.¹¹ This preference for boys is also highlighted the gender gap in the literacy rate in the 2011 census which shows that 82% of males and 65% of females are literate. The difference of 17% indicates that most of the Indian parents still give preference educating their sons over daughters while allocating family resources.¹² Nevertheless, it is commendable improvement over previous census data where the gap was 27% (1981), 25% (1991), and 22% (2001). It is worth mentioning that much of the violence against Indian women is in the form of domestic violence, dowry deaths, acid attacks, honor killings, rape, abduction, and cruelty by husbands and in-laws. One of the main challenges is dowry – a practice of the bride's family giving gifts of cash and kind to the groom and his family. In dowry cases the groom's family mistreats the bride if such demands are not met. To stop this unsocial evil the Indian government has enacted the Dowry Prohibition Act and the Protection of Women from Domestic Violence Act and cruelty under Sec 498A of the Indian Penal Code. According to the National Crime Records Bureau (NCRB) report of 2012, dowry deaths – or murders of women by the groom or in-laws because of unmet high dowry

¹⁰ Antara Bhattacharayya, Sushil Kumar Halder, *Socio-Economic Development and Child Sex Ratio in India: Revisiting the Debate using Spatial data Regression*, Springer, 2019.

¹¹ Shireen J Jejeebhoy, et.al, *Gender-Biased Sex Selection in India and Interventions to Counter the Practice*, Population Council, 2015.

¹² Tanushree Chandra, *Literacy Rate in India: The Gender and Age Dimensions*, Observer Research Foundation, 2019.

expectations – constituted 3.4% of all crimes against women. It is very shameful to mention that in India on average 22 women were killed per day due to non-fulfilment of the dowry demands by their families. The NCRB report indicates that an Indian woman is most unsafe in her marital home. The report has also shown that out of 43.6% of all crimes against women being "cruelty" inflicted by her husband and relatives. These percentages do not include crime such as marital rape, as India does not recognize marital rape as an offence. The total 24,923 rape incidences occurred in India in 2012, 98% of the offenders were known to the victim, which is higher than the global average of approximately 90%. These situations in Indian societies may also mean that children – boys and girls – grow up in a situation where they see violence against women at their home.

It is to be noted that crimes against women in India is still continuing with huge numbers till today. Reports of NCRB published in the year 2016 highlights that majority of cases under crimes against women were reported under 'Cruelty by Husband or His Relatives' 29.2% followed by 'Assault on Women with Intent to Outrage her Modesty' 25.0%. 'Kidnapping & Abduction of Women' 22.2% which is followed by 'Rape' 11.8%. A highest 33.0% (13,803 out of 41,761 cases) of total cases of crimes against women held at Delhi followed by Mumbai 12.3% (5,128 cases) during 2016. Delhi reported the highest crime rate 182.1 percent compared to the national average rate of 77.2 percent.

VI. Status of Women in North-East India

Crimes against women are also increasing tremendously in the North-Eastern states of India. The statistics released by the National Crime Records Bureau (NCRB) highlights the fact that crime against women has risen sharply in the Northeast, with Tripura recording the highest rate 37 per cent against the national crime rate of 18.9 percent in 2011. Assam stood second in the country with a crime rate of 36.9 per cent. Nagaland had the lowest rate of crime against women in the north-eastern region with a negligible 1.9 per cent. The NCRB registered only 38 cases of crime against women in 2011 in Nagaland. Out of the 2, 28,650 incidents of crimes against women in the country, Assam registered a total 11, 503 incidents according to the report of NCRB. Statistics of Assam Police reveal that 5,745 cases of cruelty by husband and

their relatives on women and 2,011 cases of rape were registered.¹³ Reports of Assam State Women Commission (ASWC) focused that crime against women has always been exist in the state, but because of higher awareness, more women are reporting the atrocities now. It is a welcome sign that the rate of crimes against women has not risen abnormally in the recent past. Earlier, women used to keep their lip tight and did not report about the crimes to police. However, due to awareness among the women community, women are now coming forward and filing cases in police stations.

The situation is very worst in Tripura, which earned the notoriety of recording the highest crime rate against women. People of the state are demanding to take stern action to stop this ugly trend, and urged the government to dispense of such cases with fast-track courts. It is a matter of great concern that in terms of conviction of the accused Tripura achieved a target of 11 percent only which is far below the national average of 40.7 per cent.¹⁴

The report published by NCRB in the year 2016 has shown that crimes against women in the North eastern states are rising sharply. It has been observed that in the NCRB report 'Assault on women to outrage her modesty' gets the top rank and Assam registered highest 3378 cases followed by Tripura 214, Arunachal Pradesh 109, Mizoram 71, Nagaland 68, Manipur 65, Sikkim 34 and Nagaland 14. Again, cases registered against 'Rape' were second highest and Assam registered 1779 cases followed by Tripura 207, Meghalaya 190, Arunachal Pradesh and Sikkim registered 92 each cases, Manipur 55, Nagaland 26 and Mizoram 23. As like that of the above mentioned cases of violation against women, 677 cases of 'Sexual Harassment' were registered in Assam followed by Tripura 52, Mizoram 44, Meghalaya 20, Manipur 15, Sikkim 08, Nagaland 06 and Arunachal Pradesh registered a total 04 cases.¹⁵

It can be said that rising of crimes against women in the North Eastern States of India is continuing. According to a report by Thomson Reuters, India is the

¹³Pranjal Baruah, Naresh Mitra, *Women Not Safe in NE, as per NCRB*, Times of India, 2012.

¹⁴Dr. Sayed Ahammed, Dr. Adidur Rahman, *A Study of Women's Rights Violation and the Role of Media with Special Reference to N.E. states*, Vol: 5(10A), SCHOLAR JOURNAL OF ARTS, HUMANITIES AND SOCIAL SCIENCES, p.1360-1365, 2017.

¹⁵*Crime in India, Statistics*, Vol.1, Ministry of Home Affairs, 2019.

"fourth most dangerous country" in the world for women.¹⁶ India was also noted as the worst country for women among the G20 countries, however, this report has faced criticism for its inaccuracy.

VII. Women and Education

Women Empowerment is a global issue and political rights of women has become a major topic of discussion formal and informal worldwide. The concept 'Women Empowerment' was first introduced at the International Women Conference at Nairobi in 1985. Education can be regarded as the milestone for women empowerment, prosperity, development and welfare. Inequality and vulnerability against women is continuing in all sectors and women oppressed in all spheres of their life. Women of our society need to be empowered to live a decent life. To fight against the socially constructed gender biases, women have to raise their voice against the system that requires more strength. So the strength will be acquired by women through empowerment and empowerment will come through the attainment of education. Education is the key factor of women empowerment because it enables them to respond to the challenges, to confront their traditional role and change their life. India is going to be a super power in the next couple of years. This can turn into reality only when women of this nation are empowered in its real sense. It is a matter of great concern that India poised the largest number of illiterates in the world at present. Literacy rate in India have risen sharply from 18.3% in 1951 to 74.04% in 2011. According to a report of National Sample Survey 2013-14, enrolment of women in education have also risen from 7% to 100.6 % in primary level and 90.3% in secondary level and 96.9% in higher Secondary level. The percentage of enrollment in higher education is only 23.5% in 2015-16.¹⁷ Despite the importance of women education, unfortunately only 65.46% of women are literate while literacy rate of man are 82.14%, which is too high. But in comparison to India some of the countries achieved commendable success in making their female 100 percent literate. For example we can cite the name of some countries like Andorra 100%, Luxembourg 100%, Norway 100% etc.

¹⁶ *Fact box: Which are the World's top most dangerous countries for Women?* Thomson Reuters Foundation, 2018.

¹⁷ Press Information Bureau, Govt. of India, Ministry of Statistics and Programme Implementation, 2019.

Russia, UK, USA, Japan also achieved great success in making women literate. It is worth mentioning that to make cent percent literate their citizens a good numbers of countries of the world spent a remarkable amount of GDP. Russia spent 4.9%, Canada 6.6%, Japan 5%, Israel 7.5% and USA 7% GDP for the upliftment of education in their countries. It is very unfortunate that the Kothari Commission in 1964 advised the government of India to spend 6% GDP in education. But data shows that India still spend 3.48% of GDP in 2017-18 for the upliftment of education which can also be regarded as one of the factor of legging behind of education sector.¹⁸It can specially be mentioned here that the draft of the National Education Policy-2019 again advised the government of India to spend 6% GDP in education.

The percentage of participation of women in education was increased to 6 percent in 1947. It is worth mentioning that for centuries higher education for women has been neglected. The negligence of higher education of women was rightly felt in India which was clearly visible in the suggestions given by the University Education Commission in 1947. In the recommendation of the commission it was mentioned that present education is entirely irrelevant to the life of women. It is not only a waste but often a definite disability (Report of the University Education Commission, Government of India, 1948-49, Vol.(i), chapter XII).

In post - Independence period the female literacy rate was increased to 8.9%. The Governments of India have been trying their best in the field of women education since Independence. In 1958, the government of India appointed a National Committee for the education of women. The government of India accepted most of the recommendations of the committee for the upliftment of women education in India. It is praise worthy that since independence there had been a gradual growth in the number of women students' enrolment in higher education. In the pre- independence period the women enrolment was less than 10 per cent of the total enrolment. But in the academic year 2010-11 women enrolment increased up to 41.5 percent. Representing the enrolment of girls, the report of UGC published under the guidance of Prof. VedPrakash , Chairman of UGC, states that in 1950 the figure was 43, 000 and in 2001 it stood at 33, 06, 000 while in 2010-11 it reached 70, 49, 000. Though the enrolment of women

¹⁸ Anurag Behar, *Thrift in Education?* Mint, 2016.

in higher education in India is continuously increasing but still the percentage of their participation is not so encouraging. Among the states of India Goa takes the pride for being the first position in women enrolment in higher education with 59 percent and Bihar in the last position with 30 percent. It is worth mentioning that the recently submitted draft of National Policy of Education-2019 considers all possible measures to make Indian education system a vibrant one. It is a welcoming decision that The New Education Policy of India suggests for 100 percent enrolment by 2035.¹⁹

It has also been observing that women are going to outnumber men in education in coming days. A report of All India Survey of Higher Education, MHRD, highlights the facts. The enrollment of women in higher education from 2011-12 to 2017-18 show an increasing trend. The total number of males enrollment increased by 30.3 lakh, 18.7 percent, in six years, while the number of women enrollment increased by 44.3 lakh, a whopping 34 percent rise. The compound annual growth rate (CAGR) for total enrollment is 3.87 percent, with males at 2.9 percent and females at 5 percent. The percentage of women rose from 44.6 percent in 2011-12 to 47.6 percent in 2017-18. More women are pursuing higher education now than ever before.²⁰ The table given below will highlight the facts.

Table 1: Year-wise enrollment in higher education in India (data from AISHE, MHRD)

Year	2011-12	2013-14	2015-16	2017-18
Total	2,91,84,331	3,23,36,234	3,45,84,781	3,66,42,378
Male	1,61,73,473	1,74,95,394	1,85,94,723	1,92,04,675
Female	1,30,10,858	1,48,40,840	1,59,90,058	1,74,37,703
% of female	44.58	44.90	46.23	47.59

¹⁹Tushar KantiGhara, *Status of Indian Women in Higher Education*, Vol. 7, No.14, JOURNAL OF EDUCATION AND PRACTICE, p.58-64, (2016).

²⁰ Independence Day 2019: Improving Women's Higher Education is the Key to India becoming a \$ 10 T Economy, Dailyhaunt, 2019.

Realizing the fact it is predicted that by the year 2030 the number of women pursuing higher education might soon outnumbered men. The year 2024-25 could see normalization between genders, and 2029-30 could see as much as 53 percent enrolment of women, a paradigm shift. In a number of countries around the world have undergone this change. According to official statistics of United States of America, 56 percent of undergraduates are women. India is also following the same trend.

The total Gross Enrollment Ratio (GER) between the age of 18-23 is steadily increasing from 20.8 in 2011-12 to 25.8 in 2017-18 (Table 2). Male enrollment increased from GER of 22.1 to 26.3, a 19 percent increase. Female enrollment rose even faster, with a GER under 20 to 25.4, a significant jump of 30 percent. The GER between genders is normalizing.

Table 2: Gross Enrollment Ratio in higher education in India (data from AISHE, MHRD)

Year	2011-12	2013-14	2015-16	2017-18
All Categories	20.8	23	24.5	25.8
Male	22.1	23.9	25.4	26.3
Female	19.4	22	23.5	25.4

VIII. Participation of Women in Politics

Within the framework of a democratic polity the Government of India has been trying its level best for the all-round development of the women community. The Governments of India have aimed at women's advancement in different spheres by enacting laws, adopting developmental plans and programmes and policies. It was observed that from the Fifth Five Year Plan (1974-78) onwards a marked shift in the approach to women's issues from welfare to development was noticed in India. In recent years, the empowerment of women has been recognized as the central issue in determining the status of women. To safeguard the rights and legal entitlements of women in India, The National Commission of Women was set up by an Act of Parliament in 1990. The 73rd and 74th Amendments (1993) to the constitution of India have provided for reservation of seats in the local bodies of Panchayats and Municipalities for women, laying a

strong foundation for their participation in decision making or policy formation at the grass-root level. Though they have been given 50 percent reservation in the Panchayati Raj Institutions in most of the states of India but still the bill is pending through which an effort was made to reserve 33 percent of seats for women in the Central as well as State legislatures. It clearly reflects the intension our leaders and political parties that they are not willing to give equal representation to women. It has also been observed that Political parties in India are also depriving women by not giving party candidature equally with men. Table-1 shows the actual facts.

Table-3: Representation of Women in Lok Sabha(1952-2019)

Lok Sabha	Total Nos of Seats(Election held)	No. of Women members who won	%
First(1952)	489	22	4.4
Second(1957)	494	27	5.4
Third(1962)	494	34	6.7
Fourth(1967)	523	31	5.9
Fifth(1971)	521	22	4.2
Sixth(1977)	544	19	3.4
Seventh(1980)	544	28	5.1
Eight(1984)	544	44	8.1
Ninth(1989)	529	28	5.3
Tenth(1991)	509	36	7.0
Eleventh(1996)	541	40*	7.4
Twelfth(1998)	545	44*	8.0
Thirteenth(1999)	543	48*	8.8
Fourteenth(2004)	543	45*	8.1
Fifteenth(2009)	543	59	10.9

Sixteenth(2014)	543	61	11.2
Seventeenth(2019)	542	78	14.3

*Including one nominated member. Source: Election Commission of India.

Though we are talking frequently about women empowerment but some of the facts of Indian election scenario will show us the reality that practically much has not been done for achieving the goal yet. It is worth mentioning that out of the 545 constituencies of Lok Sabha 264 constituencies never elected women MP since 1962-2019. Only 279 constituencies elect atleast one women MP since 1962. It is interesting that till today only 617 women MP have been elected to Lok Sabha. Data in the table given above has clearly reflected that India has considered representation to women only a negligible 14.3 percent in LokShabha in the recently concluded election in 2019. It is praise worthy that country like Rwanda stood first in the list in the world giving their women 61.3 percent (49/80) representation in the Legislature. Cuba is in the second position with 53.2 percent (322/605) and Bolivia is in the third position with 53.1 percent(69/130). It is pertinent to mention that USA has considered 23.6 percent (102/435), UK has given 32 percent (208/650) and our neighbouring China has considered 24.9 percent (742/2975) representation to women in the law making body.²¹

Participation of women in the Assam Legislative Assembly is not also very encouraging. The table given below reflects the fact.

Table-4:Percentage of Elected Women in Assam legislative Assembly since 1952

Sl. no	Year	Total number of elected representative	Number of elected Women representative	Percentage %
1	1952	94	2	2.13

²¹ Kennedy Elliott, *Rwanda's legislature is Majority Female. Here's how it happened.*National Geography, 2019.

2	1957	96	5	5.21
3	1962	105	4	3.81
4	1967	126	6	4.76
5	1972	114	8	7.02
6	1978	126	1	0.79
7	1983	126	2	1.59
8	1985	126	4	3.17
9	1991	126	5	3.97
10	1996	126	6	4.76
11	2001	126	10	7.94
12	2006	126	13	10.32
13	2011	126	15	11.90
14	2016	126	8	6.35

Source: Election Commission of India.

IX. Findings

Some of the important findings of our study are as follows:

1. Women should be given equal respect and status in society with men. In normal time the situation remains peaceful but in matters of decision making a huge percent of women have to keep their lip tight in the families and also in the society. They should also be given the right to take part in decision making with men in their family as well as in the society. Finally gender gap and gender bias which are continuing in Indian society should be finished forever.
2. Government should take stern action against the violators of women rights. Though a number of legislations have been enacted but violation against women still continues in every state in India. Government of India in the centre as well as in the states should make arrangements of fast track courts to dispense the cases in a very short period.
3. Education is the means which can turn our dream of women empowerment into reality. Though the tireless effort of the government, the percentage of literacy rate of women still remains at 65.46 percent after India completes 73rd years of its Independence. So it becomes sacred duty of every Indian to make every possible help to achieve 100

percent literacy rate of women. In this regard the MHRD and Education departments of the states should also monitor the GER and also dropout rates of females constantly.

4. Women should be given equal share in politics with men. Though talking much on women empowerment by our political leaders and political parties but it has been observed that they are not at all interested to give equal share to women in politics. It is very interesting to mention that politicians welcomed the decision of the 73rd Constitutional Amendment through which women were provided 33% reservation (which later on increased to 50%) in Panchayats in most of the states in India. But they are not interested to pass the Women Reservation Bill (108th Amendment) Bill which seeks to reserve seats for women in Parliament and State Legislatures still pending since 2008. The most negligible 14.3% (78 out of 542) of women participation in Seventeenth Lok Sabha held in 2019 shows the real picture of women empowerment in India.
5. Finally, women should economically be empowered. This is the need of the hour. It can be said that poverty or economic dependence of women can be the causes of exploitation of women in all forms.

X. Conclusion

There is no denying the fact that women in India have made a considerable progress in the last seventy years but yet they have to struggle against many handicaps and social evils in the male dominated society. Women's equality in terms of education, employment, and power is still an individual rather than a universal achievement. The majority of our women are still content to accept an inferior status. This is by and large due to the fact that, although legally women have equal rights with men, but the male dominated society has not yet been prepared to give them equal position in society. Hence it is imperative to change our mind set regarding our traditional views on women then only empowerment of women will become a reality.

Rights of Hawkers: A Study under the Indian Legal Framework

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Abstract

Hawkers form an integral part of the urban economy. Majority of the population depends on hawkers for affordable goods and services. Hawking constitutes a sizable proportion of the informal sector and creates opportunities for entrepreneurship and self-employment. It is not only considered as a source of self-employment to the poor in cities but also an 'affordable' as well as 'convenient' means of livelihood to majority of the urban population. According to the Periodic Labour Force Survey of 2017-2018, there were around 11.9 million hawkers in India of whom it is the women who constitute a larger portion of these hawkers. Despite such a massive population being engaged in such occupation, hawking is characterised by uncertainty, extortion, and low standards of regulation. Therefore, it is necessary to observe whether these hawkers have been granted with any rights under the Indian legal framework. The study, therefore, focuses on the rights granted to the hawkers under the Constitution of India and under various legislation of India. It also examines those remarkable judicial pronouncements which uphold the rights of the hawkers. Special significance is given to the national policies framed by the Government of India to protect the interest of the hawkers. The study analyses the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014. At the last but not the least, the study also focuses on the recent issues and challenges faced by the Government to address Covid-19 impact on the hawkers and provide some suitable suggestion to this respect.

Keywords: Hawkers, Urban Street Vendors, Street Vendors Act, 2014, Hawkers during Covid-19 pandemic.

I. Introduction

Every social system must have the capacity to meet the needs of all its members and for that it must have effective means of allocating and distributing

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resources. Hawking as a form of street vending incorporates a very important segment of unauthorized sector in our country³. A hawker or a street vendor, a term often used interchangeably, is a person who offers goods or services for sale to the public without having a permanent built up structure but with a temporary static structure or mobile stall⁴. They provide wide varieties of goods and commodities to the urban populace at a reasonable price and at a convenient location. It would be hard to find an urban Indian who does not purchase anything from a hawker. It has been a profession in existence since time immemorial, therefore, gradually forming an integral part of our urban history and culture.

Nevertheless, our city planners remain oblivious to the role of hawkers who are often victimised, harassed, marginalised and pushed from one area to another. After being pushed to the city in search of employment, they take to hawking as self employment. For them it is an easier option. These hawkers are erstwhile workers, who after the closure of mills and factories took to street vending. Sometime they are victim of displacement caused by development projects and sometime they are the survivors of natural disaster. These people do not require any educational qualification, special skills or training to carry on street vending. Around ten million people in India are engaged in street vending activities⁵.

The National Policy on Urban Street Vendors of 2004 and 2009, elaborates the important role of hawking both in Indian urban economies and as a source of

³DarshiniMahadevia et al., *Law, Rights and Regulation for Street Vending in Globalising Ahmadabad* 4 (Cardiff University Working Paper 1, 2012),

https://cept.ac.in/UserFiles/File/CUE/Working%20Papers/16CUEWP16_Law_Regulations%20and%20Rights%20of%20Street%20Vendors%20Ahmedabad_Resize.pdf.

⁴*Overview of street vendors- A little history*, NASVINET.ORG, <https://nasvinet.org/overview-of-street-vendors-a-little-history/> (last visited March 24, 2021).

⁵Ayani Srivastava et al., *Formalising the Informal Streets: A legislative review of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2012*, JILS 4: Monsoon, 1 (2012), <http://docs.manupatra.in/newline/articles/Upload/B2BF305B-4500-4D24-B87F-46F2AD083584.pdf>.

livelihoods for many poor urban workers⁶. It has now become one of the important means of livelihood especially for the urban poor as it requires a minor financial input and involved low skills. Though it requires low investment but the income generated by this profession is too low.

Despite it, the hawkers are regularly subjected to mental and physical harassment by city officials. While vending they have to deal with multiple authorities like the Municipal Corporation, police, regional development authorities, district administration, and local panchayat and so on. Instead of regulating, these officials treat the hawkers as a nuisance and irritant. Their valuable goods are often confiscated or destroyed by various executive authorities or by Municipalities whenever eviction drives are conducted. The police have the authority to remove them even where street vending is permitted by the Municipality. It is Section 34 of the Police Act, 1861 that empowers the police to provide punishment for certain offences occurred on the road etc. Section 34 reads as follows:

"Any person who, on any road or in any open place or street or thoroughfare within the limits of any town to which this Section shall be specially extended by the State Government, exposes any good for sale and causes inconvenience to the passenger shall be liable to fine or to imprisonment"⁷.

Therefore, those hawkers who is registered and licensed can also be evicted under this law. Apart from it, Section 283 of the Indian Penal Code 1860⁸ and Section 201 of the Motor Vehicles Act, 1988⁹ also restricted the hawkers from carrying on vending on street pavement.

⁶DarshiniMahadevia et al., *Law, Rights and Regulation for Street Vending in Globalising Ahmadabad* 4 (Cardiff University Working Paper 1, 2012), https://cept.ac.in/UserFiles/File/CUE/Working%20Papers/16CUEWP16_Law_Regulations%20and%20Rights%20of%20Street%20Vendors%20Ahmedabad_Resize.pdf.

⁷ The Police Act, No. 5 of 1861.

⁸ Section 283 of The Indian Penal Code, 1860 which provides for punishment in case of creating danger or obstruction in public way or line of navigation. It allows a fine for anyone who causes danger, obstruction or injury in a public way.

⁹ Section 201 of The Motor Vehicles Act, 1988 penalises a person who obstructs the free flow of traffic on the public highway. It provides penalty for causing obstruction to

II. Rights of the Hawkers under the Constitution of India

The Constitution of India is a social document and the majority of the provisions of the Constitution of India are aimed at promoting equality, justice, fraternity and liberty by establishing the favorable conditions required for its achievement¹⁰. In this same line, hawkers or the street vendors in India are entitled with following rights under Part III as well as under Part IV of the Constitution of India.

A. Under Part III of the Constitution of India

The Fundamental Rights as are contained under Part III of the Constitution of India are the non-negotiable, basic principles in the functioning of the Indian State¹¹. All the other laws of the State have to abide by the principles of the Fundamental Rights¹². The important fundamental rights, which have been used for litigation in order to protect the rights of the hawkers or the street vendors, are as follows¹³;

Right to Equality

The Constitution of India guarantees **right to equality under Article 14** and it is stated therein that the State shall not deny to any person whether citizen or non citizen the 'equality before law' and 'equal protection of law'¹⁴. However, at the same time, it ensures that the same law should not be applicable to all person equally as all person are not by very nature, attainment or circumstances

free flow of traffic. It is essentially designed to prohibit parking offences, specifying that whoever keeps a disabled (parked) vehicle in a place where it impedes the free flow of traffic will be liable to penalties. The wording can be applied to both motorised and non-motorised vehicles such as hand carts.

¹⁰Preamble of The Constitution of India

¹¹ V.N. SHUKLA, CONSTITUTION OF INDIA 24 (Mahendra P. Singh ed., 13th ed. 2019).

¹² *Id.*

¹³ SEWA, *Street Vendor's Laws and Legal Issues in India*, WIEGO Law and Informality Resources 2 (2014) <https://www.wiego.org/sites/default/files/resources/files/Street%20Vendors%E2%80%99%20Laws%20and%20Legal%20Issues%20in%20India.pdf>.

¹⁴ Art. 14 of The Constitution of India

is in the same position¹⁵. The varying needs of different classes of person often require different treatment and the government by applying reasonable classification gives special protection to any special class of citizen¹⁶. Hawkers also need special protection as they are a class in the society in respect to their profession.

As it was held in the case of *Bombay Hawker's Union v. Bombay Municipal Corporation*,¹⁷ that

“the public street are not only by their very nomenclature but also by their definition are exclusively meant for the use of the general public in our Country. It is important to note that they are not laid to facilitate the carrying on of private business but it is equally important that if hawkers were to be conceded the right claimed by them they could hold the society to ransom by squatting on the busy thoroughfares, thereby paralysing all civic life. This is the one side of the picture where on the other hand if proper regulations are made according to the exigency of the circumstances, the small traders on the side walk of the pavement can considerably add to the comfort and convenience to the general public by making available ordinary articles of everyday use for a comparatively lesser price. Thus an ordinary person who is not very affluent and hurrying towards his home after day's work can pick up these day to day articles without going out of his way to find a regular market. Thus it can be safely concluded that if the circumstances are appropriate then a small trader can do some business for personal gain on the pavement to the advantage of the general public and without any discomfort or annoyance to the others, there shall be no objection for carrying on the business”.

Right to Practice any Profession or to Carry on any Occupation, Trade or Business

¹⁵ V.N. SHUKLA, CONSTITUTION OF INDIA 50 (Mahendra P. Singh ed., 13th ed. 2019).

¹⁶ *Id.*

¹⁷ (1985) 3 SCC 528.

In *Sodan Singh v. New Delhi Municipal Committee*¹⁸ the court held that the hawkers have a fundamental right to carry on business on the public street, but the same should be regulated. Proper regulation is, however, a necessary condition as otherwise the very object of laying out roads to facilitate traffic may be defeated¹⁹ and thus **the right to practice any profession or to carry on any occupation, trade or business as mentioned in Article 19(1)(g)** of the Constitution of India cannot be denied to the hawkers on the ground that the streets are meant exclusively for passing or re-passing and no other use can be made²⁰. Allowing the right to freedom to practice any profession or to carry on any occupation, trade or business²¹, without providing appropriate control is likely to lead to unhealthy competition and quarrel between hawkers and pedestrians and sometimes amongst the traders themselves resulting in chaos. The right is subject to reasonable restrictions under clause (6) or Article 19 of the Constitution of India²².

Right to Livelihood

At the same time, in any organised society, right to life as a human being is not ensured by meeting only the animal needs of man²³. It is secured only when he is assured of all facilities to develop himself and is free from restriction which inhibits his growth²⁴. The word “life” employed by Article 21 of the Constitution of India takes in its sweep not only the concept of mere physical existence but also all finer values of life including the right to work and **right to livelihood**²⁵. This right is not reduced to a mere paper platitude but is kept alive, vibrant and pulsating so that the country can effectively march towards the avowed goal of establishment of an egalitarian society as envisaged by the founding father while enacting the Constitution of India along with its

¹⁸ (1989) 4 SCC 155

¹⁹ V.P. SASTRI, *THE RIGHT TO LIFE AND PERSONAL LIBERTY* 149 (M.N. Venkatachaliah ed., 1st ed. 2005).

²⁰ *Id.*

²¹ Article 19(1)(g) of The Constitution of India

²² *Id.*

²³ V.N. SHUKLA, *CONSTITUTION OF INDIA* 215 (Mahendra P. Singh ed., 13th ed. 2019).

²⁴ *Id.*

²⁵ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180

preamble²⁶. Forcible eviction of hawkers without prior notice is infringement of hawker's right guaranteed under Article 21 of the Constitution of India²⁷.

B. Under Part IV of the Constitution of India

Further **Article 39(a) and (b)** of the Directive Principle of the State Policy clearly states that the State shall in particular direct its policy so that-

- (a) The citizens, men and women equally, have the right to an adequate means of livelihood.
- (b) The ownership and the control of the material resources of the Community are so distributed as best to sub serve the common good²⁸.

III. Judicial Pronouncement on the Rights of the Hawkers in India

The main controversy regarding whether any right actually vests upon hawkers to carry out their trade in order to earn a livelihood has been adjudicated upon a number of times by the Apex Court of India.

In *Bombay Hawkers Union v. Bombay Municipal Corporation*²⁹ case, the Supreme Court has for the first time upheld the right to livelihood of the Street vendors and also held that unreasonable restriction and conditions cannot be imposed on hawkers. However, in the case of *Municipal Corporation of Delhi v. Gurnam Kaur*³⁰, the Supreme Court, adjudicating on the same line, held that street vendors has a right to carry on their business and the same can't be compromised on the alteration of the people's superficial right to use streets and that such right of livelihood should be upheld with reasonable restrictions. Another reason for which this case is important is the recognition of the factors which force people to resort to street vending and the lack of proper employment opportunities.

²⁶PALOKBASU, LAWRELATINGTOPROTECTIONOFHUMANRIGHTSUNDERTHE INDIANCONSTITUTIONAND ALLIED LAWS 724 (2nd ed. 2007).

²⁷*Id.*

²⁸Art. 39 of The Constitution of India

²⁹ AIR 1985 SC 1206

³⁰ (1989) 1 SCC 101

Another landmark case is *Sodan Singh v. New Delhi Municipal Corprration*.³¹ This case is decided by a constitutional bench of the Supreme Court and significantly contributed to the jurisprudence of hawker's rights. It was decided that there is a right in hawkers to carry on their trade on public streets but the same should be subjected to regulations by the municipal authorities. The court also passed an observation to the effect that inaction on the part of the government authorities with regard to proper management and planning with respect to street vendors would, in effect, amount to negating the fundamental rights of the citizens.

It may be relevant to cite the following extract from the decision:-

“Street trading being a fundamental right has to be made available to the citizens subject to Article 19(6) of the Constitution of India. It is within the domain of the State to make any law imposing reasonable restrictions in the interest of general public. This can be done by an enactment, on the same lines as in England or by any other law permissible, under Article 19(6) of the Constitution of India. In spite of repeated suggestions by the Apex Court nothing has been done in pursuant to this. Since a citizen has no right to choose a particular place in any street for trading, it is for the State to designate the streets and earmark the places from where street trading can be done. In action on the part of the State would result in negating the fundamental right of the citizens. It is expected that the State will do the needful in this respect within a reasonable time failing which it would be left to the courts to protect the rights of the citizens.”

The court further dealt with the issue of the nature of trade that could be undertaken by hawkers and held that grant of hawking or squatting right is not meant for luxurious items or smuggled goods.

In *Saudan Singh v. New Delhi Municipal Corporation*,³² questions were raised regarding the functioning of the Municipal Corporation of Delhi (MCD) scheme

³¹(1989) 4 SCC 155

³² (1992) 2 SCC 458

which was to look into the issue of identifying hawking zones, identifying vendors entitled to relocation and space in vending zones etc. It was alleged that the manner in which the scheme was being implemented was fraught with arbitrariness. However, the court did not entertain such apprehensions and held that the MCD scheme should be popularised in order that more and more people can be benefitted by it and can submit their objections, if any.

In *South Calcutta Hawkers Association v. Government of West Bengal*,³³ the petitioners contention was that the concerned authorities tried to evict hawkers from the Howrah area without giving them prior notice which is extremely arbitrary and contrary to the principles of natural justice. The court said that the very fact that they have been hawking there for several years clubbed with the fact that a committee was constituted to look into the issue of the hawkers germinated in their minds a legitimate expectation that they would be evicted only after being afforded a reasonable opportunity. Interestingly, taking support from the *Sodan Singh*³⁴, the High Court of Calcutta told the government that the State had a duty to formalise and regulate hawking. Inaction on the part of the State would lead to violation of fundamental rights of the hawkers. It added that if the government refused to act, then the court would have to take up the duty. Therefore the government was duty bound to frame a policy delineating hawking and non-hawking zones as well as laying down guidelines for the user of these zones.

In *Gainda Ram v. Municipal Corporation of Delhi*³⁵, the court took into account the previous decisions and the fact that a law by the name of National Capital Territory of Delhi Laws (Special Provisions) Second Act 2009 has been enacted as a temporary legislation and the Model Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2009 is pending approval. However, the court went on to observe that,

“the fundamental right of the hawkers, just because they are poor and unorganized, cannot be left in a state of limbo nor can it left to be decided by the varying standards of a scheme which changes from time to time under the orders of the Court.”

³³ AIR 1997 Cal 234

³⁴ (1989) 4 SCC 155

³⁵ (2010) 10 SCC 715

In *Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai*³⁶, the court largely concerned itself with the implementation of the National Policy on Urban Street Vendors, 2009 and issued directions thereof, till enactment of appropriate legislation. This was in view of the fact that in absence of legislation the hawkers continued to face several problems including harassment from municipal authorities.

IV. Government Policies on the Rights of the Hawkers in India

Keeping in mind the interest of the hawkers and the order issued by the Court in its various judgments the Government of India issued National Policy on Urban Street Vendors³⁷. Although national policy is essentially a statement of intent by the Government and does not have the legal “teeth” that a law has for which it need to be ratified at the level of states and give effect to the cities still the Supreme Court judgment reinforced the need for State and local governments to implement binding laws based on the National Policy³⁸.

A. National Policy on Urban Street Vendors, 2004

India is one of the few countries to have developed a national framework for street vending³⁹. The National Policy on Urban Street Vendors was first published by the Ministry of Housing and Urban Poverty Alleviation (MoHUPA) of Government of India in 2004⁴⁰ and it was developed in response to the campaign made by the National Association of Street Vendors (NASVI) in India⁴¹. Article 14, 19(1)(g), 38(2), 39(a) and (b), and 41 of the Constitution

³⁶ (2014) 1 SCC 490

³⁷ MINISTRY OF HOUSING AND URBAN POVERTY ALLEVIATION, NATIONAL POLICY ON URBAN STREET VENDORS (2004).

³⁸ Shalini Sinha & Sally Roever, *Women in Informal Employment: Globalizing and Organizing*, WIEGO POLICY BRIEF 1 (2011), https://www.wiego.org/sites/default/files/publications/files/Sinha_WIEGO_PB2.pdf.

³⁹ *Id.*

⁴⁰ MINISTRY OF HOUSING AND URBAN POVERTY ALLEVIATION, NATIONAL POLICY ON URBAN STREET VENDORS (2004).

⁴¹ NASVI is an organisation working for the protection of the livelihood rights of thousands of street vendors across the Country and it was registered in 2003 under the Societies Registration Act of 1860. NASVI, <http://nasvinet.org>. (last visited Mar. 24, 2021).

of India form the legal basis for the formation of National Policy on Urban Street Vendors 2004⁴².

The National policy on Urban Street Vendors intends to provide and promote a supportive environment for street vendors to earn their livelihoods and also aims at reducing congestion and maintaining sanitary condition in public spaces and street⁴³. The overarching objectives of this policy⁴⁴ can be summarised as follows:

- a) To give hawkers legal status by amending, enacting, repealing and implementing appropriate laws and providing legitimate hawking zones in urban development plans.
- b) To provide facilities for appropriate use of identified space including the creation of hawking zones in the urban development plans.
- c) To make Street vendors a special component of the urban development plans by treating them as an integral and legitimate part of the urban distribution system.
- d) To promote self-compliance among street vendors and to set up participatory mechanism with representation by urban vendor's organisation, voluntary organisations, local authorities, the police and other to ensure orderly conduct of street vending.
- e) To take measures for promoting a better future for child vendors by making appropriate interventions for their rehabilitation and schooling.
- f) To facilitate or promote social security i.e. pension, insurance, etc. and access to credit for Street vendors through promotion of Self Help Groups, cooperatives, Federations etc.

⁴²MINISTRYOFHOUSINGAND URBAN POVERTY ALLEVIATION, NATIONAL POLICYON URBAN STREET VENDORS (2004).

⁴³Shalini Sinha & Sally Roever, *Women in Informal Employment: Globalizing and Organizing*, WIEGO POLICY BRIEF 1 (2011), https://www.wiego.org/sites/default/files/publications/files/Sinha_WIEGO_PB2.pdf.

⁴⁴MINISTRYOFHOUSINGAND URBAN POVERTY ALLEVIATION, NATIONAL POLICYON URBAN STREET VENDORS (2004).

- g) To promote organisations of Street vendors e.g. Unions, Cooperatives, Association and other forms of organisation to facilitate their empowerment.

Apart from it, the centerpiece of the policy is the formation of the City or Town Vending Committees (TVC) at City or Town level and delegation of authority by collaborating with Ward Vending Committees⁴⁵. However, the policy recommended that there are certain Sections of the Police Act, 1861 and Indian Penal Code, 1860 which are inconsistent to the profession of street vending⁴⁶. The policy recommended that Central Government and all State Government should make a suitable amendment to the Police Act and in its Rules or Regulations⁴⁷. The Policy recommended that besides the monitoring of the situation by the external authorities, it is extremely important for the street vendors to practice self regulation especially with respect to the maintenance of hygiene and qualitycontrol and keep the environments clean⁴⁸.

In the same year when the policy was launched, the Government set up a National Commission for Enterprises in the Unorganised Sector (NCEUS) to examine the problems of small enterprises and suggest measure to overcome those problems⁴⁹. The Prime Minister's Office asked the NCEUS to review the new National Policy on Urban Street Vendors as part of its work⁵⁰. The NCEUS consulted with NASVI and other organization of Street Vendors who expressed a concern that Street Vendors continued to face harassment and insecurity despite the Supreme Court Judgments recognising their rights⁵¹. Based on its conversations, the NCEUS published a report in the year 2006 offering recommendation for revising the policy to make the most important aspects of

⁴⁵ *Id* at 5.

⁴⁶ *Id* at 9.

⁴⁷ *Id*.

⁴⁸ *Id*. at 4.

⁴⁹ Shalini Sinha & Sally Roever, *Women in Informal Employment: Globalizing and Organizing*, WIEGO POLICY BRIEF 4 (2011), https://www.wiego.org/sites/default/files/publications/files/Sinha_WIEGO_PB2.pdf.

⁵⁰ *Id*.

⁵¹ *Id*.

policy implementation more specific⁵². Informed by the report of 2006, the Government of India issued a revised policy in 2009⁵³.

B. National Policy on Urban Street Vendors, 2009

The 2009 policy recognises that street vendors constitute an integral and legitimate part of the urban retail trade and distribution system for daily necessities of the general public⁵⁴. As the street vendors assist the Government in combating unemployment and poverty, it is the duty of the state to protect the right of these micro-entrepreneurs to earn an honest living. Accordingly the policy aims to ensure that this important occupational group of the urban population finds due recognition to National, State and local levels for its contribution to the society⁵⁵.

This policy is organised around seven specific objectives. These are as follows;

a) to give street vendors a **legal status** by formulating an appropriate law and thereby providing for legitimate vending or hawking Zones in city or town master or development plans, including Zonal, local and lay out plans and ensuring their enforcement⁵⁶.

b) to provide **civic facilities** for appropriate use of identified spaces as hawking zones, vendor's market or vending areas in accordance with city or town master or development plans, including Zonal, local and lay out plans⁵⁷.

c) to eschew imposing numerical limits on access to public spaces by discretionary licenses and instead moving to nominal fee-based **transparent regulation** of access, where previous occupancy of spaces by the street vendors determines the allocation of spaces or creating new informal sector markets where spaces access is on a temporary turn-by-turn basis. All allotments of spaces, whether permanent or temporary, should be based on payment of

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.* at 5.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

prescribed fee fixed by the local authority on the recommendations of the Town Vending Committee to be constituted under the policy⁵⁸.

d) to promote, wherever necessary, **organisation of street vendors** to facilitate their collective empowerment⁵⁹.

e) to set up **participatory processes** that involved firstly; local authority, planning authority and police, secondly; association of street vendors, thirdly; resident welfare associations and fourthly; other civil society organizations such as NGOs, representatives of professional groups, representatives of trade and commerce, representatives of schedule banks and eminent citizens⁶⁰.

f) to promote norm of civic disciplines by institutionalising mechanisms of self management and **self regulation** in matters relating to hygiene, including waste disposal etc. among street vendors, both in the individually allotted areas as well as hawking zones with collective responsibility for the entire hawking zone⁶¹.

g) to promote access of street vendors to such services as credit, skill development, housing, social security and capacity building. For such **promotion** the service of Self Help Groups or Co-operatives or federation, Training Institute should be encouraged⁶².

V. Steps towards Enacting a Central Legislation for Hawkers or Street Vendors

After reviewing periodically the rights and entitlements of Street vendors over three decades, the Supreme Court of India consistently argued that a right based approach need to be adopted towards street vendors. Then the Central Government enacted two National Policy on Street Vendors 2004 and 2009 but both this policy failed to achieve main objective because of lack of implementation by the various local authority and State Government.

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

In *Gainda Ram v. Municipal Corporation of Delhi*⁶³ case, following the decision of the *Municipal Corporation of Delhi v. Gurnam Kaur*⁶⁴, the Apex Court highlighted the importance of framing regulation to regulate hawking business by creating hawking and non hawking zones. The learned judge in his concurring judgment made a very pertinent observation after comparing the position of street trading in India with that prevailing in other Countries and noted that even in England where there is complete social security and the citizen are not driven to the street to make out a living out of poverty and sheer unemployment, street trading is recognised. After considering that an alarming proportion of population lives below poverty line, the learned judge held that when the citizen by gathering meager resources tries to employ themselves as hawkers and street traders, they cannot be subjected to deprivation on the pretext that they have no rights.

After the mandate came from *Gainda Ram v. Municipal Corporation of Delhi*⁶⁵, decision and recommendation from National Advisory Council, it becomes bound to make law for the protection of street vendors by the Central Government. Although municipal zoning and regulation of vending falls under the State List, the Standing Committee on Street Vendors Bill recognised that Parliament may legislate on the rights and obligation of street vendors under entries 20, 23 and 24 of the Concurrent List of the Constitution of India⁶⁶. The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 is enacted, thereafter, with the aim to protect the rights of urban street vendors and to regulate street vending activities⁶⁷.

VI. The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014

⁶³ (2010) 10 SCC 715

⁶⁴ (1989) 1 SCC 101

⁶⁵ (2010) 10 SCC 715 (India).

⁶⁶ Bedi & others, *Progress Report 2020: Implementing the Street Vendors Act*, CENTREFOR CIVIL SOCIETY 4 <https://ccs.in/sites/default/files/progress-report-2020-implementing-the-street-vendors-act.pdf>.

⁶⁷ The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014, No. 7 of 2014, the *Gazette of India*, <http://www.egazette.nic.in>.

Street Vendor's Act, 2014 defines a 'Street vendor' as "a person engaged in vending of articles, goods, wares, food items or merchandise of everyday use or offering services to the general public, in a street, lane, side walk, footpath, pavement, public work or any other public place or private area from a temporary built up structure or by moving from place to place and includes hawkers, peddlers, squatter and all other synonymous terms which may be local or region specific"⁶⁸.

A. Main Features of the Act

Right to vend

Section 12-16 of Chapter III of this Act highlight that the Street Vendors have complete right to carry on the business of street vending⁶⁹. It emphasizes the legality and legitimacy of street vending as a profession. A certificate of vending will be binding documental proof of the same. It also makes provisions for renewal of this certificate and for suspension and cancellation of certificate.

Town Vending Committee

The Town Vending Committees (TVC) is the important element of this Act mentioned in Section 22-26 of Chapter VII⁷⁰. It is comprehensive committee of government officials, municipal officers, street vendors, bankers, traffic police, NGOs, etc. to take into consideration the opinion of all stakeholders within the ambit of street vending. The Town Vending Committee has to hold regular meeting and carry out functions relevant to vendors.

Plan for Street Vending

According to the Second Schedule of the Act, this plan is meant to be prepared by local authorities in consultation with the TVC⁷¹. It involves laying down vending zones, non-vending zones for various markets. Civic amenities have to be created and regulated. The Act also ensures to every street vendors who possesses a valid certificate of vending, the right to be entitled for a new site or

⁶⁸ See *id.* § 2.1.

⁶⁹ *Id.* at 5-7.

⁷⁰ *Id.* at 7-8.

⁷¹ *Id.* at 13-14.

area for carrying out his vending activities after determined by local authority, after consultation with the Town Vending Committee.

Redressal Mechanism

The Act in Chapter V, prescribes a governmental redressal committee which will consider the application of the street vendor and take steps for redressal on the basis of the rules set⁷². It also allows vendors to appeal to a local authority if preferred. The Act regulates street vending by issuing certificate of vending upon payment of vending fees on the street vendors.

Prevention of Harassment

Chapter VIII of the Act clearly pronounces that vendors following the terms and conditions of the certificate of vending cannot be prevented from carrying out their right to vend by any police or local authority in any manner⁷³. This is possibly the most relevant provision of the Act since harassment is the biggest problem that street vendors face.

B. Limitation under the Act

The Act is meant to focus on the rights of street vendors in order to empower them with the local authorities. Chapter III talks about the rights and obligations of street vendors but the Act only specifies that the vendors have the right to vend and not rights of street vendors. It talks nothing of the protection of the fundamental rights of street vendors that are currently being exploited.

It may be precisely noted that where under the Street Vendors Act 2014, only the holders of the certificate of vending are allowed to engage in street vending, necessarily carries the implication that each person willing to engage in street vending might not be able to receive the certificate of vending, owing to the fact that the holding capacity of each vending zone is to be determined before the certificate of vending is distributed. This suggests that if the number of street vendors is greater than the total holding capacity of all the vending zones, many street vendors might be unsuccessful in securing vending certificate. Besides that vending without possessing a certificate of vending would mean that such street vendors are denied protection given under the Act. Another problem with

⁷²*Id.* at 6.

⁷³*Id.* at 8.

the Act is sub-section 1 of Section 5 of chapter II where it is mentioned that a street vendor has to ensure that he has no other means of livelihood except street vending. Street vending is not a highly paying profession and many street vendors take up alternate jobs in order to support their families. This provision could act as a hindrance in incentivising vendors to apply for certificate of vending.

Beside this, a child above the age of 14 is eligible for acquiring vending certificate as per the provision of the Act. Thus the Act in other way permitting the child labours denying the welfare role imposed by the Constitution of India. The Act makes no distinction between the different types of breach committed by the street vendors and imposes same penalties for different kind of breach which is a major limitation of the Act. The Act has opened the door for the corrupt officials to extort bribes from street vendors, since it is the official alone who decides if the street vendor is in compliant with the terms of the certificate of the vending.

VII. Indian Government Initiatives for Hawkers during Covid-19 Pandemic

The impact of the Covid-19 pandemic on the livelihoods of the hawkers has been the worst⁷⁴. During the lockdown period of the Covid-19 pandemic, enforced social distancing and stay at home conditions not only restricted the employment opportunities of the hawkers but also increased the cost of doing business significantly.

In order to support the hawkers to regain their livelihoods during the pandemic, the Ministry of Housing and Urban Affairs of the Government of India announced the Pradhan Mantri Street Vendor's AtmaNirbharNidhi (PM SVANidhi) scheme⁷⁵. It is a part of government's economic package to address

⁷⁴Shiney Chakraborty & Gayatri Ahuja, *Emerging from the Lockdown: Insights from Women Street Vendors Lives in Delhi*, ISST 1 (2020) https://www.isstindia.org/publications/1591186006_pub_compressed_ISST_-_Final_Impact_of_Covid_19_Lockdown_on_Women_Informal_Workers_Delhi.pdf

⁷⁵ Ministry of Housing and Urban Affairs, *Scheme Guidelines for PM Street Vendors AtmaNirbhar Nidhi* (2020)

the Covid-19 related crisis. The major objective of the scheme is to provide easily repayable loans of up to Rs. 10,000 with the Government hoping that it would benefit over 50 lakh hawkers in India⁷⁶.

According to the data released by the Press Information Bureau, Ministry of Housing and Urban Affairs of Government of India on 18th November 2020, nearly 30 lakh applications were received and more than 7.5 lakh loans were disbursed as November, 2020⁷⁷. At the same time it launched a programme for socio-economic profiling of PM SVANidhi beneficiaries⁷⁸.

This is undoubtedly a welcome step as it could enable to rebuild the livelihood of the displaced hawkers but the key question is whether a microcredit facility like this would be effective in the current scenario. As per the study conducted by the Institute of Social Studies Trust (ISST) and Janapahal, Street vending activities has been most severely impacted by the pandemic which creates long-term impacts on their livelihoods⁷⁹. It is because of the nature of their work which requires excessive mobility and access to consumers, goods and markets. Street vending particularly food vending is largely a household-level activity, wherein all members of a household are involved in some or other stage of production process and therefore the loss of earnings for the vendor amounts to loss of livelihood for the family. These vendors being majorly migrant daily earners, has to leave the places of work and to return to their native villages when the pandemic induced lockdown. Due to the deep impact of the pandemic

http://mohua.gov.in/upload/uploadfiles/files/Scheme_guidelines_%20PMSAVnidhi%20_%20English.pdf

⁷⁶*Id.*

⁷⁷ Press Information Bureau, 27, 33,497 applications received under PM-SVANidhi Scheme, Government of India (2020) <http://www.pib.gov.in>.

⁷⁸ Ministry of Housing and Urban Affairs, *Scheme Guidelines for PM Street Vendors AtmaNirbharNidhi* (2020)

http://mohua.gov.in/upload/uploadfiles/files/Scheme_guidelines_%20PMSAVnidhi%20_%20English.pdf

⁷⁹Shiney Chakraborty & Gayatri Ahuja, *Emerging from the Lockdown: Insights from Women Street Vendors Lives in Delhi*, ISST 13 (2020)

https://www.isstindia.org/publications/1591186006_pub_compressed_ISST_-_Final_Impact_of_Covid_19_Lockdown_on_Women_Informal_Workers_Delhi.pdf

followed by the nationwide lockdown, the task of rebuilding their livelihood will not be an easy one. In such a situation this announcements to improve access to micro-credit may not be a sufficient one to give relief from the distress of the pandemic.

VIII. Conclusion

Upon a perusal of the various judgments of the Supreme Court, the national policies and the recent Act, it can be safely concluded that little regard has been given to recognise the right to livelihood of the hawkers.

The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 helps, to some extent, in recognising the right of the hawkers who were initially called as 'encroachers' to one where their interest plays a pivotal role while organising urban street policy. It not only delegates the rule making and decision making power upon the State authorities but also prioritises local governance in order to ensure its proper implementation. Urban Local Bodies are urged to introduce participatory decision making committees with hawker's representation in the Town Vending Committees. It, therefore, helps in building such mechanism which could enumerate all existing hawkers, ensure allocation of vending spots with least possible disruption to pedestrian movements and constitute forums to redress vendor disputes.

Now the problem is with regard to the implementation of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014. All the States and Union Territories of India are required to implement the said Act properly so that hawkers could get some benefit, being out of fears of threats of eviction. An impartial powerful regulatory mechanism is needed to protect the interest of the hawkers. An impartial Town Vending Committee is required to be established in each local authority of a State. However, while implementing the provisions of the Act, the prior concern should be with respect to the rights of pedestrian also so that a harmonious system could be evolved where both the right to livelihood of the hawkers and the right of pedestrians can be upheld.

In 2012, the Standing Committee on the Street Vendor's Bill recommended that states must be given six months to comply with the provisions of the Act⁸⁰. The study conducted by the Centre for Civil Society reveals that after six years since the passing of the Act, the State apparatus is yet to fully implement the law⁸¹. There analysis in the Urban Local Bodies level data, and the rules and schemes of 35 States and Union Territories also reveals that States still have considerable ground to cover in formulating subordinate legislation and introducing institutional mechanism and processes⁸². As per the provisions of the Act, it is time for States to do a second round of hawker's surveys in all the Urban Local Bodies but the reality is that many States such as Assam and Uttarakhand have not completed the preceding steps i.e. notifying rules and schemes by the respective State Governments, constitution of Town Vending Committees and the first round of vendor surveys in all Urban Local Bodies⁸³. Even those States which have substantially made progress on most of the parameters like the State of Mizoram and Punjab did not strictly adhere to the procedure laid down in the Act⁸⁴. While some made progress by skipping the prerequisites, others have executed processes without constituting the authority responsible for execution⁸⁵. Surveys are completed before notifying schemes, identity cards are distributed before issuing vending certificates, demarcation is done before publishing vending plans and in some cases all of this is done without constituting Town Vending Committees⁸⁶. As per the Study, a close assessment of the quality of all rules and schemes of those States reveals that these too go beyond the main objectives of the parent Act⁸⁷. Most states have introduced

⁸⁰Bedi et al., *Progress Report 2020:Implementing the Street Vendors Act*, CENTREFOR CIVIL SOCIETY 75 (2020) <https://ccs.in/sites/default/files/progress-report-2020-implementing-the-street-vendors-act.pdf>

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.*

provisions that either explicitly contravene the Act or are ambiguous, vague and unclear⁸⁸.

It shows that merely putting the Act in place may not be enough. The law remains silent on the accountability of public officials and places inadequate checks on delays in implementation. Hawkers, that have a history of being harassed and evicted by local authorities, require a law that places stronger institutional safeguards against administrative excesses to protect their livelihoods.

Apart from it the deep impact of Covid-19 pandemic, has been very harsh on informal workers who have exhausted their capital and earnings in trying to feed themselves during the extended lockdown period. Hawkers need to be able to resume their vending for survival and in order to do that Government must provide direct benefit transfer to the hawkers. At the same time, it has to look after the health, hygiene and social distancing of the hawkers while conducting vending. In order to support their rebuilding of livelihood the Government must have to give direct support which must be de-linked from the existing registration requirement because very few hawkers are registered in India.

It would be better if the Government consider the current PM SVANidhi scheme to some kind of a “conditional cash transfer” scheme because in that way it can includes some conditions to fulfil in exchange of cash receive. These conditionalities could, for instance, be linked to the utilisation of the grant to re-start their street vending activities or towards maintaining hygiene and basic sanitation in their street vending activities. While it may be difficult in allocating some amount from the budget towards facilitating a cash scheme for street vendors, it will surely go a long way in alleviating pandemic-induced distress.

⁸⁸ *Id.*

Traversing the Pathways of Citizenship: A Voyage of Contemporary Legal Regime of India

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Abstract

Citizenship being an indivisible integral of any democratic set warrants a holistic and comprehensive approach. India being a largest democracy of the world has adopted accommodative approach towards its citizenship. Moreover, the constitutional protection conferred upon the citizens and non-citizens have concretized the polity of India. On the backdrop of this, citizenship has been clearly discussed under the constitutional mandate. India as a nation has its citizenship underpinnings traced through prolonged British rule. Since the modern India has been largely unified due to British rule, the constituent assembly while making of the Constitution of India has laboriously deliberated upon nuances of citizenship of India. At the same time, international perspectives on citizenships have also enabled the India to cope up with changing geo-politico-economic scenario of the world. By virtue of constitutional mandate, India has been committed to draw policies having consonance with international legal regime; nevertheless, state sovereignty and the battle of government and public interest has generated a radical wave of discontent towards latest legal development in India pertaining citizenship. Present article takes a cross-section of historical development of citizenship law in India. It also assesses the constitutional mandate and various legal nuances on the touchstone of international legal forefront. On this backdrop present article also analyses the latest development of citizenship law of India, and lately amended bills on the citizenship. The contemporary socio-politico discourse on citizenship laws and National Citizenship Register has also been addressed hereunder. Ultimately, the article encapsulates contemporary development of citizenship regime of India while drawing critical appraisal of public opinion. The governmental as well as social measures having consonance with latest citizenship amendments in India have also been examined on the yardstick of judicial and juristic touchstone. To that effect, article highlights an emerging issue belonging to the India's Constitution and governance.

Keywords: Citizenship, Democracy, Constitution of India, Domicile, Constituent Assembly

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I. Introduction

Indubitably, the bedrock of any nation is its population. No wonder, some of the leading democracies of the world have begun their constitutions with the phrase, “We, the people”.² Perhaps, this trend of keeping ‘people’ at the forefront of the polity is quintessential in every successful democratic set-up in the world. To that effect, when at the one hand nations are denoted with the phrases like territory, country, motherland etc, on the other hand the people in the nations are also addressed with various phrases such as population, citizens etc. Thus, it becomes imperative to trace the element that formulates a nation from a territory and a citizen from the population. Certainly, some organic ideology gives effect to this phenomenon which grants a decisive pedestal to the nation and its citizens. Thus, in the wake of contemporary issues of citizenship in India, it becomes imperative to trace down the underpinnings of the citizenship into the porches of constitutional mandate. To that effect, the people of India form the Democracy by actively participating in the governance of the Government.³

Its pertinent that, citizenship is the basic building block of political order. It conflates the right to reside and move about within a given territory and, the obligation to defend these very same rights.⁴ In a democratic polity, the role of the Citizens is vital enough as it determines the quality of that Nation. Citizenship also is viewed as a legal connect between the State and the individual. Citizens are bound to follow Fundamental Duties and the State has to protect the individuals. To that effect, as stated earlier the Preamble of the Constitution of India precedes with the words “We the people of India” which itself implies the concept of Citizenship.

The source of the Constitution of India thus, invariably is the people residing within the territory of India. The people of India form the democracy by actively

² The Constitution of India, 1950, The Constitution of the United States of America

³ SUBHAS C KASHYAP, CITIZENS AND THE CONSTITUTION, (CITIZENSHIP VALUES UNDER THE CONSTITUTION) 125, (Publication Division, Ministry of Information and Broadcasting Government of India, ISBN 978-81-230-2851-4)

⁴ The project on ‘citizenship as cultural and conceptual flow’ forms part of a larger project on Asia and Europe in a Global context: Shifting asymmetries in cultural flows’ supported by the German Research Foundation (DFG).

participating in the governance of the Government. The citizenship conferred by the Constitution of India thus renders the constitutional protection, rights and privileges to everyone who falls under the purview of citizenship. It also conflates the right to reside and move about within a given territory and, the obligation to defend these very same rights. Citizenship is the relationship between an individual and a state to which the individual owes loyalty and in turn is entitled to its protection. Citizenship is the status of freedom which comes at the cost of certain responsibilities. Citizens of any particular country are entitled to certain rights, duties, and responsibilities which may not be available or only be partly available to aliens or other persons living in that country, without being its citizens.

II. Citizenship in India: A Precursor

A comprehensive account of citizenship in India, pulling together the ideological and epistemological differences that underpin it is beyond the remit of this essay. The limitation of space rules out a comprehensive documentation of the evolution of citizenship in India in terms of the interaction of indigenous categories and imported notions of citizenship and their functional correspondence with the liberal theories. Instead, my intention here is to focus on three analytical strands that underpin it. The first two evolution and involution conceptualize citizenship in terms that are indigenous and uniquely accessible to India's society and history. The first approach holds citizenship to be a seamless flow, connecting the premodern past with the present. Essential to this approach is the continuous existence of Bharat, a mythical-historical territory, a traditional name for India.⁵ Unlike evolution, involution puts the onus of citizenship on ethnicity rather than territory and accounts for the development of different strands of citizenships in terms of the moral communities that underpin them. The third approach of 'rational construction' holds the creation of '*Nagariks*' the vernacular Hindi term used in the Constitution for the citizen as the main task of the state, and goes on to devise the legislative methods for the purpose of fulfilling this goal. It concentrates on a number of selected, salient aspects of the problem. These include the

⁵Subrata K. Mitra, *Citizenship in India Evolution, Involution and Rational Construction*, 155 (Jan 20 , 2021, 9:29 PM) <https://www.researchgate.net/publication/302417401>

ontological depth and institutional stretch of citizenship, the interaction of colonial rule and Indian society, the delineation of the salient features of citizenship in India's Constitution once colonial rule came to an end through the transfer of power in 1947, the subsequent interaction of traditional society and the modern post-colonial state, and finally, an empirical measurement of citizenship in India.

The concept of citizenship was first introduced in Greece and it was generally applied to those who had some property to own. However, it did not extend to women, slaves or even people belonging to the lower sections of the society. Citizens in a Greek city-state could vote, had to pay taxes and were liable to provide service in the military if or when necessary. Apart from Greeks, the Romans first used citizenship as a device to maintain a difference between the residents of Rome and the people whose territories Rome had conquered. As the Roman Empire kept flourishing, the Romans started granting citizenship to their allies throughout Italy and then to people belonging to other Roman provinces. From 212 CE, citizenship was being granted to anyone who was a free inhabitant of the Empire. Once a person was given Roman citizenship, he got many important legal privileges within the Roman Empire.⁶

As far as India is concerned, the concept of Citizenship came into existence with the augmentation of the Constitution of India after its adoption on 26th November 1949. Prior to that people residing in India were subject to British Crown and persons belonging to Princely states were British protected persons.⁷

Apparently, the Constituent Assembly, which drafted the Constitution of India, had rejected a move to define citizenship on religious lines. This article intends to examine the views expressed by the members of Constituent Assembly in that regard.

In consonance with this, to comprehend citizenship it's imperative to understand the term 'Domicile'. Citizenship can be denoted by domicile but it can't be vice versa. One of the various factors to determine citizenship is domicile. Domicile connotes permanent residency which means intention to reside for indefinite

⁶ Ibid

⁷ Heater, Derek, *A Brief History of Citizenship*, New York City: New York University Press 157, ISBN 0-8147-3671-8.

period. Membership of the community is the crux of the notion of citizenship along with territory connect.

The discussion with respect to drafting of Article 5 of the Constitution took place in Constituent Assembly on 10-12 August 1949. The Article 5, as we see today, was introduced by Dr. B.R. Ambedkar himself. Article 5 of the Constitution of India, as it reads now, provides that, at the date of commencement of this Constitution, every person who has his domicile in the territory in India and - (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily residence in the territory of India for not less than five years immediately preceding the date of such commencement, shall be a citizen of India.⁸ with this regard, the modern thinkers agree that the history of citizenship is complex with no single definition predominating.⁹ It is hard to isolate what citizenship means without reference to other terms such as [nationalism](#), [civil society](#), and [democracy](#).¹⁰ According to one view, citizenship as a subject of study is undergoing transformation, with increased interest while the meaning of the term continues to shift.¹¹ There is agreement citizenship which is culture-specific. In a way it is a function of each political culture.

Whilst discussing the international perspective on the citizenship, its pertinent to note that, India has always been known to provide refuge to persecuted people from all over the world irrespective of their ethnicities or faith. As per the UNHCR, there were almost 2,07,070 people which were of concern in India in

⁸ Ashok Kini, *When Constituent Assembly Defeated A Move To Define Citizenship On Religious Lines*, Live Law, (Jan 22, 2021 1:00 PM) <https://www.livelaw.in/top-stories/when-constituent-assembly-rejected-a-move-to-define-citizenship-on-religious-lines-150826?infinitemscroll=1>

⁹ Kostakopoulou, Dora, *The Future Governance of Citizenship*, United States and Canada: Cambridge University Press ISBN 9781139472449,13, 195(2019)

¹⁰ Hebert (editor), Yvonne M. *Citizenship in transformation in Canada*. chapters by Veronica Strong-Boag, Yvonne Hebert, Lori Wilkinson. Toronto: University of Toronto Press. ISBN 0-8020-0850-X, 3-5

¹¹ Gross, Feliks, *Citizenship and ethnicity: the growth and development of a democratic multithnic institution*, Westport, Connecticut: Greenwood Press xi-xiii, 4. ISBN 0-313-30932-9.

the year 2018. Out of these people, 1,95,891 were refugees while 11,957 were seekers of asylum. More pertinently, India is not a party to the United Nations Refugee Convention on the Status of Refugees. Neither is it a signatory to its additional Protocols. Nevertheless, India was a participant in the Global Summit on Refugees. It also took part in the New York Declaration for Refugees and Migrants in the year 2016. Any issues arising due to refugees or asylum seekers are dealt in India as per the Passport (Entry of India) Act 1921, Passport Act 1967, Registration of Foreigners Act 1939, Foreigners Act 1946, Foreigners Order 1948, etc.

As far as legal sanctity of the citizenship is concerned, the right to a nationality is of paramount importance to the realization of other fundamental human rights. Possession of a nationality carries with it the diplomatic protection of the country of nationality and is also often a legal or practical requirement for the exercise of fundamental rights. Consequently, the right to a nationality has been described as the “right to have rights.” [Trop v. Dulles](#)¹². Individuals who lack a nationality or an effective citizenship are therefore among the world’s most vulnerable to human rights violations.

At global forefront of the legal regimes, the recognition of the importance of having a nationality is unequivocally well-known. Moreover, a number of regional and international human rights instruments include the right to a nationality. **Article 15** of the [Universal Declaration of Human Rights](#),¹³ The right to a nationality is often articulated through protection of the rights of children and the principle of non-discrimination. For example, **Article 7** of the [Convention on the Rights of the Child](#) states that every child has the right to acquire a nationality, while **Article 5** of the [Convention on the Elimination of All Forms of Racial Discrimination](#) requires States to “prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights the right to nationality.”

¹² 356 U.S. 86, 101–02 (1958)

¹³ “everyone has the right to a nationality” and that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

On account of deliberating upon the citizenship and its various perspectives, the issues and challenges of the statelessness of the people out not to be overlooked. Around the world, on the backdrop of many warfronts and imperialistic conquests, the issues of statelessness have come on the forefront. Despite recognition of the right to a nationality, there are currently at least **10 million people** who do not have a nationality and are therefore stateless. One of the earliest international efforts to address the issues of the statelessness includes the [1954 Convention relating to the Status of Stateless Persons](#) (1954 Statelessness Convention) was drafted in order to guarantee the protection of these individuals' fundamental rights. **Article 1(1)** of the 1954 Statelessness Convention defines a stateless person as **“a person who is not recognized as a national by any State under the operation of its law.”** This definition has subsequently become a part of customary international law.

The Constitution of India is the Grundnorm of all the laws in the Indian legal system; wherein the Part II of the Constitution of India is titled 'Citizenship' and its six provisions precede the important provisions relating to Fundamental Rights that are housed in the next part.¹⁴ Here, it is pertinent to note that, Unlike other provisions of the Constitution, which came into being on January 26, 1950, these articles were enforced on November 26, 1949 itself, when the Constitution was adopted. The text of the Constitution of India, 1950 recognizes the importance of issues of citizenship by according a privileged space to them in the founding document. Under Articles 5, 6, 7, 8, 9, 10 and 11 of the Constitution of India which deals with the concept of citizenship and also the term citizenship entails the enjoyment of full membership of any State in which a citizen has civil and political rights.¹⁵

Apart from the constitutional mandate, there are other legislative provisions which deals with the citizenship. These legislative sources are as follows-

¹⁴ AshnaAshesh and ArunThiruvengadam, *Report on Citizenship Law India*, (Feb 2, 2021 8:00 PM)

https://cadmus.eui.eu/bitstream/handle/1814/47124/GLOBALCIT_CR_2017_12.pdf?sequence=1

¹⁵ Indian Polity, *Citizenship of India*, (Feb 2, 2021 8:00 PM) <https://www.drishitias.com/to-the-points/Paper2/citizenship-of-india>, updated on 2nd September 2019

III. The Citizenship Act, 1955¹⁶

The Citizenship Act of 1955 was the first legislation regarding citizenship in India. It has been amended in 1986, 1992, 2003, 2005, 2015 and currently is known as the Citizenship (Amendment) Act, (CAA) amended in December 2019. The amendment of 1986 specified that to acquire citizenship by birth, at least one of the parents had to be an Indian citizen. In 2003, this aspect became stricter and said that no parent could be an illegal immigrant. This amendment also spoke about the making of a National Register of Citizens by the government.

The current law of Indian nationality generally follows the concept of citizenship by descent instead of the concept of citizenship by right of birth within the territory- known as *jus sanguinis* and *jus soli* respectively.¹⁷ After independence, India has incessantly faced the issues and challenges of the illegal immigrants from the cross-borders. Several states which share India's international border with other neighbouring countries have faced challenges of law and order as well as cross border illegal activities. Thus, India has gradually deployed a mechanism to deal with such challenges. However, although illegal immigrants under India's citizenship regime are to be denied rights, their detection played an indispensable role in identifying genuine citizens. It wasn't until the 1986 and 2003 amendments to the Act that India moved towards a more exclusionary *jus sanguinis* (right of blood) conception of citizenship.¹⁸ In this regard, the Act of 2005 is a significant move.

A. Citizenship (Amendment) Act, 2005¹⁹

The Citizenship (Amendment) Act, 2005, expanded the scope of grant of OCI²⁰ for PIOs²¹ of all countries except Pakistan as long as their home country allows

¹⁶ Act No. 57 of 1955

¹⁷ Citizenship: Part II : (Articles 5-11), *Filed under: Indian Polity Notes*, (Feb 2, 2021 3:15 PM)www.clearias.com

¹⁸ Aditya Sharma, *Birth, Descent, Origin and Now Religion: Becoming an Indian Under the Citizenship Act and Its Amendments*, (Feb 1, 2021 2:10 PM)<https://www.news18.com>, last updated on 9th December 2019

¹⁹ Act 32 of 2005

²⁰ Overseas Citizenship of India

²¹ Person of Indian Origin

dual citizenship under their local law in case it recognizes OCI as a second citizenship of India. In furtherance to this, the citizenship issues faced by India further lead to the amendments in the Citizenship Act, and one of such amendments in 2015 is significance in this regard.

B. Citizenship (Amendment) Act, 2015²²

This amendment introduced the concept of an 'Overseas Citizen of India Cardholder' (an "OCC") that essentially replaces and merges together OCIs and PIOs. Persons of Indian Origin Card (PIO Card) was a form of identification issued to a Person of Indian Origin who held a passport in a country other than Afghanistan, Bangladesh, Bhutan, China, Iran, Nepal, Pakistan and Sri Lanka.

C. Citizenship (Amendment) Act, 2019 (CAA)²³

Now, the recently introduced Citizenship (Amendment) Act in 2019 provides access to Indian citizenship for religiously persecuted minorities, viz Hindus, Sikhs, Buddhists, Jains, Parsis and Christians, from Afghanistan, Bangladesh and Pakistan, who have been victims of persecution or have a fear of persecution in their countries and have entered India on or before 31 December 2014. It was passed by both the houses of Parliament on 11 December 2019. However, as we all know, the introduction of this Act was subject to immense criticism and a number of protests were held saying that it is discriminatory as it leaves Muslims out. It is also criticized on the grounds that it violates the Assam Accord in which it had been promised that 1971 would be the cut-off date for those who had illegally migrated from Bangladesh.

The enactment of the Citizenship (Amendment) Act holds a lot of significance when it comes to altering the discourse surrounding the Centre and creating greater checks on its power.

The CAA, 2019, as mentioned previously, applies to illegal migrants from Pakistan, Bangladesh and Afghanistan who are Hindu, Sikh, Buddhist, Jain, Zoroastrian or Christian. The period of qualification for becoming an Indian

²² Bill No. 36 of 2015

²³ NO. 47 OF 2019

citizen for these people has been reduced from 11 years to 5 years, provided that these people have entered India on or before 31 December 2014²⁴.

Thus, any person that qualifies this criterion need not produce any documents to prove his or her citizenship under the Act. The CAA will therefore prove beneficial to numerous people that previously were unable to provide the required documentation.

The Citizen Amendment Act, 2019 CAA of India has become a controversial legislative endeavour by the Government of India. This law can decisively change the definition of illegal immigrants. The government seeks to amend it in order to facilitate to grant citizenry rights to non-Muslims immigrants from Pakistan, Bangladesh and Afghanistan who are of Hindu, Sikh, Jain, Parsi, Buddhist and Christian extraction and who had migrated to India without valid travel documents or the validity period of whose documents had expired during their stay in India. These people were compelled to seek refuge in India owing to religious persecution or fear of religious persecution in their countries of origin.

Its pertinent that, the CAA has its own peculiar contradictions and a will have to be passed on the yardstick of strict judicial scrutiny. A nationwide protest and agitations have already paved its way against the CAA. Some of the issues on which this law is being questioned are, CAA classification is not reasonable as mandated to qualify Article 14 of the Indian Constitution. Moreover, the Article 3 of Convention on Torture, 1984 that prohibits parties from returning, extraditing, or refouling any person to a state where there are substantial grounds for believing that he would be in danger of being subjected to torture” which India has signed on 14 Oct 1997 is being grossly vitiated by current CAA footing of the government. Further, the Article 51(c) of the Indian Constitution which says to foster respect to international law and treaties...” read with Article 253 which talks about to give effect to international agreement also warrants that India should frame policies in tune with the international obligations. Various principles such as, jus cogens and obligatio erga omnes.²⁵ The Directive Principles of State Policy (DPSP) in Article 51 (c) protects the

²⁴ THE CITIZENSHIP (AMENDMENT) ACT, 2019, NO. 47 OF 2019 (Feb 3, 2021, 3:30 PM) <http://egazette.nic.in/WriteReadData/2019/214646.pdf>

²⁵ towards all" or "towards everyone"

rights of the citizens and are fundamental in the governance of the country. It is hereby necessary to say that the basic feature of the constitution is to maintain harmony between fundamental rights.

D. National Population Register and National Register of Citizenship (NCR):

After the enactment of the Citizenship (Amendment) Act in December 2019, two other acronyms have also been flashing in the news, namely NPR and NRC. NPR stands for National Population Register and NRC stands for National Register of Citizenship. These have been said to be linked with CAA. However, there has been a lot of confusion regarding the same. This confusion has been a reason for the discontent amongst the masses, which has led to protests and riots in various parts of the country. There have been various questions buzzing around regarding the NPR and NRC. The population is flummoxed whether these are going to be implemented, if yes, what is the reason for the same, whether both of these are linked, if yes, why and in what way, etc.

To understand the stance of the judiciary with respect to laws on citizenship in India, the researcher thinks that it is crucial to shed light on 'India's Asylum Policy'. In *NHRC v. State of Arunachal Pradesh*,²⁶ the Supreme Court did not allow the forceful expulsion of Chakma refugees from the state. It made a very liberal interpretation of the law and said there is a difference between refugees and foreigners as such. It also said that refugees deserve protection under the Right to Life guaranteed by Article 21 of the Indian Constitution.

In the recent times, there has been immense negative opinion against refugees in India. The Government keeps on introducing various policies to deal with issues related to refugees. It is very important and necessary to have a clear and efficient law for refugees to reduce the arising issues related to the same. This law should also uphold the democratic and constitutional morals of the country. There have been various cases wherein citizenship has been the subject matter. The researcher has mentioned a few cases in order to shed a light on the approach the judiciary has had with respect to various cases that had citizenship into question. In *Mohammad Salimullah v. Union of India*²⁷ the Supreme Court

²⁶ 1996 AIR 1234, 1996 SCC (1) 742

²⁷ W. P. (C) NO. 793 OF 2017

reviewed the Union can deport Rohingya Refugees, which is a Muslim minority from Myanmar.

The petitioners claimed that this particular deportation that had been proposed violated the protection of Right to Equality guaranteed under Article 14, Right to Life and Personal Liberty guaranteed under Article 21 and also giving respect for international law and treaty obligations which is mentioned under Article 51(c)²⁸. The petitioners also said that the deportation would be contradictory with the principle of 'Non-Refoulement'. Non- Refoulement is generally considered to be a part of Customary International law. This principle does not permit a country to send back asylum seekers or refugees to a country where they have faced or are susceptible to face persecution. This is seen as mandatory to all countries, even if they are not a signatory to the 1951 Refugee Convention.²⁹

The Indian government maintained that the increasing numbers of Rohingya migrants could pose a danger to the national security and therefore, need to be deported. However, this particular exercise of deporting Rohingyas back to Myanmar could denote a certain change in the refugee policy of India, which could shift from being secular to being anti- Muslim.

This petition not only would decide the future or fate of around 40,000 Rohingyas in India but will also provide a clarity regarding the protection of fundamental rights of those who are not the citizens of India. It will also showcase how binding international norms are on customary laws.³⁰

While dealing with this case, the court also referred to the judgement given in *Felix Stefan Kaye v Foreigners Regional Registration Office*³¹ and said that the Central Government held 'implied powers' to give any kind of relaxation in

²⁸ Foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration PART IVA FUNDAMENTAL DUTIES

²⁹ The principle of non-refoulement under international human rights law, (Feb 2, 2021, 12:30 PM)

<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

³⁰ Id at 3

³¹ W.P.(C) 2862/2018 and CM Nos.11574-576/2018

cases that were related to the Citizenship Act, 1955. While saying this, the court also added that granting citizenship was the discretion of the Government of India and that the Government has the power to consider such applications without taking their technical status into notice.

It was also said that the Central Government would have to look into the unique situation the petitioners are facing. The undertaking that was given before the High Court of Madras which said that the applicants would not be sent back to Sri Lanka will also be considered.³² Whereas the judiciary has dealt with the term migrants in the case of *KulathilMammu v State of Kerela*.³³ In this case, the term “migrated” was defined as the person voluntary and permanently leaving from India to Pakistan.³⁴ In the case of *EbrahimVazirMavat v State of Bombay*³⁵ the constitutional validity of the Influx from Pakistan Control Act, 1949 was in question. This Act said that when a person had the domicile of either India or Pakistan, he/ she can't enter the premises of the above stated countries without permission. And if any person goes against the rule then he would be convicted of the offence mentioned in the Act. According to Section 7, a person could be denied citizenship by the Central Government under certain grounds. It was held that removing a citizen from the country would lead to the deprivation of the right of citizenship as mentioned in Part II of the Constitution of India.³⁶ Thus, the problem of migrants and refugees has always been persistent in India. As seen in cases above, the Courts have interpreted the law based on the fact and circumstances of each individual case.

Here, its noteworthy that, whilst rolling out the amended law on citizenship, giving concession of six years for residence based only on religion is against the tenets of secularism. This should be dropped to stand the test of ‘basic structure doctrine’. India, as a country which follows the ideology of

³² Id

³³ LAWS(SC)-1966-3-3

³⁴ Diva Rai, *Know More about the Law related to Citizenship in India*, (Feb 3, 2021, 1:00 PM) blog.ipleaders.in, updated on 19th October 2019

³⁵ 1954 AIR 229, 1954 SCR 933

³⁶Subodh Asthana, *Citizenship in India*, (Feb 3, 2021, 1:30 PM) blog.ipleaders.in, updated on 3rd August 2019

‘*VasudhaivaKutumbakam*’,³⁷ should not be hasty in taking decisions that can disenfranchise her citizens contradicting its centuries-followed values. The need of the hour is that the Union Government should clearly chart out the course of action regarding the fate of excluded people from final NRC of Assam and political parties should refrain from colouring the entire NRC process through electoral prospects that may snowball into communal violence.

IV. Concluding Remarks

An overly legal approach will only produce more tension, insecurity and anxiety.³⁸

Ultimately, Citizenship by its very meaning constitutes the polity of a nation. The democratic country like India has successfully thrived post to its independence for almost 7 decades on the basis of its solid unity and integrity of the population. Even the history of India shows the antecedents of the welcoming of the foreigners and treating them with utmost respect and safety. This can be seen from the provisions of the Constitution of India; wherein certain rights are available to the ‘person’ which connotes citizens as well as non-citizens of India. Viz, Article 21.³⁹ At the same time, certain rights are exclusively conferred for the citizens of this country, so as to protect their person and property.⁴⁰ Thus, Constitution of has shown unique blend of adequate constitutional protection to the citizens and non-citizens within the territory of India. Here, it must be noted that, the recent amendments under the Citizenship Act has shown huge uproar in the political and social horizons of India, however, the spirit of democracy has always prevailed and guided the governmental policy issues. As rightly envisaged in the preamble of the Constitution of India, justice, liberty, equality is prevailed in India with special existence of the fraternity. Therefore, constitutional path to the citizenship is

³⁷ Id

³⁸ Drishti, Citizenship of India (Jan 12, 2021, 5:20 PM) <https://www.drishtiiias.com/pdf/citizenship-of-india.pdf>

³⁹ Id

⁴⁰ Constitution of India Article 19

quite clear and it's the need of the time to strengthen the constitutional democracy of India.

Right to Information: A Quest for Constitutional Jurisprudence

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Abstract

*In Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal, (a three judge Bench, B.P Jeevan Reddy. J concurring) Supreme Court has declared that “The freedom of speech and expression guaranteed Article 19 (1) (a) includes right to acquire information and to disseminate it”. Article 19 (1) (a) does not specifically define the meaning of “Freedom of Speech and Expression” and has also not declared what it ought to be and ought not to be and very eloquently connected the indispensability of information and exercise of speech or expression in a democratic country like India. Therefore, the recognition of “Right to Information” as Fundamental Right is one of the milestones in the way of development of Constitutional jurisprudence of India. Later on in 2005, another milestone was constructed when as part of statutory recognition, Right to Information Act has been enacted by Parliament of India, which has framed up necessary guidelines. In the context of this Constitutional and legal frameworks, basically three aspects have been looked into. **Firstly**, by tracing the origin of this Constitutional development, the Supreme Court recognised “Freedom of Press” as Fundamental Right. This declaration paved the way for discovering many unnamed rights into Article 19 (1) (a). **Secondly**, as far as “Right to Information” is concerned, the judgments which are credited to make the prelude to “Right to Information” becoming the Fundamental Right have been deeply analysed. **Thirdly**, Rule of interpretation of Constitution especially Fundamental Rights have also been deliberated upon along with the significance of Fundamental Rights. **Finally**, the judgment in Ministry of Information and Broadcasting v. Cricket Association of Bengal, has been critically analysed only to find out that there are ten numerous flaws inherent in the judgment for which “Right to Information” stands on a very weak jurisprudential (Fundamental Rights) foundation. This achievement could not become a full bloomed success-it is partial in nature, for which the article gives some recommendations to make “Right to Information” a strong and positive Fundamental Right.*

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Keywords: Right to Information, Right to Freedom of Speech and Expression, Constitutional Jurisprudence

I. Introduction

Democracy is undoubtedly a political value, reflected in particular pattern and form of governance. But it is incomplete if democracy is made to be propagated or practiced as mere form of governance or people's voting rights only. It has wider connotations in diverse social, cultural, political and economic lives of the people, which ultimately finds its place in much broader phenomena of philosophical and ideological value system. It transcends the barrier of a system of governance i.e. a running of government by the people, for the people and of the people, merges with a larger canvas of a virtue of individual life, a value of social, political, economic, cultural and international fields. Former US President Woodrow Wilson, emphatically views Democracy as "Democracy is not so much a form of government, as a set of principles."³ He continues by stating that "It is for this that we love democracy: for the emphasis it puts on character; for its tendency to exalt purposes of the average man to some high level of endeavours; for its just principle of common asset in matters in which we all are concerned; for its ideals of duty and its sense of brotherhood."⁴ In a democratic country, the sovereignty is vested with the people from political point of view. People in the society are actually powerful than the ruler-it is because the government is owned by the people. Democratic form of governance demands from its citizens an active and intelligent participation in the affairs of the country. Not only they take part in the decision making process of all levels of the government, but also take part in its implementations. For the afore-mentioned objectives, formation of opinion is very crucial, towards which direction the nation will move on. Therefore, in a peaceful way, to take the nation towards fulfilment of its goal (set out in the Preamble to Constitution of India), through people's participation, open discussion (to find the views of majority of the people or all) including airing of dissenting view, to have a collective decision is pre-requisite. Democratic environment also values critical opinion of an individual or a group, different from a set of established practice

³ Woodrow Wilson, *Democracy and Efficiency*, Vol-LXXXVII, THE ATLANTIC MONTHLY, 289, 298 (March, 291).

⁴*Id.* at 290.

of the society, whatever radical in nature (with certain limitations). It teaches the society to honor the worthiness and potentiality of other views. All these come under the purview of “Right to Freedom of Speech and Expression.”

Democracy means freedom and liberty. Constitution of India guarantees for its citizens certain basic freedoms, one of such is declared as: **ALL CITIZENS SHALL HAVE THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION**⁵. This “Freedom of Speech and Expression” is a Fundamental Right and if any pre-Constitutional law is inconsistent with it or any post-constitutional law contravenes this, then to the extent of inconsistency or extent of contravention, this law will be void⁶. As it is very essential for all round development of people, it is also a sine-qua-non for the flourishing of democracy in all its dimensions. Hence, when “Freedom of Speech and Expression” is so indispensable to the functioning of democracy, law must ensure that exercise of “Right to Speech” (including any expression) is not based on falsehood. Therefore, pre-requisite to “Freedom of Speech and Expression” is access to all information, either about affairs of government or private bodies”. Correct information is a base over which the whole structure of “Freedom of Speech and Expression” is built upon, and again over which effective functioning of democracy depends. Therefore, guaranteed ‘Right to Information’ on demand or suo-moto disclosure is very vital, without which first “Freedom of Speech” will lose its value and later on democracy would collapse down. Speech and expression premising upon wrong information, partial information, false information or suppressed information cannot be true and fair. In this context, Supreme Court in Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal observed⁷:

84. True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. **The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views.** One-sided

⁵ INDIA CONST. art.19, cl.(1)(a).

⁶ INDIA CONST. art. 13.

⁷ Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal, AIR 1995 SC 1236.

information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations.

In the history of Constitutional jurisprudence of India, a milestone was created when Supreme Court conferred the status of Fundamental Right on “Right to Information” under Article 19 (1) (a) of Constitution of India. While including the “Right to Information” within the purview of “Freedom of Speech and Expression”, it actually had shown the real horizon of this named Fundamental Right. This judicial journey started in India when an unnamed right i.e. Freedom Of Press was recognized within the purview of “Freedom of Speech And Expression” long back which paved the way for “Right to Information” as Fundamental Right today.

II. Significance of Fundamental Right in Indian Constitution

Deliberating on the significance of Fundamental Rights in lives of people of this country, Supreme Court in *Maneka Gandhi v. Union of India*⁸ (speaking through P.N.Bhagwati J) observed that Fundamental Rights are pre-requisites to all round development of human beings and is rooted in India’s tradition, culture and heritage:

These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.

They weave a ‘pattern of guarantees on the basic structure of human rights’ and impose negative obligations on the State not to encroach on individual liberty in its various dimensions. (page 669).

III. Freedom of Press: First Recognition of Unnamed Right as Fundamental Right under Article 19 (1) (g)

⁸Maneka Gandhi v. Union of India, AIR 1978 SC 597.

In *RomeshThappar v. State of Madras*⁹, is the first judgment of the Supreme Court of India, where a six judge Constitution Bench (Saiyid Fazal Ali. J. dissenting), planted the sapling of unnamed right i.e. 'Freedom of Press' in the garden of Fundamental Rights (without expressly mentioning it as such) as facet of 'Freedom of Speech and Expression', under Article 19 (1) (a) of Constitution of India, as is clearly evident from the following observation (in the form of propagation of ideas), but fact remains that 'Freedom of Speech and Expression' and 'Freedom of Press' are explained under two separate headings not as inclusive to each other:

“There can be no doubt that **freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation.** Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value.”

“...this was doubtless due to the realisation **that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible.**”

Thereafter, ***Brij Bhushan v. State of Delhi***¹⁰ is the most significant judgment (delivered on the same day with the *RomeshThappar v. State of Madras*), where the same six judge Constitution Bench (Saiyid Fazal Ali. J. dissenting), echoed the same thinking that “Freedom of Press” is essential part of “Freedom of Speech and Expression”, in a direct way for the first time, by unequivocally expressing it, what Supreme Court in *RomeshThappar v. State of Madras* did not do. This judgment is engraved in the Constitutional jurisprudence of India, not only due to the reason of recognition/discovery of FREEDOM OF PRESS by it as first recognition/discovery of an unnamed right under “Freedom of Speech and Expression” of Article 19 (1) (a) but also an instance of first recognition/inclusion before any other named Fundamental Right under Part III of Constitution of India itself. The construction of Article

⁹ *RomeshThappar v. State of Madras*, AIR 1950 SC 124 (delivered on 26th May, 1950).

¹⁰ *BrijBhushan v. State of Delhi*, AIR 1950 SC 129 (delivered on 26th May, 1950).

19 (1) (a) paved the way for further recognition/discovery of many unnamed rights in future not only for Article 19 but also for Article 21 of Constitution of India. If the Ratio-Decidendi of this judgment is seen, then it would be crystal clear:

“There can be little doubt that the imposition of pre-censorship on a journal is a restriction on **the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19 (1)(a).** As pointed out by Blackstone in his Commentaries “the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press”.

The Supreme Court (five judge Constitution Bench) in **Sakal Papers (P) Ltd v. Union of India**¹¹(unanimous view) applied the above-mentioned Ratio-Decidendi regarding ‘Freedom of Press’ by stating that **“Our Constitution does not expressly provide for the freedom of press but it has been held by this Court that this freedom is included in “Freedom of Speech and Expression” guaranteed by clause (1)(a) of Article 19 vide Brij Bhushan v. State of Delhi.”** It continues to state that “The right to propagate one’s ideas is inherent in the conception of freedom of speech and expression. For the purpose of propagating his ideas every citizen has a right to publish them, to disseminate them and to circulate them.”

In another five judge Constitution Bench, **Bennett Coleman & Co. v. Union of India**¹² (Mathew, KuttayilKurien JJ dissenting), Supreme Court, clearly underscored the settled position about ‘Freedom of Press’ by terming it as ark of the covenant of democracy because public criticism was so essential to the working of its institutions:

Article 19(1) (a) provides that all citizens shall have the right to freedom of speech and expression. Although Article 19(1) (a) does not mention

¹¹ Sakal Papers (P) Ltd v. Union of India, AIR 1962 SC 305.

¹² Bennett Coleman & Co v. Union of India, 1973 SCR (2) 757.

the freedom of the Press, it is the settled view of this Court that 'Freedom of Speech and Expression' includes 'Freedom of the Press' and circulation. It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views.

Freedom of the press is no higher than the, freedom of speech of a citizen under Article 19(1)(a). Article 19 does not specifically provide for the freedom of the press as the First Amendment of the Constitution of the U.S.A. does. The freedom of the press is simply an emanation from the concept of fundamental right of the freedom of speech of every citizen.

The direct linking of 'Freedom of Press' with 'Freedom of Speech and Expression' got a fillip when in **Express Newspapers v. Union Of India**¹³, a six judge Constitution Bench (unanimous view), viewed '**Freedom of Press**' as inclusive of 'Freedom of Speech and Expression' under Article 19 (1) (a) and restrictions imposed on it, not saved by Article 19 (2), were absolutely unconstitutional:

207. It would certainly not be legitimate to subject the press to laws which take away or abridge the freedom of speech and expression or which would curtail circulation and thereby narrow the scope of dissemination of information, or fetter its freedom to choose its means of exercising the right or would undermine its independence by driving it to seek Government aid. **Laws which single out the press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its right to choose the instruments for its exercise or to seek an alternative media, prevent news-papers from being started and ultimately drive the press to seek Government aid in order to survive, would therefore be struck down as unconstitutional. Such laws would not be saved by Article 19 (2) of the Constitution.**

While recognising unnamed right as Fundamental Right within pre-existing named Fundamental right under Article 19 (1) (a), the apex Court did not

¹³ Express Newspapers v. Union Of India, AIR 1958 578.

formulate any principle in the preceding judgments. To fill-up the vacuum of Constitutional jurisprudence, Supreme Court in Sakal Papers (P) Ltd. v. Union of India¹⁴ observed that **“On the other hand the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.”**

In **Express Newspapers v. Union Of India**¹⁵ Supreme Court also found another dimension for theorising it under Article 19 (1) (a): **“The guarantee of an abstract freedom of expression would be meaningless unless it contemplated (anticipate, envisage, envision, think of) and included in its ambit all the means necessary for the practical application of the freedom.”**

IV. Right to Information: A Facet of Right to Freedom of Speech and Expression

The guarantee of “Freedom of Speech and Expression” would be meaningless unless necessary “Right to Information” is included in its ambit. It would enable the citizens to enjoy the rights guaranteed by it in the fullest extent. Exercise of “Freedom of Speech and Expression” is wholly dependent on information; or to put it differently, information is pre-requisite to any exercise “Speech and Expression.” Information is required for a person to say something or not to say something with conviction or confidence. Unless a person is truly informed about the matter, then how is it possible for that person to give an opinion, make a comment about the pros and cons of an issue or to critique it and to fairly judge the performance? If the system does not ensure the self disclosure of the information or disclosure on demand, there is no guarantee that the opinion, comment, criticism, advice, judging of performance, would be true and fair; these are definitely going to be biased, wrong, misleading and far from truth. There would be a question of the acceptability of any opinion which is not supported by facts or true information. It would hinder the process of forming an individual or group opinion which finally takes a shape of national opinion. If

¹⁴ Sakal Papers (P) Ltd v. Union of India, AIR 1962 SC 305.

¹⁵ Express Newspapers v. Union Of India, AIR 1958 SC 578.

the basic premise is based on wrong and falsehood, ultimately it would not lead anywhere, might be misdirected and finally the basic object for which the decision is taken will remain unfulfilled, leading towards total failure of policy and implementation. **In this background, four leading judgments are analysed where the issue of “Right to Information” directly or indirectly involved to trace out the origin and nature of Constitutional jurisprudence of it.**

In **Express Newspapers v. Union of India**¹⁶, the Supreme Court (a five judge Constitution Bench), by referring to passages from “Freedom of the Press-A Framework of Principles” (Report of the Commission on Freedom of Press in the United States of America), tacitly recognised the importance of “Right to Information” as an obligation of the PRESS and people’s expectation to access to information. Though PRESS is not State under Article 12, even then, it gives a new dimension to building up a new dimension, which will go a long way in transforming the vertical nature of Fundamental Right into a horizontal one by expanding its base towards non-State entities. **Rightly speaking, ‘Right to Information’ started emerging in the Constitutional field of India from this judgment by reminding the obligation of press to collect and disseminate information to the citizens for making the democracy viable:**

183. Press freedom means freedom from and freedom for. A free press is free from compulsions from whatever source, governmental or social, external or internal.....For these ends it must have full command of technical resources, financial strength, **reasonable access to sources of information at home and abroad, and the necessary facilities for bringing information to the national market.**

199. In United States of America: **(b). the freedom of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public;**(c). Such freedom is the foundation of free government of a free people.

¹⁶ Express Newspapers v. Union of India, AIR 1958 SC 578.

In **State of Uttar Pradesh v. Raj Narain**¹⁷, a five judge Constitution Bench (Kurien Mathew. J concurring), apex Court admitted (in a negative way) the necessity of disclosure of documents (regarding the affairs of the State) before the Court by ignoring the “Protection Clause” of section 123 of Indian Evidence Act 1872, if it is not against public interest. In this case, Raj Narain, in his Election Petition, made an application to produce following documents, before court: (a). the circulars received from the Home Ministry and the Defense Ministry of the Union Government regarding the security and tour arrangements of Prime Minister Indira Gandhi, for the tour programs of Rae Bareli District or any general order for security arrangement; and (b). all correspondence between the State Government and the Government of India and between the Chief Minister and the Prime Minister regarding police arrangement for public meeting of Prime Minister by State Government and the necessary expenses incurred:

“It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld, is to be weighed against the public interest in the administration of justice that court should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents.”

In this case, majority of the judges did not pronounce any decision on “Right to Information” as facet of “Article 19 (1) (a). Even K.K.Mathew J also looked at the matter from the perspective of “Right to Know” under Article 19 (1) (a). From the governance perspective, the apex Court felt the indispensability of keeping the confidential information (documents which were sought to be submitted before court) under veil of secrecy due to the reason of public interest. **The facts of this case have a direct bearing on ‘Right to Information’ though in a covert way, because the access of the above-referred documents to the court will result in its disclosure to the person concerned, later.**

¹⁷ State of Uttar Pradesh v. Raj Narain, (1975) 4 SCC 428.

In **S.P. Gupta v. Union of India**¹⁸ the crux of the issue was the transfer of judges from one High Court to another High Court. The main question was disclosure of information (regarding the correspondences/consultations between the Govt of India and Chief Justice of India, by relying on which Govt of India formed an opinion about transfers, conveyed to President of India for issuance of order) before apex Court which were needed to determine the constitutionality of existing process of transfer of judges. The second impediment for the required disclosure is section 123 of Indian Evidence Act which stated: “No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit”. So the apex Court takes the stand by stating that disclosure of information in regard to the functioning of Government must be the rule and secrecy is an exception justified only where the strictest requirement of ‘Public Interest’ so demands and advices for maintaining a balance between ‘public interest’ and ‘state interest’:

73. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say that to order production of the document in question would put the interest of the State in jeopardy.....The court has to balance the detriment to the public interest on the administrative side which would result from the disclosure of the document and the detriment to the public interest on the judicial side which would result from non-disclosure of the document though relevant to the proceeding.

The facts which emerge from this judgment are: **Firstly**, the Supreme Court in this judgment never opines that “Right to Information” is inclusive of

¹⁸ S.P. Gupta v. Union of India, 1981 SCC SUPP 87.

“Freedom of Speech and Expression” under Article 19 (1) (a); what the Supreme Court emphasised was “Right to Know” and that was also “seemed to be implicit in the right of ‘Free Speech and Expression’ guaranteed under Article 19 (1) (a)”. Moreover, the indispensability of “Access to Information” to the public again was placed not in the context of Article 19 (1) (a), but in the context of good governance of the country. **Secondly**, the observation of Supreme Court that “people should have information about the functioning of the government” is merely obiter dictum. The following passages of this judgment are indicative of it:

64. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing..... No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government.

67. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a).

Finally, in **Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal**¹⁹, (a three judge Bench) Supreme Court has expressly stated that ‘Right To Freedom Of Speech and Expression’ includes ‘Right To Information’:

44. The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self expression which is an important means of free conscience and self fulfilment. It enables people to contribute to debates of social and moral issues. It is the best way to find a truest model of anything, since it is only through it, that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy.

¹⁹ Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal, AIR 1995 SC 1236.

78. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained.

124. [ii] The right to impart and receive information is a species of the right of freedom of speech and expression-the best means of imparting and receiving information and as such to have an access to telecasting for the purpose.

V. Ministry of Information & Broadcasting v. Cricket Association of Bengal: An Analysis

As Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal is a Supreme Court judgment which unequivocally declared for the first time that “Freedom of Speech and Expression includes right to acquire information”, therefore it has become incumbent to have its in-depth analysis in fathoming many untold points, which are given in the following:

Cricket Association of Bengal (CAB) is affiliated to Board of Control for Cricket in India (BCCI) and officially controls games of cricket in West Bengal. The main objects are to promote cricket, to foster the spirit of sportsmanship and ideals of cricket, to impart cricket education through media, and for achieving the said objects, to organise cricket matches-national and international. But neither CAB nor BCCI was established either by an executive order of Government or by a Statute. Neither of these organisations is controlled by any Governmental agency nor receives any financial assistance or grants from Govt, of whatsoever nature. **Therefore, it is amply clear that CAB/BCCI is not State or instrumentality of State falling under “Other Authority” created or established by Article 12 of Constitution of India.**

Dispute between CAB/BCCI and MIB/DD arose with regard to the right to live-telecast the event, viz., the cricket matches organised by CAB. In telecasting, there are three methods: (a) terrestrial, (b) cable and (c) satellite. In this case, it is the telecasting was to be done through satellite T.V. operation which involved either the use of a frequency generated, owned or controlled by the national Government or the Governmental agencies, or those generated,

owned and controlled by other agencies. CAB wanted to live telecast the cricket matches, organised by it through satellite, by a foreign agency and did not want DD to do it (which rejected CAB's proposal for up-linking the terrestrial signal to the foreign satellite). Now the question is why and to what extent, CAB/BCCI required the government's permission for up-linking. Moreover, though CAB/BCCI had not made any demand on any of the frequencies generated or owned and controlled by MIB/DD (Govt of India), is it permissible under law to exclude MIB/DD for telecasting the event? These questions are naturally surfacing because in India, there is a monopoly of broad-casting/telecasting in favour of Government of India and that is created by Indian Telegraph Act, 1885²⁰ (where telegraph²¹ includes telecast in its entirety). As part of this monopoly, the statute vests the power of licensing for establishing, maintaining and working a telegraph to it on conditions and payments. Over here, no permission to establish or maintain telegraph even was sought by CAB from Government. CAB/BCCI only desired to telecast the cricket matches through a frequency not owned by Government but owned by foreign agency. To this end, what CAB/ BCCI sought from VSNL (as it controls the airwaves/frequencies on behalf of Govt of India) was to uplink to the foreign satellite, the signals created by its own cameras and its earth station or the cameras and earth station of CAB/BCCI's its foreign agency to a foreign satellite. The permission is sought technically only for operating a telegraph and that too for a limited period of time and for a specified purpose. Regarding airwaves/frequencies which are available with Government of India, it is scarce and limited; so there has to have equitable distribution of resources which sometimes needs prioritization (sometimes denial or sometimes allocation of limited resources as this is the only way to marshal

²⁰4.(1) Within India the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs: Provided that the Central Government may grant a licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India.

²¹3.(1) "Telegraph" means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, Radio waves Hertzian waves, galvanic, electric or magnetic means.

scarce resources to ensure their optimum enjoyment by all including those who are not affluent enough to dominate the media). Therefore the argument that telecasting will suffer for want of frequency or denial is justified for public interest, does not exist. When, there was no a demand of a share of limited resources by CAB, the claim of MIB/DD that it wanted to telecast the event for fair or equitable use of limited resources, does also not hold any ground:

80. What is claimed is a right to an access to telecasting specific events for a limited duration and during limited hours of the day. There is no demand for owning or controlling a frequency. Lastly and this is an important aspect of the present case, to which no reply has been given by the MIB, there is no claim to any frequency owned and controlled by the Government. What is claimed is a permission to uplink the signal created by the organiser of the events to a foreign satellite.

81. Airwaves/frequencies are a public property and are also limited; the airwaves/frequencies have to be used in the best interest of the society. Best Interest of the society through its right, fair, equal and equitable use can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears.

It should not be forgotten that organising of cricket matches, its production, recording, transmission and telecast (either by own-self or by agent) are under “Freedom of Speech and Expression” guaranteed by Article 19 (1) (a). hence, the above-stated activities related to cricket matches cannot be restricted/prohibited except on the grounds under Article 19 (2) by government or any of its instrumentality, i.e. in the interests of 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, in addition to a limitation imposed by the nature of the public property i.e. airwaves/frequencies involved. In this background, apart from other contentions, CAB/BCCI, put forward that the right to disseminate/circulate information is a part of the Fundamental Right to

“Freedom of Speech and Expression” which is subject only to the restrictions under Article 19(2). Therefore, as cricket match generates information (becomes document after televising), the citizens (interested in sports by way of education, information, record and entertainment) including the organisers have a right to such information, knowledge and entertainment. By not allowing the telecasting by a foreign agency planned out by CAB/BCCI, Union Govt would be violating Fundamental Rights of citizens of this country.

Was MIB or DD opposing the recognition of “Right to Information” as integral part of “Freedom of Speech and Expression”? From the submission of MIB/DD it is absolutely clear that it did not refuse to telecasting the cricket matches per se, organised by CAB/ BCCI. They are of the view that when the agency like DD has access to the largest number of viewers agrees to telecast the events, their right as well as the viewers’ right under Article 19 (1) (a) is absolutely satisfied (though “Right to Information” was not specifically mentioned as such but it was implied). A mere creation of the monopoly-agency to telecast in favour of Govt of India does not per se violate Article 19 (1) (a) as long as the access is not denied to the media or to any private entity either absolutely or by imposition of terms which are reasonable under Article 19 (2). In the present case, the refusal by MIB/DD for up-linking of signals regarding cricket matches created by CAB/BCCI to a foreign satellite whose airwaves/frequencies are to be used does not attract any of the reasonable restrictions under Article 19 (1) (a) of Constitution of India, what Supreme Court, opined.

It is a milestone in the history of Constitutional jurisprudence of India when Supreme Court declared that “Freedom of Speech and Expression” included right to acquire information. However, if delved deeper, this judgment has some inherent limitation for which it has failed in getting transformed into a full bloomed accomplishment, which are as follows: **Firstly**, this judgment is not a declaration of a simple or larger Constitutional Bench of Supreme Court. **Secondly**, there was no issue framed up by Supreme Court by stating that “whether right to information forms the basic upon which freedom of speech and expression is built upon as an integral part of it”? **Thirdly**, no natural citizen of India, filed a writ petition to any of the Constitutional Courts after being denied by the govt or by its instrumentality or by any public authority, the access to a document or information. **Fifthly**, no citizen of India nor any

organisation directly filed a writ petition to Supreme Court to make a declaration that “Right to Information” is inclusive of Article 19 (1) (a) of Constitution of India. **Sixthly**, Supreme Court made a non-state entity responsible to provide the citizens of India with the information. The primary obligation to furnish the information to the deserving sections lies with a non-State entity like CAB/BCCI in this case. **Seventhly**, according to existing Fundamental Rights jurisprudence, it is the obligation of State or its instrumentality under Article 12, to realise the Fundamental Rights of the people (either positively or negatively) and if there is any violation of it, it is to be enforceable against State or its instrumentality as mandated. By deviating from the existing system, the Supreme Court must have done a great deed (by trying to make the Fundamental Rights horizontal), but on the same point, it has weakened the realisation of “Right to Information” as in this case the apex Court did not make it an obligation of State or its instrumentality fully, by directing the MIB/DD (or approving its proposal) to televise the event, instead of getting the event televised by a foreign agency, for which information (it exists in the form of cricket matches) the people of this country have to pay for it unlikely to the service if provided by DD, the people have not to pay. This arrangement gives an impression that that “Right to Information” has to be purchased, because the foreign channel has to be subscribed by countrymen. The opposite approach could have been adopted by Supreme Court either on the ground of morality (Constitutional morality) under Article 19 (2) or in the interest general public under Article 19 (6) by excluding India from the operation of agreement of CAB and the foreign agency. Had the Supreme Court divided the responsibility among CAB/BCCI and MIB/DD for televising the cricket matches (foreign agency for foreign countries and Doodarshan inside India), the decision would have been much more reasonable. For effective realisation of citizens’ Fundamental Right” any court of record, can’t divest off or disallow the State (partially or fully) from performing its obligation. **Eighthly**, according to this judgment, the responsibility to realise “Right to Information”, by whatever way it may be, the role of State or its instrumentality is very limited i.e. the authority concerned will have to permit CAB/BCCI to link the signals to the airways/frequencies, generated, owned and controlled by a foreign agency, so that people’s “Right to Information” according to Supreme Court, can be realised in India. **Ninthly**, definition of “Information” has not been given in

this judgment including what will be the grounds of non-disclosure. **And finally**, the information which was generated (which according to Supreme Court, needs to be accessible to the people of India), in this case in the form of sports activity-cricket match, did not derive from the activity or affairs of the State or its instrumentality, it did derive from the activity of a private body and some private persons (cricket players, who also were not paid by the government). **In a nutshell, it can be commented that the recognition of “Right to Information” by Supreme Court is premised on a weak foundation of Constitutional jurisprudence.**

Lastly, N.N.Vohra Committee was constituted by Govt. of India. “To take urgent stock of all available information about the activities and links of all Mafia organizations/elements, to enable further action”. In main Report, by analyzing various sub-committee reports, it was noted that the growth and spread of crime syndicates in Indian has been pervasive and these criminal elements have developed an extensive network with bureaucrats, government functionaries, politicians, media personalities, strategically located persons in the non-Governmental sector and members of the judiciary; some of these criminal syndicates have international links including foreign intelligence agencies. After the report was tabled in Parliament, Dinesh Trivedi, demanded to Government to make the ground-reports public which were the premise of main report (without which the main report is baseless) including the names of individuals who would become identifiable as a result of studying the various background papers. When it was not met, he in conjunction with some NGOs filed this writ-present in public interest which gave rise to **Dinesh Trivedi v. Union of India**²². One of the main contentions was that the people have a right to know about the full investigatory details of the report. Such disclosure is stated to be essential for the maintenance of democracy, for ensuring that transparency in government and section 5 of the Official Secrets Act, 1923 is over-broad, unreasonable. A two judge Bench of Supreme Court opined that people have a ‘Right to Know’ (by not even linking it to Article 19 (1) (a)) by totally departing from the Ratio-Decidendi of Ministry of Information & Broadcasting v. Cricket Association of Bengal, a larger Bench in this regard and

²² Dinesh Trivedi v. Union of India, (1997) 4 SCC 306.

In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare...To ensure the continued participation of the people in the democratic process, they must kept informed of the vital decisions taken by the Government and the basis thereof.Democracy, therefore, expects openness and openness is a concomitant of a free society.

VI. Enactment of Right to Information (RTI) Act and Salient Features

A big development occurs in the history of Indian legislations, when Parliament enacted Right to Information Act in 2005²³. This is one of the most important legislations in the first decade of 21st Century in India, which recognises “Right to Information” as a Statutory Right.

A. Objective of RTI Act

As Constitution of India has established democratic republic and democracy requires an informed citizenry which are vital to its functioning and to contain corruption, therefore, the basic purpose of Right to Information Act is to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability (towards the citizens of this country) in the working of every public authority.

B. What is Right to Information

A pertinent question is what is “Right to Information”? ‘Right to Information’²⁴ means the information²⁵ accessible under this Act which is held by or under

²³ Right to Information Act, 2005, No. 22, Acts of Parliament, 2005 (India).

²⁴ *Id.* s 2(j).

²⁵ ‘**Information**’ means any material in any form, including records²⁵, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public

the control of any public authority and includes the right to (i). inspection of work, documents, records; (ii). taking notes, extracts or certified copies of documents or records; (iii). taking certified samples of material; (iv). obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

C. Obligations of Public Authorities

Primary obligation to disclose the information lies with 'Public Authority'. Apart from many duties (1).every Public Authority²⁶ shall (a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated; (2) it shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo-motuto the public at regular intervals through various means of communications, so that the public have minimum resort to the use of this Act to obtain information.

C. Duties of Information Officers

An information seeker under this Act, shall make a request in writing or through electronic means, with a deposit of prescribed fees, either to (a) the CPIO or SPIO, of the public authority concerned; the information seeker is not required to give any reason for the disclosure of information or any other

authority under any other law for the time being in force (defined in section 2 (f) of RTI Act).

²⁶'Public Authority' means any authority or body or institution of self-government established or constituted -(a) by or under the Constitution;(b) by any other law made by Parliament;(c) by any other law made by State Legislature;(d) by notification issued or order made by the appropriate Government, and includes any-(i)body owned, controlled or substantially financed;(ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government (defined in section 2 (h) of RTI Act).

personal details except what may be necessary for contacting him²⁷. The CPIO or the SPIO after receiving a request u/s 6 shall, within thirty days of the receipt of the request either provide the information (may be on payment of such prescribed fee if necessity arises) or reject the request for any of the reasons specified in sections 8 and 9²⁸. However, where the information sought for concerns the life or liberty of a person, the information shall have to be furnished within forty-eight hours of the receipt of the request.

D. Exemption from Disclosure of Information

The information under Right to Information Act may be denied for the following grounds²⁹: (a) information, disclosure of which would prejudicially affect the sovereignty, integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence; (b) information which are expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court; (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature; (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless larger public interest warrants the disclosure; (e) information available to a person in his fiduciary relationship, unless larger public interest warrants the disclosure; (f) information received in confidence from foreign Government; (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes; (h) information which would impede the process of investigation or apprehension or prosecution of offenders; (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers for certain period of time; (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless larger public interest justifies the disclosure. **(2) Notwithstanding**

²⁷*Id.* s 6.

²⁸*Id.* s 7.

²⁹*Id.* s 8.

anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with section (8) (1) of, a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

E. Rejection for being Third Party Information³⁰

Where a CPIO or SPIO intends to disclose any information or record, or its part under this Act, which relates to or has been given by a third party to public authority or is confidential in the opinion of that third party, the CPIO or SPIO, shall give a written notice to that third party regarding that RTI letter and the desire of the CPIO or SPIO to disclose the information or record, or its part to the information seeker and invite the third party to make a written or oral submission, regarding the disclosure of such third party information, which shall be kept in view while taking a decision about disclosure of information. However, except trade or commercial secrets protected by law, disclosure of third party information may be allowed if the public interest outweighs in importance any possible harm or injury to the interests of that third party.

F. Personal Liability of Information Officer

RTI Act, fixes up the responsibility of the information officers by penalising them for non-performance of their duties, where the CIC or SIC at the time of deciding any complaint or appeal is of the opinion that the CPIO or SPIO has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or denied the request with mala-fides for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or, obstructed in any manner in furnishing the information³¹.

VII. A Concluding Comment: Little Is Done, Vast Remains Undone

³⁰*Id.* s 11 (1).

³¹*Id.* s 20.

Democracy succeeds in a country where “Freedom of Speech and Expression” is guaranteed, and as natural corollary, this freedom cannot be properly functional where there is no “Right to Information”. A milestone was constructed in history of Constitutional jurisprudence of India when in Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal, Supreme Court expressly recognised “Right to Information” as Fundamental Right as inclusive of “Freedom of Speech and Expression” under Article 19 (1) (a), Constitution of India in spite of some having some major shortcomings. However if “objective clause” of Right to Information Act is looked at, it will be seen that it was not at all enacted to put in place in the legal regime, once declared “Right to Information” as Fundamental Right under Article 19 (1) (a). Whatever, may the limitations of Ministry, Information and broadcasting v. Cricket association of Bengal, the objective clause should have declared that the objective was to give effect to the apex Court’s recognition to “Right to Information” as Fundamental Right. As far as analysis of Constitutional jurisprudence of India with regard to “Right to Information” is concerned, the following points need attention so that Constitutional jurisprudence behind it, can become a sound, robust, living and model framework for India.

Factually, “Right to Information” is an interpreting right. This right is not the only interpreting right under Part III of Constitution of India, there are many such interpreting rights under the umbrella of some expressed Fundamental Rights in Part III. At the time of adoption of Constitution of India, these unnamed rights were not thought to be parts of the named Fundamental Rights but gradually, Supreme Court took the lead and by construing the meaning of named Fundamental Rights, conferred the status of Fundamental Rights on many unnamed rights under the tagging of Articles 19, 21, 25 respectively. Some of the recognitions/inclusions were interpreted by Constitution Benches while some of those are not like “Right to Information” Here lies a serious Constitutional flaw with the approach of judiciary. Given the significance of Fundamental Rights in the law and life of people of India, the conferment of status of Fundamental Rights on unnamed rights (which fulfils the criteria set out by the Supreme Court itself), should not be admitted in the garden of Fundamental Right unless it is construed by Constitution Bench. Therefore, it is recommended that a Constitution Bench be constituted for the purpose of formal

recognition/inclusion of “Right to Information” as integral part of “Freedom of Speech and Expression” under Article 19 (1) (a), Constitution of India, the way it was done for “Right to Privacy” in K.S Puttaswamy v. Union of India³², to maintain the dignity of Fundamental Rights and its superlative character. State of U.P v Raj Narain or S.P Gupta v. Union of India would have been the ideal cases for expressly declaring “Right to Information” as Fundamental Right under Article 19 (1) (a) as facts were related to demands of citizens to have access to the information/document related to the affairs of states (though in indirect way).

In Maneka Gandhi v. Union of India judgment, for the first time a non-named right i.e. “Right to Go Abroad” was recognised as a Fundamental Right under “Personal Liberty”, by a seven judge Constitution Bench. Its Ratio-Decidendi becomes integral part of Article 21, so also is occupying the legal field as law in itself due to the implication of Doctrine of Stare Decisis. The above Ratio Decidendi, paved the way for the recognition/inclusion of many un-named rights as Fundamental Rights under “Right to Life” or “Right to Personal Liberty”, such as “Right to Livelihood”, “Right to Dignity”, “Right to Clean Environment” or recent “Right to Privacy” etc. Except “Right to Elementary Education” as Article 21 (A), no other interpreting right (newly discovered Fundamental Rights) was inserted in the relevant Article by amendment of Constitution. People, interested (without law or political science backgrounds) in knowing Indian Constitution after going through the bare Act of Constitution, will not find these developments, --significant features of Constitutional jurisprudence. Even the children/young people in educational institutions in India, who are to be oriented with constitutional values, have to read the voluminous books or huge judgments to know the scope of Fundamental Rights. Constitutional amendment needs to be done by clearly inserting/expressing, those unnamed rights (interpreting rights) including “Right to Information” under the relevant Articles in Part III, as distinct Fundamental Rights, by following procedure of Article 368 of Constitution of India.

The criteria adopted by Supreme Court for recognising “Freedom of Press” (equally applicable for “Right to Information”), as Fundamental Right, if compared with the criteria set out in Maneka Gandhi v. Union of India, for

³²K.S Puttaswamy v. Union of India, AIR 2017 SC 4161.

doing the same under Article 21, it will be crystal clear that the later is more comprehensive than the former. The verbatim transcriptions of the relevant parts of Ratio Decidendis of both are reproduced below:

(A). (1). “the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions” (Sakal Papers (P) Ltd v. Union of India). (2). “The guarantee of an abstract freedom of expression would be meaningless unless it contemplated and included in its ambit all the means necessary for the practical application of the freedom.”(Express Newspapers v. Union Of India).

(B). (1).“The expression ‘Personal Liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19” (Maneka Gandhi v. Union of India). (2). Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible, otherwise to effectively exercise, that fundamental right. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right.

It is pertinent to understand the difference between restriction under a 19 (2) and sections 8 and 11 of RTI Act. **Firstly**, Under Article 19 (2) of Constitution of India, Security of State, Friendly Relations with Foreign States, Public Order, Decency or Morality, Contempt of Court, Defamation, Incitement to an Offence and Sovereignty and Integrity of India, make any restriction or prohibition by the State on Article 19 (1) (a) constitutionally valid. On the other hand, if the exception clause embedded in Right to Information Act, is perused, it will be seen that the exceptions under sections 8 and 11 for which informations can be barred from disclosure are not absolute in nature as on larger public interests those protections from disclosure can be done away with, which is absent in Article 19 (2), wherein reasonable restrictions on Article (1) (a) can be given up. **Secondly**, a comparison between the reasonable restrictions under Article 19 (2)

and exceptions under sections 8 and 11 of Right to Information Act, reveals that as far as the former is concerned, the numbers are less compared to the latter. **Thirdly,**the statutory right i.e. Right to Information Act allows more restrictions than what were not envisaged/allowed in/by the Article 19 (2) as Fundamental Right. A pertinent question arises in the Fundamental Rights jurisprudence: can a statute do impose more restrictions on Statutory Right (which happens to be a Fundamental Right) than the Constitutionally permissible restrictions? Are the additional or statutory restrictions not stultifying Article 13 (2) which reads: “the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall, to the extent of the contravention, be void”. Hence, the exemptions under section 8 of RTI Act should be reconsidered, so that a more viable Right to Information regime can be created for the full realization of democracy in India.

Fundamental Rights are enforceable against State which is according to Article 12 of Constitution of India (a). Government of India; (b) Governments of States; (c). Union Parliament; (d). State Legislatures; (e). Local authorities and (f). Other Authorities. Fundamental Rights cannot be enforced against private entities, which make the system a vertical one; so no citizen cannot seek information from private bodies regarding their activities under Article 19 (1) (a). In the same way, “Right to Information” as statutory right, permits a citizen to get information only from “Public Authorities” which according to section 2(h) are any authority, body or institution of self government established or constituted (a). by or under Constitution; (b). any law of Parliament; (c). any law of State Legislature; (d). by notification issued or order made by appropriate Government and includes (i). anybody owned, controlled or substantially financed; (ii). Non-Government organization substantially financed, by appropriate government. Unless, all private bodies, not covered by Article 12 or Section 2 (h) of RTI Act, are brought within the purview of “Right to Information” so that citizens can have access to information from them, by making the system a horizontal one, basic objects of Fundamental Rights as envisaged in Preamble to Constitution of India and OBJECTIVE CLAUSE of Right to Information Act 2005 will remain un-fulfilled. To some extent, the enforcement of “Right to Information” has been made horizontal under Article 19 (1) (a) when (in spite of all limitations) Supreme Court in Cricket

Association of Bengal judgment, put the primary obligation of realizing the citizens' "Right to Information" upon a non-State entity (CAB/BCCI) with a little bit touch of State and in Right to Information Act, whiling fixing up the responsibility upon "Public Authorities" to furnish the information to the citizens, the Government has gone some steps away from Article 12 of Constitution of India (enforceability of "Right to information" as Fundamental Right against State) and brought many non-State entities within the purview of "Public Authorities" which are not considered as state under Article 12 of Constitution of India, but it is not complete horizontal in nature, because many other non-State (non-Govt.) entities remain outside this trajectory of Fundamental Right and Statutory Right.

A Socio Legal Study of Community Policing in India with Special Reference to the State of Meghalaya

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Abstract

India is a welfare state where the safety of the people is very essential. To maintain the safety of the people the role of police is very crucial. However, people hesitate to develop relationship with police. To remove the hesitation from the mind of the people the community policy plays a very important role. It is found that there is gap between police public relationship. This gap can be bridged when various community related programmes are organised where both police and public should actively participate. Through Community policing mutual trust develops in the mind of community and police which helps to create positive attitude towards police. To make community policing successful there is requirement of police reform. Supreme Court of India has also issued guidelines to stop undue interference of politicians and ensure appropriate policy directions. State of Meghalaya being a tribal state is having better police public relationship in comparison of other States.

Key Words: Community policing, Obstacles, Magistrate, Traditional, Citizens, Relationship

I. Introduction

From 19th Century to the first half of the 20th Century, almost all the Countries including India the autocratic rule was prevailing. During this period, the police were used as tools by the Rulers. The police were enforcing all the government policies ruthlessly. This developed ill feelings about police in the minds of the people. Because of the acts of police the innocents were used to be the victims most of the time which created fear psychosis among the people. It resulted loss of the faith and confidence of the people about police. Although, India became independent in 1947 from British rule but still the police are being governed by the Indian Police Act, 1861. British enacted this Act after the 1857

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when first revolt of independence in India took place. Even after one hundred and sixty-one year not many structural changes have been brought in the Act. The police still have been functioning as an instrument of the state. Police is an organization which is the most visible representatives of the government. In any danger, crisis or difficulty, a citizen approaches the police station with belief that such is an appropriate unit that can help him. The police are expected to be the most interactive and dynamic organisation of any society. The role of police in one hand is to uphold and enforce the law impartially, while in other hand to protect life, liberty, property, human rights, and dignity of the public. Although, the role of police is very crucial but people's concept about the police is different, especially among the poor and rural people. If we ask them who is a police? There answer is 'police is a person who comes and arrests.' Even after so many years of independence of India, this image of police is continued. What is the reason behind this? Why could not police be able to remove the ill feeling about them from the mind of the people? How can community policing be helpful to bridge the gap between police and public? These are some of the issues that are going to be discussed in this paper. For this task various statutory provisions and case laws are highlighted. And also, the Reports of National Police Commission and the Law Commission of India are described wherever felt relevant. In the last part of the discussion position of community policing especially in State of Meghalaya has been highlighted. In Conclusion part some suggestions are mentioned to make the discussion fruitful. The methodology that has been adopted for the above discussion is doctrinal and based on the data available.

II. Meaning and Concept of Community Policing

Community policing is the first substantive reform in the police institution. It is a new Philosophy of policing, based on the concept that PoliceOfficers and law abiding private citizens working together in a creative ways which can help to solve the problems of community. These problems may be related to crime, or social problems. The main philosophy behind the community policing is that every citizen is a policeman without uniform and every policeman is a citizen in uniform.² The community policing can be defined as a proactive policing

²Hasmukh Patel, *Community Policing: A Case Study*'59Academy Journal, , Jan-Dec.2007 at10

approach where police and people work together to ensure safety and security of the citizens.³ However, there are many obstacles in implementing the community policing such as conservative police Culture, resistance to change the traditional and rule bound rigid organization by community policing, rigid paramilitary structure, Multiplicity of police wings etc. John Angell in 1971 used the term “democratic policing to describe the community policing. He said that citizens are directly or indirectly supporting the police by paying taxes so their voice should be given importance.⁴ Police which is an important component of the criminal justice system have duty to opt all the preventive measures to control crime and maintain law and order.. There is a perception that police is meant only to deal with criminals or victims and a common man who is not a victim of crime has no place in the priorities of police.⁵ But now time is being changed and it has become imperative that police must consider the concerns of people, their expectations from police as well as their priorities?⁶ If these things are considered and examined by the police the role of police in society will be appreciated. This realization alone would enable police to come closer to people.⁷ In community policing people have the opportunity to decide how police services are to be carried out in the community. It allows them to have greater voice in addressing their concerns and enhances the overall quality of life in their neighborhoods.⁸ It follows the principle of participatory process of development. It also recognizes the people’s participation as it is not possible for the police alone to reduce crime and disorder that are threaten of a society. Community policing offers a different connotation to the role of the police in a society and also widens the mandate of police beyond the traditional focus through a personalized approach to address community problems. Community Policing requires that all sections of the local community should be in regular

³ ibid

⁴ John E. Angell, *Toward an Alternative to the Classic Police Organisational Arrangement: A Demographic model*, in SankerSen,, ‘Community Policing: Concepts and Elements’ 59*Academy Journal*, Jan-Dec.2007 at.3

⁵ P S Bawa*Police from the Perspective of People’ 57 Academy Journal*, , 2005 at.10

⁶ ibid

⁷ ibid

⁸ Neighbourhoods here means a geographically localised [community](#) within a larger [city](#), [town](#), [suburb](#) or [rural area](#).

contact so that the police and the public can work together to identify local solutions to local problems.⁹ In this particular situation the role of police should not be only reactive but be pro-active in which community policing would predominate.

III. Community Policing and Statutory Provisions

Community policing has emerged as an approach to establish better relationships with the community in order to improve service through cooperative effort.¹⁰ Concept of Community policing is not an old model rather it is a new model in India. So there is no codified law regarding community policing. However, Section 37 of the Code of Criminal Procedure, 1973 imposes a three-fold duty on the public to assist a Magistrate or police officer.¹¹ The public is bound to assist the Magistrate /police in arresting or preventing the escape of an offender; in the prevention or suppression of a breach of the peace; or in the prevention of injury to railway, canal, telegraph or public property. Anyone who breaches the above duties shall be punished under section 187 of the Indian Penal Code, 1860¹². Similarly section 38 of Code of Criminal

⁹Hesta Groenewald & Gordon Peake, *Police reform through Community-based policing: philosophy and guidelines for implementation the security development program*, International Peace Academy, 2004, p.2, (Apr.29,2018, 9.30 PM) <https://gsdrc.org/document-library/police-reform-through-community-based-policing-philosophy-and-guidelines-for-implementation>,

¹⁰David A. Kessler, *The Effects of Community Policing on Complaints Against Officers*, 15 *Journal of Quantitative Criminology*, Sept. 1999, 333-372, (Apr.,26,2018) <https://doi.org/10.1023/A:1007580632179>,

¹¹Section 37 of the Code of Criminal Procedure provides, "Every person is bound to assist a Magistrate or police officer reasonably demanding his aid-

- (a) in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorised to arrest; or
- (b) in the prevention or suppression of a breach of the peace; or
- (c) in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

¹² Section 187 of the Indian Penal Code provides, "Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty,

Procedure, 1973 protects the person who renders aid in the execution of the warrant.¹³ And also, Section 39, imposes a duty on every person to give information of certain offences specified in clauses (i) to (xii) of sub section.(1)¹⁴ Any person who breaches the above requirements shall be liable

intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.”

¹³ Section 38 of the Code of Criminal Procedure provides, “When a warrant is directed to a person other than a police officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.”

¹⁴ Section 39 of the Code of Criminal Procedure says, “Every person, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code, (45 of 1860), namely:-

- (i) sections 121 to 126, both inclusive, and section 130 (that is to say, offences against the State specified in Chapter VI of the said Code);
- (ii) sections 143, 144, 145, 147 and 148 (that is to say, offences against the public tranquillity specified in Chapter VIII of the said Code);
- (iii) sections 161 to 165A, both inclusive (that is to say, offences relating to illegal gratification);
- (iv) sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, etc.);
- (v) sections 302, 303 and 304 (that is to say, offences affecting life);
- (va) section 364A (that is to say, offence relating to kidnapping for ransom, etc.);
- (vi) section 382 (that is to say, offence of theft after preparation made for causing death, hurt or restraint in order to the committing of the theft);
- (vii) sections 392 to 399, both inclusive, and section 402 (that is to say, offences of robbery and dacoity);

under the Section 176¹⁵ as well as section 202 of the Indian Penal Code 1860.¹⁶ Apart from the above, section 40 of the Code of Criminal procedure 1973¹⁷ imposes obligation on the village officer and residents of such village to

(viii) section 409 (that is to say, offence relating to criminal breach of trust by public servant, etc.);

(ix) sections 431 to 439, both inclusive (that is to say, offences of mischief against property);

(x) sections 449 and 450 (that is to say, offence of house-trespass);

(xi) sections 456 to 460, both inclusive (that is to say, offences of lurking house-trespass); and

(xii) sections 489A to 489E, both inclusive (that is to say, offences relating to currency notes and bank notes) shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such commission or intention.

¹⁵ Section 176 of the Code of Criminal Procedure states, "Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

¹⁶ Section 202 of the Code of Criminal Procedure provides: "Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."

¹⁷ Section 40(1) of the Code of Criminal Procedure provides, "every officer employed in connection with the affairs of a village and every person residing in a village shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police station, whichever is nearer, any information which he may possess respecting;

- i. the permanent or temporary residence of any notorious receiver or vendor of stolen property in or near such village;

intimate immediately to the Magistrate or Police office regarding commission of any offence. Not only this but the duty to inform the police or Magistrate regarding an offence against child has been made mandatory under the Prevention of Child from Sexual Offences Act(POCSO Act)2012.¹⁸ Any person, who fails to report the commission of an offence under sub-section (1) of section 19 (1) shall be punished with imprisonment of either description which

ii. the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender;

iii. the Commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under section 143, section 144, section 145, section 147 or section 148 of the Indian Penal Code 1860;

iv. the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances or the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person.”

v. the Commission of, or intention to commit, at any place out of India near such village any act which, if committed in India, would be an offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 231 to 238 (both inclusive), sections 302, 304, 382, 392 to 399 (both inclusive), 402, 435, 436, 449, 457, to 460 (both inclusive), sections 489A, 489B, 489C and 489D;

vi. any matter likely to affect the maintenance of order of the prevention of crime or the safety of person or property respecting which the District Magistrate by general or special order made with the previous sanction of the State Government, has directed him to communicate information.

¹⁸ Section 19 (1) of the POCSO Act,2012 provides; "Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,(a) the Special Juvenile Police Unit, or (b) to the local police. Section 19(2) says; "Every report given under sub-section (1) shall be- a. ascribed an entry number and recorded in writing; b. be read over to the informant;c. shall be entered in a book to be kept by the Police Unit."

may extend to six months or with fine or with both.¹⁹ However, there is a misconception that if any one gives information to the police about any offence he will be called again and again by the police as well as by court and may be held liable. Whereas section 19 (7) of the POCSO Act makes it clear that the informants shall not incur any civil or criminal liability.²⁰ It is duty of the police that through community policing this misconception should be removed from the mind of the people. The POCSO Act is the special law for the protection of children so the provision of Section 19(7) is applicable only to those informants who are giving the information regarding the offences mentioned under the POCSO Act. However, such provisions are not mentioned in general laws. If same protection is available in general Criminal law then the more number of people will come forward to help the police by giving information regarding offence which is going to be committed or that has been committed. Hence, the requirement of the day is, activating and vigorously pursuing the Community Policing System by establishing mutual trust and cordial police-public relationship.

IV. Components of Community Policing

Sir Robert Peel was the person who had sowed the seed of community policing. There was a gap between police - public relationship. For so many years the relationship of police and the public had become so separated from one another that in some communities an attitude of “us versus them” developed.²¹ The requirement of community policing is involvement of police officers with local citizens to address the root causes of crime with the assistance of the larger

¹⁹Section 21(1) provides; “Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.”

²⁰ Section 19 (7) of the POCSO Act,2012 provides; “No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1) of Section 19.

²¹Understanding Community Policing, Bureau of Justice Assistance :A Framework for Action, Monograph, 1994 <https://www.ncjrs.gov>, p.6

community.²² The community policing can provide a very positive result as it increases public support and cooperation with the police leading to a more effective means of combating the crime. There are five main features of community policing. They are ; (i)Decentralization of decision making power,(ii) citizen's participation to decide the issue, (iii)meeting of police and citizens to solve the issue, (iv) consultation with citizens and (v) consideration of their views to decide the issues and transparency in community policing.Community policing is a model of policing that is different from traditional models of policing that focuses on the crime and its prevention. In community policing the community and police work together on common community issues or problems. That is why now a days a model of policing i.e. the problem-oriented policing has emerged. . Some authors used the term “community-oriented policing” also.²³ Whatever term we use, but for successful community policing three prerequisites are essential. These are; (i)Sensitization, (b)Institutionalization and(c) Networking. People should be sensitized that police is for the help of public. They need not afraid of them. The police and public should work together like an institution there should not be any gap between them. Not only the police but public should also come forward and educate the ignorant people regarding police public relationship.

There are three facets of community policing .First is community partnerships, the second is organizational transformation and the third is problem solving.²⁴ To make the idea of community policing more effective the focus should be given on all three facets. In community partnership the community is engaged as an equal partner with police who is the main law enforcement agencies to solve the other issues. This approach emphasizes partnership between community stakeholders and the police in solving local security issues. For community policing the/ policing is required by consent, not by coercion. The police is required to be treated as part of the community, not apart from it. The police,

²² Community Policing in India:Evolution and Various Model, <https://www.gktoday.in>, visited on 14th April,2018

²³ [GeorgePatterson,CommunityPolicing,\(Apr.25,2018,8.00PM\)https://www.oxfordbibliographies.com/view/document/obo-9780195389678/obo-9780195389678-0239.xml](https://www.oxfordbibliographies.com/view/document/obo-9780195389678/obo-9780195389678-0239.xml).

²⁴CommunityPolicyDefined, (Apr,28,2018, 7.30 AM) <https://www.everbridge.com/solutions/alert-residents-and-visitors/community-policing>.

public and other agencies work together in partnership. In this process those officers should be involved who are trained in public relations. It helps to establish mutual trust between police and community stakeholders. And also, there is requirement of coordination as well as mutual support not only between the police and public but from other institutions especially specially those institutions which are dealing with crimes. Community partnership also seeks to remove the resentment apathy and opposition to the police. To make community partnerships more effective, some degree of trust and mutual respect between the police and the community is necessary that are often lacking in whole of the country. A new relationship based on mutual trust is required to be established. And also, both partners have to know their responsibilities.

As for organizational transformation is concerned, to win the confidence of general public the police have to discharge its duties impartially and help the weak and oppressed people. For successful community policing there is requirement of transformational changes in the organizational structure and operation of a police department²⁵. The police departments are organized around geographically-based assignments and allocations because it facilitate closer and more frequent contact between the officers who are dedicated to those areas and the people who live and work in them.²⁶ However, The decentralization of police department can be more effective. It gives local officers and precinct leaders more authority and discretion and also it enables them to find creative solutions to specific, individual neighbourhood problems without unreasonable restrictions.²⁷ Because of changing scenario and to increase the efficiency and effectiveness of community policing transformation is needed in management policies, organizational structure, personnel practices, and information technology systems.

²⁵Diamond & Weiss, *Advancing Community Policing Through Community Governance: A Framework Document*, US Department of Justice, 2009 cited in 'What Works in Community Policing?' *Law and Social Policy* <https://www.google.com/search?safe=strict&biw>,

²⁶Ibid.

²⁷Ibid.

The third factor i.e. problem-solving policing focuses police attention on the problems that lie behind incidents not only on the incidents.²⁸The community policing emphasizes on proactive approach rather reactive approach which is also known as problem-oriented policing” (POP).²⁹ This approach focuses on efforts to prevent crime before it happens by identify the root causes of a problem and addressing them in a proper manner. This approach encourages various agencies to proactively develop solutions regarding any problems in underlying conditions.

V. Advantages of Community Policing

Undoubtedly community policing is a very good step in policing and it can be successful by hard work of the stakeholder’s institutionalization of policing as well as changing the attitudes. To make community policing successful various community related programmes should be organised where both police and public should actively participate. However, one thing should be kept in the mind that a community related programme is not a public relation programme to sell the image of police to people.³⁰And also, it is important to keep in mind that community-based policing is not a one-off effort, but a long-term strategic approach, and as such it needs to be implemented in a sustainable and systematic way. It is a full scale effort to acquaint the police and the community with each other’s problem and to resolve that problem.³¹Community policing has many advantages. Community policing improve the environment the fear psychosis against the police that is lying in the mind of the people especially countryside people. A self-confidence develops among the people that their voice would be heard by the police. Community policing empowers the communities to redress their grievances.Through Community policing mutual

²⁸Mark Harrison Moore,*Problem-Solving and Community Policing*,15 Crime and Justice, 99, (1992) (Jan.27,2018, 10.30AM)<http://www.jstor.org>.

²⁹Goldstein, H (1987). *Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions*33*Crimeand Delinquency* cited in WhatWorks in Community Policing?’ *Law and Social Policy*, University of Carlifornia,2013 at9

³⁰A. RODELET LOUIS, *THE POLICE AND THE COMMUNITY*,22 ,Glence, Press, California, (1973)

³¹ibid

trust develops in the mind of community and police which helps to create positive attitude towards police. Apart from the above, community policing makes police easy to detect the crime with the help of public that strengthen the police community relationship. Once mutual trust develops hardly there will be conflicts between police and public of such particular area. There are certain area where police cannot investigate properly but through community policing there will be share of information between the police and community that will help in arresting the accused.

VI. Community Policing and the Judiciary

In India, today political interference in policing is a routine. This includes manipulating police recruitment, promotion and transfer of policemen. The Supreme Court of India delivered a historic judgment in *Prakash Singh and other vs Union of India*³² instructing the central and state governments to comply with a set of seven directives that have been laid down in this case. The Court in the instant case issued guidelines to stop undue interference of politicians and ensure appropriate policy directions. The Court issued the guidelines considering the gravity of the problem, the urgent need for preservation and strengthening of Rule of Law, recommendations of various Commissions and Committees on similar lines for introducing reforms in the police set-up which has not been are not implemented and total uncertainty as to when police reforms would be introduced. The Court held that there is need of establishment of a State Security Commission to ensure that the state government does not exercise unwarranted influence or pressure on the police and also, evaluate the performance of the state. The Court directed that police officers who are involved in operational duties should also have a minimum tenure of two years unless it is found necessary to remove them prematurely following disciplinary proceedings against them. To ensure speedier investigation better expertise and improved rapport with the people ensuring full coordination between two wings. Although Court has issued a broad guidelines in this case but some of the issues the concept of democratic policing and accountability towards public at large directly under its mechanism remained untapped. Court in an earlier case has also shown concern regarding police

³²(2006) 8SCC 1.

reform. In case of *VineetNarain&Ors. v. Union of India &Anr.*³³the Court noticed the urgent need for the State Governments to set up the requisite mechanism and directed the Central Government to pursue the matter of police reforms with the State Governments and ensure the setting up of a mechanism for appointment, tenure, transfer, and posting of not merely the Chief of the State Police but also all police officers of the rank of Superintendents of Police and above.

VII. Community Policing Practice in the State of Meghalaya

The State of Meghalaya is the State situated in North Eastern part of India. Being a tribal dominated State it has its customary laws due to which the police public relationship is better in comparison of other States. Although, the system of community policing is very important in the state but rarely community policing initiative has been practiced formally in this State. However, in some districts the community policing programme has been initiated. The West Khasi Hills District the Village Defence Parties with other volunteers conducting regular vice raids with the Police and assist the police in making arrest of criminals . The services of VDP have been found useful in tracking the movement of militants which have led to some successful operations against the militants in 2008.³⁴ In 2015 Bansara Eye Care Centre in collaboration with the Office of the Deputy Commissioner, Superintendent of Police and DMHO, West Jaintia Hills organized a Mega Eye Camp on the 30th of October, 2015 in the Department of Arts and Culture, District Library Jowai.³⁵ The North East Network (NEN,) Meghalaya, has been consistently working with the Meghalaya Police in sensitizing police personnel.³⁶ It has proposed to Meghalaya police to sensitize the people with NEN regarding Gender related issues and that has been

³³(1998) 1 SCC 226.

³⁴ Community policing Through Village Defence Parties , (Jan,21,2019 12.30PM).http://megpolice.gov.in/infowkh_welfare.htm.

³⁵ Awareness Programme, Health Camp(Jan14,1019, 230 PM) <http://jowaipolice.gov.in/community.html>.

³⁶collaboration-with-Meghalaya-police, (Jan.,15,2019, 9.30.PM)<https://www.northeastnetwork.org>.

accepted by the Meghalaya police.³⁷ In furtherance of that a community awareness programme was organized in *Moodap, Nartiang*, by NEN on the 23rd of June, 2017, in collaboration with the West Jaintia Hills District Police on “Crime Against Women and Girls”. About 93 members in which 48 were male and 45 were female participated in this programme. These participants were from various fields which such as police personnel, members of the village council and community members which included – church leaders, school teachers, students and women’s group.³⁸ And also, on 4th July, 2017 a community awareness programme was organised in Raliang village by West Jaintia Hills District Police in collaboration with, NEN on “Crime against Women and Girls”. The total of 24 participants discussed on domestic violence, teenage pregnancy and gaps between the police and the community, legal remedies and existing services to deal with different forms of violence.³⁹

VIII. Conclusion

Policing is an essential public service and it is the duty of every state to provide this service to its people. A Good policing protects person, property and rights of everyone. An effective policing works in an impartial and efficient manner for the benefit of all without any discrimination. Effective and efficient enforcement of law is the basic sign of good governance. Police, being the primary law enforcement agency, is expected to be more dynamic and responsive to the changing nature of the society. The liberalization of policy has drastically changed the nature of Indian society. The administrative approach has been changed from regulatory measure to welfare measures, but somehow the approach of policing remained the same. However, the advent of globalization has laid down obligations on the police system to perform their role in a very different way. Being law enforcement agency they must also serve as advisors, facilitators, supporters and leaders of new community-based initiatives. They should consider themselves as part of the community rather than separate from the community. In its ideal form, community policing is a grassroots form of participation, rather than a representative top-down approach

³⁷ibid

³⁸ibid

³⁹ibid

to addressing contemporary community life. The police are to bring out real-life problems of communities and provide needed services to their communities.⁴⁰ Moreover, while introducing community policing programme due care should be exercised. The programme should be designed in such a way, as while implementing it the needs, aspirations and expectations of the rural and urban community should be fulfilled. To avoid misunderstanding between police and citizens, frequent interaction between the police and community leaders should be initiated. So that they(people) are able to understand about the contents of the programs. One more important point for suggestions is that the Police should try to understand and appreciate the fears and problems of the citizens. Emphasis should be given on service oriented work of the police to break apathy, and the resentment of the public towards the police. It will help police in mobilizing the support and participation of the community in police work. Apart from the above, community policing programme should not be organized only just for formalities but to implement these programmes also. There should be politicization of police and whole organization should think over it.

⁴⁰ Victor E. Kappeler, *What is Community Policing?* Police studies Online,EKU(May,5,2018,1.45 PM) <http://plsonline.eku.edu>.

Approach and Contribution of Justice Hidayatullah to the Freedom of Speech and Expression

Harish Chandra Pandey¹

Abstract

Justice Hidayatullah spoke with rare courage on delicate issues including restrictions of freedom of speech and expression in the interest of democracy, morality and contempt of court. In his opinions he consistently insisted upon the fullest protection being extended to individual rights. He delved deep into the foundation of the law and analyzed the underlying principles with clarity and precision. By his judgments he made priceless contribution to legal literature especially in the area of freedom of speech and expression.

Keywords: Freedom of Speech and Expression, Democracy, Administration of justice, Civil Liberty.

I. Introduction

Freedom of speech and expression lay at the foundation of all democratic organizations. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance, the culture of open dialogue is generally of great societal importance.

In the field of freedom of speech and expression, the opinions of Mr. Hidayatullah, J., are characterized by, in addition to his usual literary flourish, a deep commitment towards western liberal thought, and the liberty of speech there under.

II. Freedom of Speech and Judicial Administration

Naresh Sridhar Mirajkar v. State of Maharashtra² afforded him the opportunity to protest against extension of exceptions to the guarantee of free speech. In the

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² AIR 1967 SC 1.

instant case the constitutionality of the order passed by a high court judge not to report the evidence of a person in newspaper was challenged.³ The petitioner, who was a reporter of the 'Blitz' contended that prior to the order of Tarkunde, J., he was reporting the proceedings in the suit in the column of 'Blitz' and but for the order he would have continued doing so. The order prohibited him from publishing the evidence of the witness thereby violating freedom of press which according to the court's decision⁴ was part of the freedom of speech and expression guaranteed by Article 19(1)g.

The petition was heard by a bench of nine judges and was dismissed by majority judgment of the Court with Hidayatullah's J., dissent to it.

The first and the most important issue before the court was whether the judicial order could claim immunity from being challenged under Article 32. The implications of this question extend beyond freedom of speech as the principle laid down by the court would be applicable to other fundamental rights as well. Gajendragadkar, C.J., as well as Sarkar, J. constituting the majority, after explaining the true nature and character of judicial process and of judicial decisions added a pragmatic approach and held that the Supreme Court would

³The matter arose out of a sensational libel case, *K.M.D. Thakersayv. R.K. Karanjia*, in the Bombay High Court in which hearings had been held in public. One goda, who had been examined earlier was recalled for further examination, when he applied to Tarkunde, J., that his evidence should not be allowed to be reported because reports of his evidence on the earlier occasions had injured him in his business. Although the trial continued to be in public, the judge directed the Goda's further evidence should not be reported. The next day counsel for defendant contended that the fundamental principle in administration of justice was that it must be open to public and exception could be made only in case such as where a child was victim of sexual offence or in a case intimate relations between the spouse were likely to come out or in proceedings in regard to official secrecy. No witness could claim protection from publicity on the ground that if the evidence was published it might adversely affect his business. The counsel further submitted the order ought not to have been passed, and in any event the judge should pass a written order. The objection was rejected by the learned judge and afterwards by a Division Bench of the High Court on the ground that a judicial order was not amendable to a writ under Article 226.

⁴*Sakal Newspaper v. Union of India*, AIR 1962 SC 303.

not issue writs to the High Courts. Since High Courts are courts of concurrent jurisdiction. In adopting this view, the Chief Justice drew support from the established practice in England.

In this dissenting judgment, Hidayatullah, J., strongly resisted the claim of courts and judges to immunity from the writ jurisdiction of the Supreme Court. The learned judge observed that although Article 12 did not expressly mention the court, they were not expressly excluded either⁵ He considered that the word 'state must obviously include courts because otherwise courts would be able to make rules which might take away or abridge fundamental rights. This apprehension, however, was well founded as the court had struck down such rules in the past.⁶ In his considered opinion, a judicial decision based on such a rule was not any different and it could not claim any exception from judicial scrutiny as to its consistency with fundamental rights.⁷ Referring to the content of some of the fundamental rights, he pointed out that Articles 20 and 22(1) were addressed to the courts and judges as much as to other organs of government⁸ and Article 32 made no exception in favour of the High Courts.⁹

Hidayatullah, J., explained away the rule of English Law on the ground that the Queen Herself was supposed to be present in the Court. As there was no real correspondence between the courts in the two countries, the question as to whether the High Courts were excluded or included within the jurisdiction of the Supreme Court under Article 32 had to be decided with reference to the provision of the Indian Constitution and not on the basis of English Law. This is one of the rare departures from English Law on the part of Hidayatullah, J. This approach is unexceptionable as the Indian Law is not hide bound to the English practice.

Examining Articles 32 and 226 the learned judge came to the conclusion that "there is no sharing of powers to issue the prerogative writs" between the Supreme Court and the High Courts. The whole of the power is still with this Courtand only analogous powers for local enforcement are given to the

⁵Naresh Sridhar Mirajkarv. State of Maharashtra ,*Supra*, note 1 at 28.

⁶Pre Chand v. Excise Commissioner, AIR 1963 SC 996.

⁷*Supra*, note 1 at 28.

⁸*Id.*

⁹*Id.*, at 30.

High Courts.’ The conclusion of His Lordship, therefore, was that the subordination of the High Courts to the Supreme Court is not only evident but is logical.¹⁰ Mr. Seervai has supported the view of Hidayatullah, J., while stating its effect.¹¹ The views of Hidayatullah, J., are sound indeed in theory but the practical implications of subjecting High Courts to the writ jurisdiction of the Supreme Court have to be fully considered, particularly when the Supreme Court has wide appellate jurisdiction to correct errors on the part of the High Courts.

The next question before the court was whether the order of Tarkunde, J., excluding publicity in respect of the testimony given by Goda violated the fundamental rights to freedom of press in so far as that order prevented the reporter of Blitz’ from reporting the case.

Gajendragadkar, C.J. (for the majority) while conceding the importance of an open trial said that an open trial was a means, not an end, the end being the fair administration of justice. And hence where a conflict arose between the needs of fair administration of justice and the desirability of a public trial, the latter must be regulated or controlled by the former”.¹² The learned Chief Justice further

¹⁰*Id*, at 33.

¹¹The supreme Court has been given the right to issue the writs for the protection of fundamental rights, and there is no express exclusion to the exercise of that power, it must follow therefore that where there is a violation of fundamental rights by a court judicial tribunal a writ must prima facie lie. This conclusion is strengthened by the provision of Article 226. If the power to issue writs were conferred on the Supreme Court alone it would be difficult for the Supreme Court to protect single handed the people from the violation of their fundamental rights and consequently, power to issue writs was given to all the High Courts in India. But Article 226(2) contained an express provision that nothing contained in Article 226 (1) should derogate from the power of the S.C. to issue writs, which must mean that the grant of this power to High Court did not in any way prevent the S.C. from issuing writs. This express exclusion supported that conclusion that the mere fact that the High Courts had power to issue writs of certiorari was not to affect the power of the S.C. to issue such writs for the purpose of enforcing fundamental rights. H.M. Seervai, Constitutional Law of India, p. 749.

¹²*Supra*, note 1 at 9.

observed that the encroachment on the fundamental rights of the press was but indirect and only an incidental consequence of the impugned judicial order.¹³

Hidayatullah, J., however, did not agree with this view and made the following observation:

“attachment to an open trial is not a rule of practice with the English, but is an article of their great charter, and judges view with great concern any departure from it. Whenever a judge departed from it, he defined that ‘field of exceptions’ and stated the “overriding principles” on which his decision was based. No judge passes an order which is not recorded in the minutes and a question of this kind is not dealt with by the judge as within his mere discretion as to what he considers expedient or convenient.”¹⁴

He further observed:

“as the institution was to serve goda’s business from harm, it is reasonable to think that the prohibition was perpetual and that is how the matter appears to have been understood.....because no report of his deposition has since appeared in any newspaper.”¹⁵

Referring to the fact that public hearing of cases before the courts is as fundamental as our democracy and system of justice as to any other country, Hidayatullah, J. held the order of Tarkunde, J., imposing suppression of the reporting of deposition of goda was illegal and without jurisdiction.

As to the claim that no action of a judge can ever be questioned on the ground of breach of fundamental rights, Hidayatullah, J., said:

“The judges no doubt function, most of the time to decide controversies between the parties, in which the judge does not figure, but occasion may arise collaterally where the matter may be between the judge and the fundamental rights of any person by reason of the judge’s action. It is true that judges, as the upholders of the Constitution and laws, are

¹³ *Id.*, at 12.

¹⁴ *Id.*, at 25.

¹⁵ *Id.*, at 24-25.

least likely to err, but the possibility of their action contrary to the Constitution cannot be completely excluded.”¹⁶

Accordingly, Hidayatullah, J., came in full support of the contention of the petitioner when he observed that “a suppression of the publication of the report of a case conducted in open court, for a reason which has no merit, ex facie offends that freedom”.¹⁷ According to the learned judge, “denial of the rights to publish reports of a public trial is also to deny the freedom of press which is included in the freedom of speech and expression.”¹⁸

The reasoning adopted by Hidayatullah, J., and the principles laid down by him are in keeping with his deep concern to uphold the fundamental rights. At the same time when contrasted with the pragmatic approach of the majority’s judgment it illustrates how a mere concern with abstract rights can lead to principles which may appear on the face attractive but lead to impractical situations.

III. Freedom of Speech and Political Dissent

Blackstone has rightly pointed out that “every free man has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy ‘the freedom of press’. The right to freedom of speech and expression is one of the most valuable rights guaranteed to a citizen which carries with it the right to propagate one’s views, which may include a fair criticism of the system of judicial administration. It is not for any agency of the state to give its judgment on the ideology of any political party or its leader. It must also be recognized that free political discussion is essential for the proper functioning of democratic government to change political and social conditions and to advance human knowledge.

The usual concern for fundamental rights evident in the opinions of Hidayatullah, J., is unfortunately missing in his judgment in *E.M.S. Namboodiripad v. T.N. Nambiar*.¹⁹ This case, arising out of contempt of court proceeding against an ex. Chief Minister and a prominent communist leader

¹⁶*Id.*, at 29.

¹⁷*Id.*

¹⁸*Id.*

¹⁹AIR 1970 SC 2015.

raised certain basic questions. Does an alleged misinterpretation of the writings of a political thinker and criticism of the system of judiciary in general based on such misinterpretation amount to a contempt of courts? Does it make any difference if in fact the political thinkers did not hold the view which is attributed to them?

The power of the courts of punish for contempt is an essential judicial weapon to prevent interference with the administration of justice. However, it may at times conflict with freedom of speech. This conflict has to be resolved in such a way as to protect administration of justice at a minimum sacrifice of freedom of speech. But in the instant case, Hidayatullah, C.J., has missed the opportunity of striking a balance between the competing demands of freedom of speech and fair administration of justice by adopting a rather uncharitable view towards the criticism made by Namboodiripad.

In this case, Namboodiripad was convicted for contempt of court on the basis of the following utterances which he had made at a press conference:

“Marx and Engels considered the judiciary as an instrument of oppression..... judges are guided and dominated by class hatred, class interest and class prejudices and where the evidence is balanced between a well-dressed pot belied rich man and a poor ill-dressed and illiterate person the judge instinctively favour the former..... judiciary is part of a class rule of the ruling class. And there are limits to the sanctity of the judiciary. The judiciary is weighed against workers-peasants and other section of working classes and the law and the system of judiciary essentially serve the exploiting class.”

Namboodiripad made it clear that he was in no way questioning the integrity of an individual judge or casting reflection on any judgment. He further added that it was not an aspersion on the integrity of judges when he said that they were dominated by class hatred.

When Namboodiripad appealed against the decision of the high court to the Supreme Court, the court speaking through Hidayatullah, C.J., upheld the decision against him. The arguments in his defence were that:

- (1) his observation did not more than give expression to the marxist philosophy and that was contained in the programme of his party i.e. the C.P.J. (M) Programme adopted in November 1964.
- (2) they did not contain criticism of any particular judge or his judgment or conduct.
- (3) they did not contain criticism of any particular judge or his judgment or conduct.
- (4) he did so in pursuance of his duty to educate public opinion.
- (5) he had always enforced the judgment of the courts and he never shown disrespect to the judiciary.
- (6) the law of contempt of court ought to be interpreted so as to cause no encroachment upon the freedom of speech guaranteed by Article 19(1) (a) of the Constitution.
- (7) the alleged harm done to the courts by his utterances was not apparent.

Referring to the sixth argument first, i.e. the law of contempt should be so applied that the freedom of speech and expression are not whittled down, the learned Chief Justice, accepting the contention observed:

“The spirit underlying Article 19(1)(a) must have due place but we cannot overlook the provisions of the second clause of the Article. While it is intended that there should be freedom of speech and expression, it is also intended that in exercise of that right, contempt of court should not be committed.”²⁰

He further observed:

“freedom of speech and expression will always prevail except where contempt is manifest, mischievous or substantial.”²¹

Referring to the other arguments that observations about the judiciary were based on the teachings of Marx, Engels and other philosopher, such thoughts also formed part of the Communist (Marxist) Party’s Programme which was approved in 1964 and as such what Namboodiripad did at (he press conference were merely to expose these teachings, the learned Chief Justice made an

²⁰*Id.*, at 2019.

²¹*Id.*

elaborate survey of writings of thinkers like Marx, Engels and Lenin. His Lordship conceded that they (judges) did view the : state “an instrument of exploitation of the oppressed classes.” They thought in terms of ultimate withering away the state. It wits (he dictatorship of the proletariat established by the communists which misunderstood Marx and thought that the proletariat need the state. According to the Chief Justice “in all writings there is no direct attack on judiciary”.²² In fact “Engels regarded the court as one of the means adopted by the law for effectuating itself.” He, however, accepted that Engels considered the courts “as an evil adjunct of the administration of class legislation”.²³

After a very painstaking survey of the writings of Marx and Engels, Hidayatullah, C.J., took further pains to controvert the interpretation which Mr. Namboodiripad had put upon these writings. His lordship over doubted whether Mr. Namboodiripad had read Marx and Engels and whether if he had read them he had fully appreciated the literature. The learned Chief Justice observed:

“We have summarized into a very small compass, many thousands of words in which this doctrine has been debated from Plekhanov to Lenin through the thoughts of Kants, Kerensky, Lesalle, Belinsky and others who attempted a middle line between revisionism of Berstein and the Bolsheire views of Lenin. We have done so because Mr. V.K. Krishna Menon sneered that many people learn about communism through Middleton Murry”.²⁴

Hidayatullah, C.J., thus, arrived at the conclusion that “in all these writings there is not that mention of judges which the appellant had made”.²⁵ Front this his Lordship observed that “either he (Namboodiripad) does not know or has deliberately distorted the writings of the Marx, Engels, and Lenin for this own purpose.”²⁶

It to be noted that it was quite unnecessary for the learned Chief Justice, to make the excursion into the writings, of Marx, Engels and other communist writers, which has been aptly remarked by one writer.

²²*Id.*, at 2022.

²³*Id.*, at 2023.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

“An interpretation of the Marx or Engels work may form a good subject for a doctoral dissertation in politics or philosophy but is not appropriate in a Supreme Court judgment. Apart from the fact that it side tracks the main legal issues it unnecessarily involve the court in a political controversy”.²⁷

It we suppose that Marx and Engels really said that the judiciary was dominated by class prejudices, class hatred and all other communist clinches, would that have saved Namboodiripad from being found guilty of contempt? If there is contempt, committed in fact, one cannot get away, it is submitted, by quoting scriptures in support. It is further noted that the larger question whether a general criticism of the judiciary not directed against any particular court or class of courts or any particular judge would amount to contempt remains unanswered.

Hidayatullah, C.J., of course, observed:

Whether he (Mr. Namboodiripad) misunderstood the teachings of Marx and Engels or deliberately distorted them is not to much purpose. The likely effect of his words must be seen and they have clearly the effect of lowering the prestige of the judges and courts in the eyes of the people.²⁸

He further observed:

“It is clear that it is an attack upon judges which is calculated to raise in the minds of the people a general dissatisfaction.”²⁹

It is submitted that the effect of these observation has been considerably weakened by the finding that the teachings of Marx and Engels did not warrant the criticism made by Mr. Namboodiripad.

It is to be noted that Namboodiripad’s observations, if seen in the context of circumstances, they were made in, contained a criticism of the judicial system in general, and were expressed at a press conference before press correspondents so that were not likely to cause, even distantly, any interference with the

²⁷S.P. Sathe, *Economic and Political Weekly*, V No. 42, October, 17, 1970, at 1741.

²⁸*Supra*, note 19 at 2024.

²⁹*Id.*

administration of justice. They were purely of academic nature so far as their effect on the listeners was concerned. The issue is not whether what Namboodiripad said was desirable or not. The question for court's determination should have been whether in the circumstances, freedom of speech needed to be restricted or not. If one has a freedom to propogate views of Marx, does not one have the freedom to give his own interpretation to these views. A dangerous implication of Hidayatulla's, C.J., opinions that one can only propogate the 'approved' version of a political thought. What distinguishes a free society from a totalitarian one is that there is freedom of speech in the former. This liberty provides guarantee to the people to say what they have to say concerning the governance of the country, including administration of justice. To suppress them as contempt of court because their views intend to lower the prestige of the judges and courts would destroy the very Inundation of the self government.

If in the light of the decisions,³⁰ the law in relation to the defamation referred to in Article 19(2) should not be allowed to paralyze a citizen's right to free discussion of public conduct of officers or public organs, it is logical that the law of contempt of court should not prevent a citizen (torn expressing his views as to defects in the system of administration of justice.

It is submitted that while indirectly defining the scope of the power of the court in the context of the requirement of "reasonableness" under Article 19(2) of the Constitution, the dicta of Hidayatullah, C.J., that freedom of speech will prevail in all cases except where a contempt of court is 'manifest' or 'substantial' is a definite improvement over the past legal position held by courts in India. Unfortunately this wholesome principle laid down by the judge was not followed in its spirit while deciding the actual case.

IV. Freedom of Speech and Public Morality

³⁰New York Times v. Sullivan, 376 U.S. 254; Garrison v. Louisiana, 379 U.S. 64; Curtis Publishing Company v. Butts, 388 U.S. 130.

Determination of the obscenity of an object is bound to be looked through a Constitutionally eye³¹ which posed for Hidayatullah, J., in *Ranjit Udeshi v. State of Maharashtra*³² a ticklish problem because he had to strike a balance not only between the freedom of individual in free speech and the power of state to impose reasonable restrictions, but also a balance between social interest in general morals³³ and social interest in cultural and political progress.³⁴ Further, obscenity and literature appear to be going hand-in-hand and may a times it becomes difficult to know whether to draw the line. That is why, Hidayatullah, J., in evolving a test took into consideration the prevailing conditions of the Indian Society, the need for growth of art and literature as also the individual freedom of speech and expression.

The facts of the instant case were that the appellant a Bombay Bookseller, was prosecuted under section 292 of the I.P.C. for selling and for keeping for sale the well-known book “The Lady Chatterley’s Lover (unexpurgated edition) written by D.H. Lawrence. The Magistrate held that the book was obscene and sentenced the appellant. He filed a revision in the High Court of Bombay. Having failed there, he approached the Supreme Court of India by special leave. The appellant in his defence challenged the validity of Section 292 I.P.C. and urged the court to reject the definition of obscenity as laid down in the Hicklin³⁵ case.

Hidayatullah, J., speaking for a unanimous court rejected the plea of appellant and upheld his conviction. Referring to the validity of Section 292 I.P.C., his lordship held that Section 292 I.P.C. was not violative of Article 19(1)(a) as it

³¹INDIA CONST, art 19(1)(a) guarantees freedom of speech and expression which is made subject to reasonable restriction in the interests of, among other things, the public decency and morality. Accordingly, writings of other things if absence may be suppressed and punished because such action would promote public morality and decency se such action would promote public morality and decency.

³²AIR 1965 SC 881.

³³Section 292, the IPC recognizes the social interest in general morals by penalizing the sale etc. of obscene literature and objects.

³⁴*Supra*, note 30.

³⁵Queen v. Hicklin, 1864, LR 3 QB 360.

was protected under clause 2 of the same article which permits imposition of restriction on the exercise of the right in the interest of decency or morality.³⁶

In deciding when “Can an object be said to be obscene?”, Hidayatullah, J., approved the test of obscenity as laid down by Cockburn, C.J., in Hicklin case in 1868. The test as enunciated was: “Whether the tendency of the matters charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall” and “would suggest.....thoughts of a most impure and libidinous character”.³⁷

In addition to the above test Hidayatullah, J., also laid down a test of obscenity which runs as follows:

“In our opinion the test to adopt in our country (regard being had to community mores) is that obscenity without a prepondering social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature or having that tendency.”³⁸

Applying the above principle, his lordship held the novel Lady Chatterley’s Lover as obscene. The suggestion that the overall effect of the book should be seen and not the stray passages or words here and there which may be offensive to particularly sensitive persons, did not impress him. He observed:

“an overall effect of the obscene matter in the setting to the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall.”³⁹

His Lordship further added:

“the novel in question in treating with the sex the impugned portions viewed separately and also in the setting of the whole book passed the

³⁶ *Supra*, note 31 at 885.

³⁷ *Supra*, note 34 at 371.

³⁸ *Supra*, note 31 at 888.

³⁹ *Id.*

permissible limits judged from our community standards and as there was no social gain to the public which could be said to preponderate, the book must be held to satisfy the test of obscenity.”⁴⁰

Although it has been rejected in the country of its origin, Hidayatullah’s J., refusal to discharge the Hicklin rule, has been criticized by many writers⁴¹ on various grounds.⁴² The Hicklin test has no doubt been rejected in U.S.A.⁴³ and England and substituted by statutory definitions in England⁴⁴ and Canada.⁴⁵ This cannot be decisive for India for the simple reason that the socio-economic and cultural and other conditions are quite different in the Indian Society. In an affluent Society highly educated and industrialized, where science and technology have become part and parcel of man’s daily life, the attitude towards sex relations and consequently towards the problem of obscenity naturally differs from countries in which these things are conspicuous by their absence. This accounts for the fact that in U.K. and U.S.A., “Lady Chatterley’s Lover” has been held not to be obscene whereas in India and Japan it has been held to be otherwise.

On a closer scrutiny of the standard, Hidayatullah, J., set for himself to determine the obscenity of the book, it appears that the Hicklin rule is on its way

⁴⁰*Id.*, at 891.

⁴¹The Supreme Court has erred in not rejecting the Hicklin rule which has become obsolete. It also lays down a vague arid arbitrary standard for judging obscenity and has a tendency to curtail the guaranteed right to freedom of speech. V.N. Shukla, ‘The Constitution of India’ (1972) p. 69.

⁴²By undermining the importance of expert opinion and by leaving the dividing line between the pureart and obscenity to be drawn by the courts, the S.C. may have introduced an element of uncertainty which may not have as happy an impact on the literary development in the country as the court intended. R.K. Misra, ‘Judicial Process’, A.S.I.L. (1965) XII.

⁴³*Walker v. Popenoe*, 149 Feb 2nd. 511, *U.S. v. Denott* 39 Feb 3rd564, *American Civil Liberties v. Chicago* 121 WE 2nd585, *U.S. v. Book called Lilysses* 72 Feb. 2nd705, *Ratt v. U.S.* 354 US 476.

⁴⁴Section (1) of the Obscene Publication Act, 1959.

⁴⁵Section 150(8) of the Criminal Code.

out.⁴⁶The court has defined obscenity' as "treating with sex in a manner appealing to the carnal side of human nature or having that tendency". Similarly he has tried to indicate when it will have constitutional protection by putting forward the theory of "prepondering social purpose or profit". Therefore, the approach in any given case would be to find out,

- First : Whether there is obscenity,
- Second : If there is obscenity whether side by side there is social purpose or profit and
- Third : If there is such social purpose or profit, is it of prepondering nature.

It is submitted that the test correctly tries to balance the interests of the individuals in freedom of speech and expression against the interest of the society in preserving public morals. It is further submitted that the test evolved by Hidayatullah, J., is more logical than the Hicklin test. For example, in U.K. one may come across a case in which the court finds that there is obscenity but the person concerned would be acquitted if proper evidence is not forthcoming. In India, if the court finds that there is obscenity and there is no social purpose to counterbalance it, whether or not it created depravity of mind in another will have no value, and the person concern would be convicted.

For another reason, the test evolved by Hidayatullah, J., may be said to be more natural and precise. It is always a more difficult task for a judge to determine the subjectivity of minds of somebody else than to give the subjectivity of minds of his own-self. The test evolved by Hidayatullah, J. requires the judge to come to a decision subjectively, whereas Hicklin test calls upon the judge to decide the subjectivity of another person's mind which is certainly a more difficult task.

The greatest merit of the test is its flexibility. Hidayatullah, J., has also taken care not to make the test a rigid one by pointing out that each case will have to be considered on its own and no inference has to be drawn before-hand. This flexibility of the test will enable us to adopt it in the changing times and needs of society in future.

⁴⁶R.K. Misra, Judicial Process, A.S.I.L. 1965 XI.

Thus, on the whole test evolved by Hidayatullah, J., is a positive step in the direction of the substitution of along established judicial test and is further adequate and in keeping with our fundamental laws as well as our moral and ethical standards.

Hidayatullah, J., seems to have been influenced by certain pernicious trends in contemporary Indian literature. A vast amount of literature in shape of novels, fairytales, murder stories and other fictions are being produced at an alarming rate and the books mostly discuss matters concerning sex relations in a way which is not in keeping with good taste. Through these books appeal is made to the baser instincts in human nature and the cumulative effect of this form of the literature on the society cannot be anything but disastrous. The danger which this kind of literature poses to the moral foundations of the society has become the matter of anxiety from being “perverted” under the influence of literary determined limits of decency. The learned judge has observed:

“Emulation by our writers of an obscene book under the aegis of this court’s determination is likely to pervert the entire literature because obscenity pays and true art finds little popular support. Only an obscurant will deny the need for such a caution.”⁴⁷

The opinion of the learned judge is characterized by his ambivalent attitude towards English principle and his awareness of the problems of the Indian Society and the need to encourage development of healthy trends in the literature. Last, but not the least, his opinion is further characterized by a certain literary quality which may be said to be his specialty. His exposition of what constituted obscenity in literary works can itself be said to be a piece of literature.

The greatest contribution of his decision in ‘the instant case, in the field of constitutional law is that although this case involved the obscenity of a book under Section 292 IPC, the principles evolved there from “apply mutatis mutandis to film and other areas besides obscenity.”⁴⁸ The Khosla Committee also adopted them and recommended for the guidance of the film censors.

⁴⁷*Supra*, note 31 at 889.

⁴⁸K.A. Abbas v. Union of India, AIR 1971 SC 481.

Hidayatullah, C.J., was again called upon to define the limits of free expression in a slightly different context in *K.A. Abbas v. Union of India*,⁴⁹ where constitutionality of the prevailing scheme of film censorship was seriously questioned. In this case, K.A. Abbas produced a documentary film entitled “Tale of Four Cities” depicting the contrast between the rich and the poor. There were some scenes of the red districts of Bombay showing the life of the prostitutes and their exploitation by pimps. The film was given “U” certificate provided certain cuts were made in the film containing the scenes in the red light districts. Mr. Abbas challenged this order on the grounds that,

1. the pre-censorship exercised by the film censors violated the fundamental rights to freedom of speech and expression,
2. even if pre-censorship was legitimate restraint, it must be exercised on the basis of definite principles which preclude arbitrary action,
3. there must be a fixed reasonable time limit for the decision of the film censors, and
4. final appeal in the process should lie to the court of law and not to the central government.

Hidayatullah, C.J., who delivered the judgment dispensed with the latter two contentions because the Solicitor General conceded their validity and assured the court that the government would take step to effectuate these policies at the earliest.

After delineating the history, organization, procedure and substantive rules of film censorship in India, the Chief Justice went on to consider the central issue of whether pre-censorship of films was a valid constitutional restraint on freedom of speech and expression. To this end, his lordship established two premises which foreordained the court's conclusion that pre-censorship of film is constitutionally permissible.

First : He pointed out that such prior restraints are not qualitatively different from another forms of censorship, the only distinction being the stage at which the state imposes its regulations between the individual and his freedom.

⁴⁹*Supra*, note 47.

Secondly: He held that motion pictures, because of their unique ability to portray realism and arouse the senses, must be treated on a different footing from other forms of art and expressions.

Thus, his lordship observed:

“...the art of cameraman with trick photography, vista vision and three dimensional representation.....has made the cinema picture more true to life than even the theatre or..... any other form of representative art. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect practically on children and adolescent is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in picture and try to emulate or imitate what they have seen..... It is for this reason that motion pictures must be regarded differently from other forms of speech and expression.”⁵⁰

On the basis of these reasons, the learned Chief Justice concluded that classification of films, prior to their exhibition into “U” and “A” categories is not an unreasonable restriction within the dictates of the Constitution. It is to be noticed that by assuming that precensorship is merely an aspect of censorship in general and films are subject to different and by implication more rigorous scrutiny than other medium of expression, the court narrowed the issues to one more readily resolvable: whether films require any censorship at all.⁵¹

In this regard, Hidayatullah, C.J., gave a cursory review of the major U.S. Supreme Court decisions on freedom of speech and expression and film censorship and a brief summary of recent British obscenity law. He concluded that minority opinion expounded by Black and Douglas, J.J., i.e., that film censorship of any nature is constitutionally impermissible is in applicable to Indian experience because unlike the first amendment of U.S. Constitution which guarantees the right of freedom of speech and expression in absolute terms, Article 19(2) of the Indian Constitution, clearly envisages legitimate

⁵⁰*Id.*, at 489.

⁵¹B.M. Boyd : Film Censorship in India. A reasonable restriction on freedom of speech and expression, J.I.L.I. 1972 (523).

restrictions on this right.⁵² Such restriction in the interest of decency and morality are justified, he adds in a philosophical note, because in general, the “social interest of the people override individual freedom”.⁵³

He further added:

“Whether we regard the state as the *parenpatriciae* or as guardian and promoter of general welfare, we have to concede that these restrains on the liberty may be justified by their absolute necessity and clear purpose..... The larger interest of the community require the formulation of policies and regulations to combat at dishonesty, corruption, gambling, vice another things of immoral tendency and things which affect the security of the state and the preservation of public order and tranquility.”⁵⁴

The learned Chief Justice, then, proceeded to consider the petitioner’s next argument that the substantive censorship rules are unconstitutional for being vague. Holding that ‘void for vagueness’ doctrine is wholly inapplicable to the litigation involving an enforcement of one of the fundamental rights,⁵⁵Hidayatullah, C.J., followed an intermediate approach, noting:

⁵²*Supra*, note 47 at 494. Douglas, J., himself recognized this position where he stated in *Kingsley Intt Picture Corp. v.Regents* that if we had a provision in our constitution for ‘reasonable’ regulation of the Press, such as India has included in her, there would be room for argument that censorship in the interest of morality would be punished, (1959) 360 SC, 648 (concurring opinion). In the K.A. Abbas case, the Supreme Court however seems to have correctly observed that despite its absolute working of the first amendment, the U.S., Constitution has long attempted to read the words ‘reasonable restriction’ or something very much like that into the Amendment.

⁵³*Supra*, note 47 at 495.

⁵⁴*Id.*

⁵⁵In doing so the court appears to have overruled *Amritsar v. State of Punjab*, (AIR, 1969 SC 1100) which held that while a law may be declared invalid by the courts on the ground that it was ultravires the legislatures or infringe upon a fundamental right, it may not be so invalidated on the ground that it is vague or offends some motion of due process. The *Amritsar* case however, may have been an exceptional case outside the mainstream of Indian jurisprudential thought because it is clear that legislation had

“The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction that construction which accords best with the intention of the legislature is to be preferred.”⁵⁶

He further added:

“Where however the law admits of no such construction and persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the constitution..... This is not the application of the doctrine of due process, the invalidity arises from the probability of the misuse of law to the detriment of individual.”⁵⁷

Based on this standard, Hidayatullah, C.J., declared the general principles of the censorship directions, being merely a restatement of Article 19(2) of the Constitution, could not be said to be impermissibly vague. The application of the general principle, however, presented more of a problem. In adjudging whether these directions were unconstitutionally vague, the court formulated one ancillary test to the “boundless sea of uncertainty” standard. The words used are “within the common understanding of the average man.”⁵⁸ In applying the test Hidayatullah, C.J., said “if the average man can understand the meaning of ‘rape’ set down in the Penal code, he can doubtless comprehend the meaning of expression such as “sedition”, “immoral traffic” in woman, “soliciting prostitution or procuration” “indicate sexual situation”, “suggestive of immorality”, seences, “traffic and use of drugs”, “class hatred”, and “blackmail associated with immorality”. He further said, “If the average man can understand such term, then a fortiori the members of the censorship board would comprehend the nuances of these expressions.” Hence it could be said,

been declared void for vagueness previously. See e.g. *State of M.P. v. Baldeo pd.* AIR 1961 SC. 48.

⁵⁶*Supra*, note 47 at 496.

⁵⁷*Id.*

⁵⁸*Id.* at 497.

Hidayatullah, C.J., held that such rules or directions are not unconstitutionally void on account of vagueness.

Despite the above assurances, Hidayatullah, C.J., declined to endow the code with its complete imprimatur of approval. Rather as the learned Chief Justice noted:

What appears to us to be the real flaw in the scheme of the directions is a total absence of any direction which would tend to preserve art and promote it. The artistic appeal or presentation of an episode robs it of its vulgarity and harm and this appears to be completely forgotten. Artistic and inartistic presentations are treated alike and also what may be socially good and useful and what may not.⁵⁹

These observations show the concern of the learned Chief Justice for the preservation of an artist's freedom and creativity. It is submitted that though they may sound extraneous to the legal issues involved, they doubtless lay down valid guidelines for further censorial policy.

Conclusion

While considering a volatic constitutional issue by way of first impression, opinion of Justice Hidayatullah, provides that degree of penetration and lucid analysis which is essential for the development of sound constitutional doctrine in the area of civil liberty and fundamental rights. His opinions taken together constitute a tract for our times. His powerful and fertile opinions afford to contemporary Indians 'a guide to the perplexed' in the human battle ground between the liberty and authority.

⁵⁹ *Id.*

Participatory Governance through Women's Representation in Gujarat: Assessing the Role and Relevance of Government Initiatives since 2000

Dr. Ahmed Raza¹

Abstract

The underrepresentation of women in the decision making process always amounts to be sensitive and patriarchal issues in a society as it totally violates the notion of equality. After 74 years of independence in India, the issue of poor representation of women in political system remained same or inadequate as compared to their population ratio, although, efforts in the form of reservation, awareness and laws are continued. The paper has chosen Gujarat as a case study in order to explore the rationales behind decreasing trend towards women representation in Gujarat state assembly election and Lok Sabha election held in 2017 and 2019 respectively. Though, representation of women through 50 percent reservation has been a successful in local bodies including Gujarat. This paper also made an analysis of legal and institutional steps carried by Gujarat government since 2000 towards empowering women for ensuring their inclusiveness in the decision making process.²

Keywords: women representation, decision making, policy, reservation

I. Introduction

Women's participation in political system amounts to be an essential and pre-requisite for women's interests as well as nation building. Although, women have different needs and perspectives on social, economical and political issues, hence, they must be incorporated at all of the societal viewpoints in policy and decision-making processes. But, the way, the democracy is being spread and being adopted throughout the world, women's participation has been an unfulfilled dream as women having about fifty percent of the population of the

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² Article has been written as a part of ICSSR MRP, Ministry of Education, Government of India.

world did not acquire their proportional position in legislative bodies. As per the report of the Inter-Parliamentary Union (IPU), only 24.3 percent of all national parliamentarians were women as of February 2019, leading Rwanda on top having 61.3 per cent of seats in the lower house.³ Equality from women's right to vote till appropriate representation in political system always happens to be core of any health democracy.⁴

Since independence, India has been making a strong foundation for participatory governance by providing equal opportunity for women in every sphere of life whether political, social, cultural etc. therefore; the share of women representation in legislatures has been increasing. But, they are still underrepresented as compared to the women ratio to whole population of the country which puts a number of questions on political willingness of every political party of India. Sensitization towards women representation into legislative bodies has always been a least preferred assignment of political parties.⁵ Hence, Gujarat has been selected as a case study as women's participation to political process in this state has declined despite of a being developed state in terms of economical, social, education and cultural. At last, there has been content analysis of legal and institutional initiatives taken for political empowerment of the women since the formation of the state in the year of 1960.⁶

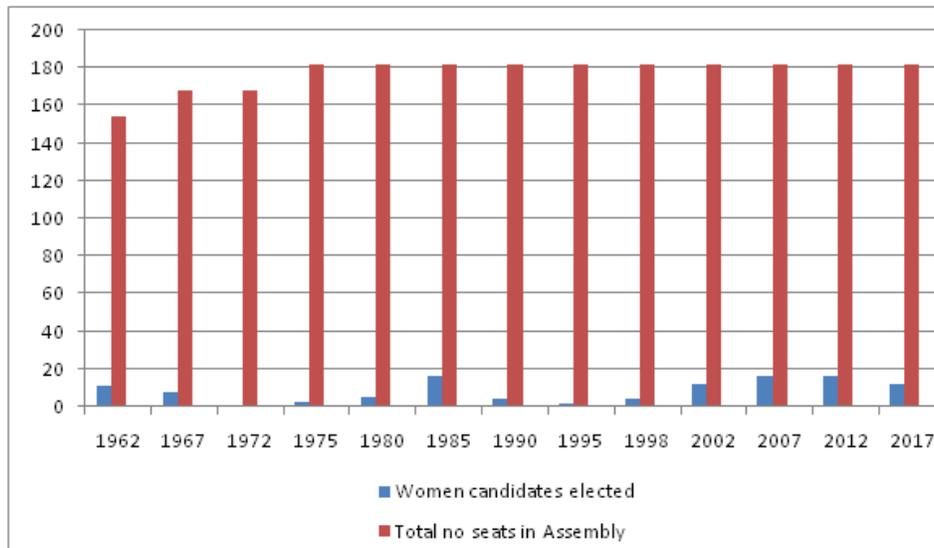
In order to reach the in-depth analysis on women representation to legislative bodies in Gujarat, the following a couple of figures would be relevant statistically

³The data has been taken by the [Inter-Parliamentary Union](http://archive.ipu.org/wmn-e/classif.htm) on the basis of information provided by National Parliaments by 1st February 2019. Accessed from <http://archive.ipu.org/wmn-e/classif.htm>

⁴Nripendra Kishore Mishra, TulikaTripathi. 2011. 'Conceptualising Women's Agency, Autonomy and Empowerment', Economic & Political Weekly, March 12.

⁵Buch, Nirmala. 2000. 'Women's Experience in New Panchayats: The Emerging Leadership of Rural Women, ' Occasional Paper no. 35, Centre for Women's Development Studies, New Delhi.

⁶ Socio-economic Review 2012-13, Gujarat State, Directorate of Economic and Statistics, Government of Gujarat, Gandhinagar, 2013

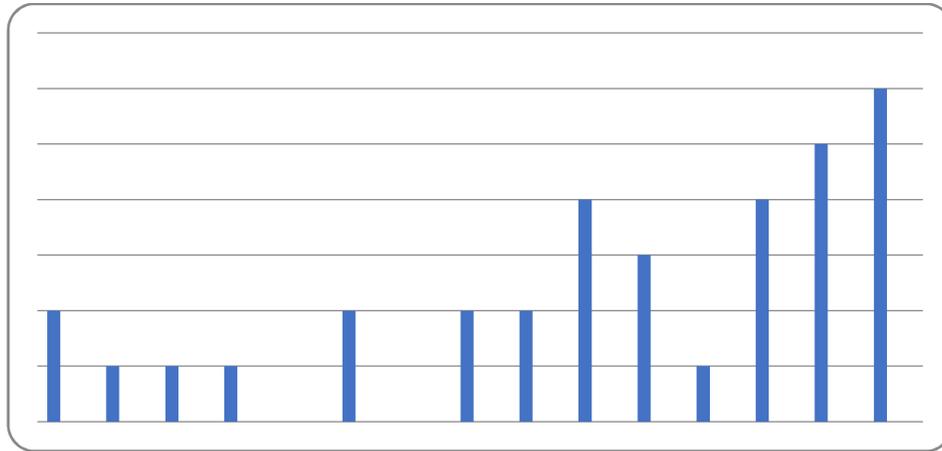
Figure – 1: Elected Women MLA from Gujarat (1962-2017)⁷

The figure 1 shows that numbers of contestants for state assembly in Gujarat have risen significantly from 19 in 1962 to 126 in 2017, but still women representation remained low, at an average of 8%.

Figure – 2: Elected Women Lok Sabha MP from Gujarat (1962-2019)⁸

⁷ Source: Gujarat State assembly official website

⁸Source:Lok Sabha official website, available at <https://loksabha.nic.in/>



The figure 2 may be referred to analyze a gradual improvement of women's representation in Lok Sabha. It shows that women representation in Lok Sabha has also not been pleasing in Gujarat in 1962, though, their representation begins to improve following Narendra Modi regime after 2000. But, in 2019, again, only six women from Gujarat could be elected as Lok Sabha member. The concept of participatory governance could never be imagined if the women's voice is unreached at legislative bodies such as Lok Sabha, Rajya Sabha or state assemblies. Post independent India did not have an adequate representation of women into 1st Lok Sabha restricting elected women Lok Sabha member in 24.⁹ Over the time, discourse on adequate women representation in parliament has always been a catchy election agenda for leading political party which could reach at 78, the highest since independence, which is 14% of the house. On the other hand, the creation of local governance as the third tier of government was necessitated with the strengthening of democracy and of accommodating all sections of society. Therefore, one of the important purposes of having local governance becomes itself a boon for participatory governance in India.

In Gujarat, local governance in urban and rural level has been functional with the formation of Gujarat as a new state in accordance with the Gujarat

⁹ Report from official website of Parliament of India LOK SABHA, <http://164.100.47.194/loksabha/Members/womenar.aspx?Isno=1&tab=15>

Panchayats Act of 1961 following three structures patterns, namely gram panchayati, intermediate level and district Panchayat. Although, women representation in local bodies in Gujarat at beginning level could find only two seats at all levels. Later on, a landmark milestone for strengthening local governance constitutionally has evolved with the introduction of a Panchayat raj system and urban local governance in 1993 mandating one third reservation at all levels for women.

Over the year, Gujarat government broadened its political willpower by passing the Gujarat Local Authorities Laws (Amendment) Act, 2009 providing a provision of 50% reservation for women in urban and rural local bodies which led to increase to 49.99 percent of total elected representation at all level local bodies in the 2015 election.¹⁰ It is utmost a victory in the paradigm of a long awaited battle against underrepresentation of women in decision making opening up of immense space in the heart of government. on the other hand, the 50 per cent reservation for women was also brought into effect in Gujarat's urban local bodies for the first time during the 2015 municipal corporation elections. Though, few of reports were also published highlighting issues of women's representation in local bodies due to unwillingness, lack of political maturity, patriarchal family setup etc prohibiting them into jumping into the real political arena in Gujarat. Though, the Gujarat state happened to be an eye witness of numbers of constitutional and institutional changes during 2000 to 2015 in order to make women's representations more feasible and practical. But the women's representation to political process has gone down despite of state categorized as developed state. Government initiative of the Gujarat amounts to be a remarkable as compared to other states of India particularly after 2000 in order to fulfill the gap between women and men's representation in legislation.¹¹

On one hand, there has been a sharp fall in women's representation in Gujarat state assembly 2017; on the other hand, India has witnessed the highest women representation in post independent India in the 2019 general election, which is a

¹⁰ November 11, 2009, India Today Magazine, published at Gandhinagar, available at <https://www.indiatoday.in/india/story/gujarat-govt-clears-50-pc-reservation-for-women-in-local-bodies-60616-2009-11-11>

¹¹ Gujarat "Nari Gaurav Niti", (State Policy for Gender Equity) 2006, Women and Child Development, Government of Gujarat, Gujarat State.

matter of intense debate as Gujarat happens to be India's prosperous States, but, it did not see adequate representation in the state assembly and Lok Sabha. Therefore, few of analysis on Narendra Modi's initiatives as Chief Minister of Gujarat for women empowerments are mandated as a numbers of state-run programs and schemes for women empowerment has been launched particularly after 2000.¹²

II. Legal and Institutional Initiatives towards Increasing Women's Representation in Gujarat since 2000

A. Creation of Department of Women and Child Development

Formation of separate departments for women and child development in 2001 may be accorded a landmark initiative for effective implementation of the Gender Equity Policy in the state.¹³ This year also was dedicated to women by celebrating as "Women's Empowerment Year". The department positively took all the responsibility of empowering the women in the state through launching policies, schemes and projects leading to catalyzing women's representation for next 10 years. The Gender Resource Center and Swayamsiddha have been two leading programs of the department for gender equality in terms of political and social aspects of life. Swayamsiddha enables women to have a life with dignity and self-reliance at Panchayat level effecting an increase of women's representation in legislation in the long run.

B. Reserving 50 percent Seats for Women in Local Bodies

Participation of women in panchayati raj institutions involves women as voters, member of political parties, candidates and elected members.. However, by virtue of the 73rd constitution amendment Act, 1993 the women ration have

¹² See an article by Charu Sudan Kasturi, "Truth vs hype in Modi's boast about Gujarat's women" published at Hindustan Times, New Delhi, April 09, 2013, available at <https://www.hindustantimes.com/delhi/truth-vs-hype-in-modi-s-boast-about-gujarat-s-women/story-EJ5SyLLW0KkcAaGDF0euWK.html>

¹³ Prior to year 2001, there was no separate department for addressing the concerns of women as the year 2001, was celebrated as "Women's Empowerment Year".

been one third reservation of seats in the Panchayati Raj Institutions.¹⁴ As a consequence of the 73rd amendment Act, Gujarat experienced a notable growth in women's representation in rural bodies. In the year of 2002, it was noted-down about 27.09 percent representations of women at all levels in Gujarat PRI. Following this footstep, the government further demonstrated its big wisdom by extending 50 percent reservation for women in local bodies in 2009 in order to showing optimistic gesture towards women's representation in the decision making bodies resulting in 49.99 percent of total elected representation at the local bodies in 2015 election. The then government deserved to be applauded as reservation prepares the way to first level of victory over the chronic issue of underrepresentation of women in local bodies. Though, present study here, brought few questions for policy makers and social scientist to explore rationale behind ruining of the women's representation in the last Gujarat assembly election held in 2017 as their numbers shrank to 13 only out of 182 member house.

C. Financial Strengthening of Samaras Yojana since 2002

An admirable planning, namely 'Samaras Yojana' has been already persisting since 1992 in Gujarat promoting a consensus among the Panchayats so as to nominate representatives from all sections including women. The financial positions was strengthened following the takeover of the new regime after 2001 onwards resulting in an upwards trend for women representatives. As an effect of the yojna, women Panchayats increased from 20 in the 2006 elections to 254 in the 2011 elections. The government kept on focussing Yojana by providing grant time to time so as to spread at wider level in state.

MahilaSwarajAbhiyan (MSA)

The initiative namely MahilaSwarajAbhiyan as a form of state level network based in Ahmedabad has been taken by encouraging and spreading awareness for bringing women's participation towards panchayat raj system.¹⁵ It has a long history associated with the promotion of democracy at grass root level through

¹⁴ Dalit Women's Right to Political Participation in Rural Panchayati Raj: A study of Gujarat and Tamil Nadu© JayshreeMangubhai, Aloysius Irudayamsj& Emma Sydenham, 2008

¹⁵ See the detail from official website of MahilaSwarajAbhiyan (MSA), Ahmedabad available at <http://www.wecaretoo.com/Organizations/IND/mahilaswarajabhiyan.html>

organizing seminar, workshop, symposium, etc. so as to establish the concept of self governance among the women. It acts as a catalyst in order to motivate women standing in last of the long existing queue. The Gujarat government has been maintaining a harmonious relationship in order to pushing women's representation. The MSA also coordinates with two women's organizations, namely Kutch MahilaVikasSangathan and Society for Women's Action and Training Initiatives for extending the work.

D. Gender Resources Centre

An organization registered under the Societies Registrations Act, 1860 has been in operation under the guidance of department of women and child from March, 2004 making no of efforts towards incorporating gender equity and equality in the overall development process.¹⁶ The dynamics of GRC dashed in flying mode of operation taking into the confidence of different sections of society in order to hit the target against gender related hurdles. The GRC's beginning for improvement in the life of women's lives has been a primary objective, but, it always dedicates itself to sensitize women's representation in decision making in Gujarat. In this process of vibrancy, it is also facilitated by departments, NGOs and academic institutions.

E. State Commission for Women

The countrywide trend of introducing commission for women in each state has been a prime concern of central government resulting in the formation of a commission for each state after 2000. Keeping the priorities in mind, the then government immediately signaled green flag by establishing Stat Commission for women in Gujarat in the year of 2005.¹⁷ The commission conventionally was nurtured thoroughly with a wide range of jurisdictions pertaining to empowering the women. It has also been assigned consolidating voice and tone of women in legislative process. . However, being as advisory body to the government, commission executed a number program to empower the women so as to

¹⁶ Annual Report 2009-10, published by Gender Resource Centre, Govt of Gujarat, Ahmedabad, available at https://grcgujarat.org/pdf/programme_annual_report_2009_10.pdf

¹⁷ See detail from The Gujarat State Commission for Women Act, 2002 Gujarat Act No. 12 of 2002, available at <http://www.bareactslive.com/Guj/guj195.htm>

improve the representation in legislative bodies. The commission remains engaged with no other organizations in order to undertake promotional, educational research so as to seek suggestions for ensuring representation of women at all levels of life. A large number of seminar, conferences and workshop through financial support from the government always help increase the awareness level for women.

III. Conclusion

The above mentioned government sponsored efforts and schemes in different ways need not be tested as they are undoubtedly dedicated for women's representations. The efforts tried to reach its zenith following the takeover of Narendra Modi as chief minister of Gujarat as he himself has shown full gesture and willingness towards women empowerment which led to rise women representation remarkably. Though, it could not be accepted full of satisfaction as few of government policies after 2000 has sparked controversy for example 'two child norm creating negative impact to bring younger women into politics'. On the other hand, the fiscal pattern of the Gujarat model of local governance makes PRIs more dependent on governments at state and central level as finances are sanctioned to local government through central and state schemes. In this parameter, elected women representatives' autonomy is hindered which prevents new women entrants into local election.. To conclude, foundation for women's representation in the past 15 years is well prepared, but there must be proper monitoring of all state initiatives schemes at implementation level.

Finding the Ratio between Law as an Instrument of Social Change and Social Changes that Germinated Law: A Unique Indian Scenario

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Abstract

The main objective of this paper is to study the way how law and Indian society had interacted with each other during colonial and post-colonial era. While doing so this paper examines why groups seeking social reform have resorted to different movements, litigation which eventually germinated law, and whether and how court-made law has contributed in social engineering. From a sociological perspective, an attempt has been made to treat law in its institutional, historical, socio-cultural, and politico-legal systems and analyze its dialectics with the ever changing Indian society in its broader structural setting. Finally, an attempt has been made to find out the ratio between the spheres where “law changed the society,” and where “society changed the law.”

Keywords: law, social engineering, judicial law making, socio-cultural movement, politico-legal system, social change.

I. Prologue

Let us begin with the assumption that any good polity must have a proportionate ratio between the so called concept of ‘law as an instrument of social engineering’ and the concept that ‘social changes do really germinate law’. “Every social and economic change causes a change in the law, and it is impossible to change the legal bases of society and of economic life without bringing about a corresponding change in the law.”³ Consequently this paper peeps into the scenario where social movement has contributed for propelling the process of law making to cover certain areas touching some socio-economic,

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³ E. Ehrlich, “Fundamental Principles of the Sociology of Law”, (437), Translation by W. L. Moll, Harvard University Press, 1936 (“Ehrlich”).

demographic, and political issues along with their volatility. This piece of paper then inter alia probes the fact as to whether do we have a balanced ratio as mentioned in the title of the article. Having these in mind if we try to explore Indian scenario few things need clarification, i.e., social engineering, social change, social movement, and their interplay in the backdrop of political engineering by law making agencies specially the legislative bodies directly controlled by the state and the role of the apex court of the country in particular.

II. The Concept of Law as an Instrument of Social Engineering

The concept of law as an instrument of social engineering has its initial foundation in Roscoe Pound's Jurisprudence,⁴ although Sociological jurisprudence was first introduced by Roscoe Pound in a law-review article⁵. He questioned the formal jurisprudence by introducing the concept of using social sciences to develop legal rules. He was of the view that for the just claims and desires to be satisfied the law as a form of social control need to be adequately employed and reliance upon the social science is necessary for the understanding of law in society.⁶ This is where we also need to look at sociological jurisprudence from the perspective of model for responsive law.⁷

Law has always been looked at as one of the important instruments that could bring about social change. Many academicians have supported the view that law enjoys and uses unifying power to contribute towards better social cohesion, as a tool for bringing about homogeneity in the heterogeneous population having socio-cultural diversities and reformation through law is perhaps one of the most effective and safest methods to achieve this end.

It is pertinent to mention here that while sociological jurisprudence ultimately came to be associated with legal progressivism, its underlying rationale did not

⁴ Jurisprudence by Roscoe Pound, Volume I, Chapter 6, Section 22, The Law book Exchange, LTD. Union, New Jersey, 2000, Pages- 291-358.

⁵ Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence," (1911), 24 Harvard Law Review 591.

⁶ - Richard Langone, "The Science of Sociological Jurisprudence as a Methodology for Legal Analysis" (2001) 17 Touro L Rev 769, 779.

⁷ - Philippe Nonet, Philip Selzinck, et al, Law and Society in Transition: Towards a Responsive Law (2001) 73.

inherently require judicial deference to the legislature.⁸ This is the basic reason for which Judiciary is understood to be playing a major role to bring about the reform in the society to which sociologists refer to as ‘social change’.⁹

Law as an instrument of social change implies many things.¹⁰ Firstly, law is the reflection of the will and wish of the society. It is believed that if we want to study any society, we have to study the laws enacted by that society and you come to know whether the society is developed or wild world. The law, though it is the product of the society is responsible for the social transformations. In fact, there are two modes of this aspect. Secondly, “Law changing the society”, which means that the law of the land compels the society to be changed according to it. Thirdly “Society changes the law”, as per its needs. It means law is made by the society according to its requirement by its democratic institution i.e. legislative bodies or by adopting custom and usage. When law changes the society, it is the sign of beginning of the development of the society. When society changes law it is the sign of maturity of the society.

III. Social, Religious, Political Movements and The Law During Colonial Era

India in the 18th century had to endure one of the most chaotic periods in its entire history. The Mughal Empire, which had dominated the Indian subcontinent for two centuries, began to decline with internal and external pressures. Following the decline of the empire, numerous local powers strived for independence, and foreign powers began to invade the area, further deteriorating the situation of India and promoting additional disorder.¹¹ The then Indian society was burdened with a host of evil customs and regulations. Elaborate rituals and strict moral codes were enforced which were largely modified, and badly interpreted ancient traditions.¹²The 18th century colonial

⁸ Roscoe Pound, “The Sociology of Law and Sociological Jurisprudence”, 5 U. Toronto Law Journal, 1,2-3, 1943.

⁹This can particularly be seen in the post-independence scenario of our county.

¹⁰Ibid at 3.

¹¹<https://www.quora.com/Is-it-right-to-call-18th-century-a-dark-age-in-the-Indian-history>.

¹²http://www.nitintayade.com/feed_post.php?blog_id=21.

legislation primarily influenced by orientalism¹³ and it had left its impression in some social legislation.¹⁴ The colonial legislations of pre-independence period though helped in abolition of social evils prevalent at that time but gradually led to breach the socio-religious fabric of India since they were mainly focused and based on the English perception and attitude. But it would be an injustice to deny the contribution various social and religious movements that were led by some great Indian intelligentsia¹⁵; namely Raja Ram Mohan Roy and BrahmoSamaj, PanditIshwar Chandra Vidyasagar, DayanandSaraswati and, Henry Vivian Derozio with his young Bengal, M.G. Ranade and PrathanaSamaj, JyotibaPhule and its SatyashodhakSamaj, RamakrishanParamhansa Dev and Swami Vivekananda, Rabindranath Tagore, Kesab Chandra Sen, DadabhaiNaoroji, Gopal Krishna Gokhale and many more had in fact made deep impact on the then ruler including the masses in general. The colonial legislation touched the following areas for reforming the society.

A. Female Infanticide

This practice was very common among upper class Bengalis and Rajputs, who considered females as economic burden. Hence, in order to reform the perception of Indian society, the Bengal Regulation Acts of 1795 and 1804

¹³[Edward W. Said](#), "Orientalism" 1978, Pantheon Books, ISBN-978-0-394-42814-7, in which the author discusses [Orientalism](#), defined as [the West's](#) patronizing representations of "[The East](#)"—the societies and peoples who inhabit the places of Asia, North Africa, and the Middle East. According to Said, orientalism (the Western scholarship about the [Eastern World](#)) is inextricably tied to the [imperialist](#) societies who produced it, which makes much Orientalist work inherently political and servile to [power](#). The first school of thought that emerged in the writing of empire is perhaps best described as British Orientalist. The Orientalist scholars proved most dominant during the early modern contact between India and the Great Britain.

¹⁴ Toynbee, Arnold, "The Disintegration of Civilization; A Study of History", (V) Oxford University Press, New York, 1962; Arnold Toynbee, among others, helped in universalizing the notion of Intelligentsia by assigning to it the function of mediator between cultures. The intelligentsia arises, says Toynbee, "in any community that is attempting to solve the problem of adapting its life to the rhythm of an exotic civilization to which it has been forcibly annexed or freely converted."

¹⁵: See also Taylor, Joshua, (ed.) „Nineteenth-century Theories of Art", University of California Press, Berkeley, 1987.

declared murdering of female infant illegal. Finally, in 1870 an Act was passed for the prohibition of female infanticide whereby among other things it was made compulsory for parents to register the birth of all children and provided for the verification of female child for some years after birth especially those areas where this custom was very much prevalent.

B. Abolition of Sati

This was influenced by the step of Raja Ram Mohan Roy's frontal attack. The British Government decided to abolish the practice of Sati or live burning of widow and declared it as culpable homicide. The Regulation of 1829 was applicable for the first instance to Bengal Presidency alone, but was extended with slight modification to Madras and Bombay Presidencies in 1830.

C. Abolition of Slavery

This was another practice which came under British scanner. Hence, under *Charter Act of 1833* slavery in India was abolished and under Act V of 1843 the practice of slavery got sacked by law and declared illegal. The Penal Code of 1860 also declared trade in slavery illegal.

D. Widow Remarriage

Vidyasagar took the initiative to propose and push through the Widow Remarriage Act XV of 1856 in India, which was decreed on 26 July 1856.¹⁶ The following year, he filed a petition before the government of the day, seeking legislation that would allow widow remarriage. Although support for his campaign came from few influential people, a lot of backlash came from powerful conservative groups within Hindu society. In fact, the government received more than 30,000 signatures challenging Ishwar Chandra's petition. However, his sustained efforts, alongside fellow social reformers finally resulted in the passing of the Widow Remarriage Act,¹⁷ on 26 July 1856.¹⁸ Despite their

¹⁶ <https://theprint.in/india/vidyasagar-the-path-breaking-reformer-educationist-who-is-bengals-intellectual-pride/235933/>.

¹⁷ Please see <https://byjus.com/free-ias-prep/this-day-in-history-jul16/>.

¹⁸ The Act contained that "No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having

success in passing a law, the real challenge was getting society to accept widow remarriage.¹⁹

E. Prohibition on ‘Hook Swinging’

The practice of hook-swinging, linked to rituals of Hindu Gods in Bengal and South India, was a source of both interest and horror to British authorities in the eighteenth and nineteenth centuries. It was finally banned by the British ruler in 1860.²⁰

F. Prohibition of Polygamy

Another Act was passed in 1872, at the insistence of BrahmaSamaj, which tried to abolish polygamy and marriage of minor girls below 14 years and sanctioned inter-caste marriages and remarriages of widow. Preventing a child from enjoying his childhood is a grave crime.

G. Protection of Childhood

Preventing a child from enjoying his childhood is a grave crime. This idea came to the mind of the then society. The Factories Act, 1881²¹ was the first one of its

been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu Law to the contrary notwithstanding,”

¹⁹<https://www.thebetterindia.com/182357/ishwar-chandra-vidyasagar-widow-remarriage-bengal-women-rights-india/>: Also see <https://theprint.in/india/vidyasagar-the-path-breaking-reformer-educationist-who-is-bengals-intellectual-pride/235933/>.

²⁰ Alexander Duff, “India and India Mission,” (Edinburgh: 1840), 268-9; Cited in Geoffrey Oddie, Popular Religion, Elites and Reform: Hook-Swinging and its Prohibition in Colonial India, 1800-1894

(New Delhi: Manohar, 1995), 13: Also see, J. H. Powell, "Hook-Swinging in India. A Description of the Ceremony, and an Enquiry into Its Origin and Significance," *Folklore*, Vol. 25, No. 2 (Jun. 30, 1914), pp. 147-197, [Taylor & Francis, Ltd.](https://www.jstor.org/stable/1254904) on behalf of Folklore Enterprises, Ltd. ,available at <https://www.jstor.org/stable/1254904>, p 1-65.

²¹The Act, listed 17 occupations and 65 processes in Schedules A & B.

kind to prohibit employment of child below the age of 7 years and the working hours were limited.²² Even after this, the Age of Consent Act came up in 1891.

H. Prohibition of Child Marriage

In 1872, *the Native Marriage Act* (Civil Marriage Act) intended legislative action for the prohibition but had very limited periphery because it was not applicable to Hindus, Muslims and other recognized religions. In 1891, Act of the Age of Consent was enacted which prohibited the marriage of girl child below the age of 12 years. The Child Marriage Restraint Act, 1929 was passed on 28 September 1929, which, fixed the age of marriage for girls at 14 years and boys at 18 years and the same was later amended to 18 for girls and 21 for boys. It is popularly known as the **Sarda Act**²³ which came into effect six months later on 1 April 1930 and applied to all of British India.

During twentieth century, the policies regarding social change mainly resulted from Indian opinion, various movements, progress of western education, growth of political consciousness, coupled with struggle for social reform by the then Indian intelligentsia and off course much credit goes to Renaissance of that period. Side by side the upsurge of nationalistic movements due to British suppression and control mechanism to extend their colonialism contributed much friction among the Indian polity to come out and organize the Indian masses, developing the mindset for social reform as well as for freedom struggle.

The targets of the then intellectual attacks were against the existing socio-cultural evils and malpractices such as obscurantism, superstitions and irrationality imbedded in the society.²⁴ The social reform movement did not;

²²Dr.S. Durgalakshmi& Mrs. R. Ammu, "Law as an Instrument of Social changes and for Empowerment of the Masses",Indian Journal of Applied Research, Vol-5,issue 12, Special Issue Dec 2015,issn-2249-555X, at page 131.

²³ Popularly known as Sarda Act, after its sponsor [Har Bilas Sarda \(1867-1955\) was an Indian academic, judge and politician. He is best known for having introduced the Child Marriage Restraint Act \(1929\).](#)

²⁴ This proves what Ehrlich had succinctly written that "the center of gravity of legal development lies not in legislation, not in juristic science, nor in judicial decision but in society itself," For details please see, E. Ehrlich, "Fundamental Principles of the

however attack the entire social system as a whole. It was mainly focusing on the perversions and distortions that had crept into the then existing society. They did not advocate a sharp rupture in the existing social structure of the country but touched some fundamental evils that were enough to destroy the society.²⁵ In a way, the social reform movement was a prelude to nationalism.

IV. Law and Social Change During Post-Independence Period

During post-independence period, law has often been used as an instrument of social reform. Every year new legislation or regulation is coming up as such in post independent period we could see voluminous legislations and regulation or bye laws. For better understanding this subtopic may be examined under the following touch stone of some fundamental aspects of human life in a continuously evolving society which the law tries regulate and also see whether the society has been able to evolve further to demand its own share and thereby making the pathway of new law to adjust with the society on the basis of its prevalent need.

A. Touching The Untouchability and the Caste System

India is a caste ridden society. The caste system has been a stumbling block towards enforcing equality before law. The caste system survived despite the introduction of rule of law, growth of urbanization and industrialization, spread of mass education, and constitutional commitment to establish egalitarian society. Despite challenges thrown by the newer sects of Hinduism like Buddhism, Jainism, and Sikhism, the practice of untouchability and stricter

Sociology of Law", (437), Translation by W. L. Moll, Harvard University Press, 1936 ("Ehrlich").

²⁵[The history of British India: a chronology](#), John F. Riddick, 2006, Praeger, West Port, Connecticut, London. Also note that The Rowlatt Act, 1919 was much resented by an aroused Indian public. All nonofficial Indian members of the council (i.e., those who were not officials in the colonial government) voted against the acts. [Mahatma Gandhi](#) organized a protest movement that led directly to the [Massacre of Amritsar](#)²⁵ (April 1919) and subsequently to his [non-cooperation movement](#) (1920–22). The acts were never actually [implemented](#). Accepting the report of the Repressive Laws Committee, the [Government of India](#) repealed the Rowlatt Act, the [Press Act](#), and twenty-two other laws in March 1922.

caste division still remained and India witnessed worst categories of unequal treatment meted out to certain categories of people.

Taking a cue from the central spirit of Article 17 of the Constitution, the independent India enacted Untouchability Offences Act, in 1955. This legislation outlaw's practice of untouchability directly or indirectly, though it has not attempted to define untouchability. The working of the Act was reviewed in 1972 and various limitations were discovered. Then the government came up with the Protection of Civil Rights Act, 1976.²⁶ The difference is that while the former Act was concerned with prohibitions imposed on untouchables in relation to public places, the new Act included both public as well as privately owned place of worship allowed by owner for public worship. Many new behaviors like, discrimination in jobs and employment, disability in participation in cultural, or in hostels, residences, have been brought within the ambit of the Act. It forbids direct or indirect preaching or practicing of untouchability or its jurisdiction on historical, philosophical or religious grounds.

After a decade back the government realized that the atrocities on the SCs' and STs' were rising phenomenally and, therefore, it came out with The Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act, 1989. The Act confers civil rights on SC/STs' and seeks to prevent atrocities on them. Civil Rights Act, 1976 does not define untouchability, but the SC/ST Act defines atrocities. The Hallmark of this law is its conceptualization of the term atrocity through its definition and introduction of stringent measures for committing atrocities. The Probation of Offenders Act does not apply to an accused under the Act. This shows legislature's importance attributed to this law.

B. Protection of Children

Primary Education: A Sine Qua Non for Any Social Change

Any exercise in empowerment and social development of any sections of Indian society is bound to be ineffective unless the prospective beneficiaries are literate and can appreciate the framework of empowerment or reform to which there are

²⁶The Act forbids enforcement of disability on the ground of untouchability against any person with regard to access to any river, well, bathing ghat, etc.

being subjected.²⁷ Education provides the basic foundation for good citizenship, and is a primary vehicle for imparting cultural values in children, and making them adjust to the fast-changing environment around them. Professor Amartya Sen rightly argues that social rate of return from investment in education especially basic and primary education compares favorably with investment in physical assets and that increase in physical capital-formation by itself cannot ensure rapid economic growth.²⁸ Article 26 of the Universal Declaration of Human Rights has recognized education as a basic human right. It also envisages primary education to be free and compulsory. Article 45 of the Indian Constitution which contains such a promise and says that, "the State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

"The right to education flows directly from the right to life²⁹." Later in **Unni Krishnan v. State of A.P.**,³⁰ the majority judges held the right to education as a fundamental right. The National Education Policy (1986) projected that the promise of Article 45 would be redeemed by the year 2000. The Constitution (86th Amendment) Act, 2002 inserted Article 21-A in the Constitution of India to provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary

²⁷Prof. Debi S. Saini, "Law and Social Development in India", a paper presented in an international Dialogue on 'Law and Social Development', at Mexico City from November 24-26,1999.

²⁸MoktarMaazouz, "Return to Investment in Human Capital and Policy of Labour Market: Emperical Analysis of Developing Countries", in 'Procedural Economics and Finance', Vol-5, 2013, pages -524-531.

²⁹Mohini Jain vs. State of Karnataka, (1992) 3 SCC 666 where the court observed that; "Right to life is the compendium expression for all those rights which the court must enforce because they are basic to the dignified."

³⁰(1993) 1 SCC 645.

education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.³¹

The title of the RTE Act incorporates the words 'free and compulsory'. 'Free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. 'Compulsory education' casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 age groups. On the basis of constitutional mandate provided in Article 41, 45, 46, 21A as well as, as per the various judgments' of the Supreme Court, the Government of India has taken several steps to eradicate illiteracy, improvement the quality of education and make children back to school who left the schools for one or the other reasons. Some of these programmes are National Technology Mission, District Primary Education Programme and Nutrition Support for Primary Education, National Open School, Mid-Day Meal Scheme, SarvaSikshaAbhiyan and other state specific initiatives.³² With this, India has moved forward to a rights based framework that casts a legal obligation on the Central and State Governments to implement this fundamental child right as enshrined in the Article 21A of the Constitution, in accordance with the provisions of the RTE Act.

Abolition of Child Labour

Article 45 of the Constitution should be read along with Article 24.³³ The former makes primary education compulsory and free for all children till they

³¹ Article 21-A and the RTE Act came into effect on 1 April 2010.

³² Dr. Sanjay Sindhu, "Fundamental Right to Education in India: An Overview," 'Global Journal of Interdisciplinary Social Sciences,' Published by Global Institute for Research and Education, Vol.3(5):92-95 (September-October, 2014) ISSN: 2319-8834.

³³ Article 24 mandates that No child below age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Similarly, Article 39(f) lays down certain directive principles of policy to be followed by the State: Article 39 The State shall, in particular, direct its policy towards securing: (f) that children are

complete the age of 14 years. The Government of India in 1986 enacted the Child Labour (Prohibition and Regulation) Act, which in a way considerably harmed the child labour abolition agenda. It should be noted that the employment of children is hazardous per se because it takes away from the child his/her childhood. However, the thinking and the act of making child labour as acceptable and worthy of regulation in some employments is not tenable. This shift of official thinking took place in India in 1980s when we made a choice of giving support to working children rather than banning it altogether.

Protection Against Child Marriage and Sexual Offences

Protection Against Child Marriage

Even after 72 years of our independence from British rule, child marriages could not be completely eradicated. The Child Marriage Prohibition Act was passed in 2006. Organizing a child marriage is under the Act, but the breaching of the age bar does not make the marriage invalid (*void ab initio*). As per Section 3 of the Act, the marriage is voidable at the option of the contracting party who was a child at the time of marriage. This means that a petition for annulling the marriage can be filed on behalf of the minor by his/her guardian or 'next friend', along with the Child Marriage Prohibition Officer. The petition under this section may be filed at any time but within two years after attaining majority (18 years). It is a reflection on rural society which supports child marriage that the provisions of this Act are not invoked when child marriages are performed by families and communities.

Protection From Sexual Offences

The government had also acceded the Convention on the rights of the child, adopted by the General Assembly of the United Nations in 1992 which prescribed a set of standard to be followed by all State parties in securing the best interest of the Child. The sexual offences against children continued in an

given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

unabated manner and the government felt the need of the hour and as a result Protection of Children from Sexual Offences (POCSO) Act, was passed in 2012.³⁴ This Act is an improvement over IPC as it criminalizes acts of any immodesty and not just traditional 'peno-vaginal' intercourse. Hereby child pornography was criminalized.

The Act is gender neutral and arrangement of special courts for POSCO cases is good initiative. But there are certain demerits like; no provision of police training, no counseling available for children to recover from post crime trauma, it encompasses the biological age of the child and silent on the mental age considerations. Consequently, the government came up with Protection of Children from Sexual Offences (Amendment), Act 2019 to cover up the demerits of the earlier Act.³⁵ But certain drawbacks remained with regard to, medical examination,³⁶ treatment cost,³⁷ consented sexual intimacy,³⁸ child marriages,³⁹ mental age of the victim.⁴⁰

C. Peoples' Participation

Though Mahatma Gandhi, had advocated for a village model of development, with self-dependent villages having resources and even the dispute resolution being done at the village level, the constitutional framers were not very much in favour of such a model. The model that finally got implanted in India is a top-down approach model, with a partial mention to the need for village level

³⁴Article 15(3) of the Constitution inter alia empowers the state to make special provisions for children.

³⁵Now punishment is stronger, emergency medical facility within 24 hours, care and protection and compensation by the state government within 30 days.

³⁶Conflicting legal position arises when female doctor is not available and the criminal law says anybody can do examination.

³⁷The hospital and establishment has to provide free medical care or the state should take responsibility to reimburse otherwise the hospital may provide substandard treatment.

³⁸Sexual contact between two adolescents or between an adolescent and an adult are considered illegal under the Act.

³⁹Child marriages are considered illegal under the Act but it enjoys sanction under certain personal law thus complicating the matter.

⁴⁰It does not take mental age as parameter thus injustice to those suffering from them.

administration in Article 40 of Constitution of India. The 73rd Amendment to the Constitution of India⁴¹ in 1992 which inter alia envisages a model of governance having following features:

- a. Formation of Gram Sabhas (Village councils)
- b. Uniform 3-tier system at village, block and district levels
- c. Direct elections—all seats at all levels
- d. 21 years as minimum age for membership as well as chairperson of the Panchayat

The Gram Sabha, which is the pivot of village panchayat has been entrusted with multi-dimensional responsibilities in the changed atmosphere.

In the area of municipal governance, the 74th constitutional amendment Act, 1992 besides providing for the constitution of municipal council, ward committee directs that not less than one third seats to be reserved for women (including SC/ST women) in proportion to their population, which may be allotted by rotation to different constituencies. Works of UpendraBaxi and Marc Galanter⁴² point out that the Nyaya Panchayat role in the process of informal, effective, faster and economical access to justice for the people in the rural areas. But at the same time, Panchayati Raj Institutions (PRI) as a method of decentralized mechanism of administration, with participatory method got constitutional recognition in the real sense, quite late with the aforesaid Amendment.⁴³ Both the 73rd and 74th Constitution Amendment Acts aim to enhance the capabilities of rural people to involve themselves in the planning process about their priorities. One can also witness decentralization of developmental activities, with active people participation.

⁴¹ The 73rd Amendment of the Constitution provide for direct participation of people in village governance structures.

⁴² UpendraBaxi and Marc Galanter, "Panchayat Justice: An Indian Experiment in Legal Access" in M. Cappelletti (ed), Access to Justice (1979) Vol. III.

⁴³ UpendraBaxi, "Towards a Sociology of Indian Law, 1st Edition, Satvahan Publications, 1986: Please see https://www.academia.edu/8135594/Baxi_Upendra.1985.Towards_a_Sociology_of_Indian_Law.New_Delhi_ICSSR_Satvahan_Publications.

D. Empowering Women: The Mother of All Social Development

Empowering women in the Indian context is a very complex issue. It involves changing the preconditioned mindsets of males and the society in general. There are several problems to be tackled in this regard. Human dignity for women needs economic self-sufficiency; they need capacity to generate independent income. Their disempowerment is a result of complex interaction of economic, social and political power structures. Education of women is also a first pre-requisite in uplifting their status.

Women's rights in India are widespread over a fairly good area. For example, there is prohibition of discrimination against them as per the spirit of Articles 14, 15, 16, 39 of the Constitution. Article 15 (3) envisages affirmative action for women and children. The Equal Remuneration Act 1976 talks about: equal wages for the same work or work of similar nature for men and women workers; and prohibits discrimination against women in matters of recruitment. The Maternity Benefits Act 1961 and the Employees State Insurance Act 1948 provide for payment of maternity benefit. But in actuality very small number of women gets this benefit. Unfair Labour Practices are committed by employers against their employment. The Factories Act, 1948 provides for restriction of hours of work (women cannot be asked to work between 7 p.m.-6 a.m.), concessions regarding lifting of weights, and special safety protection for women. The Dowry Prohibition Act 1961 provides stringent punishment for the practicing of dowry. The government has appointed the National Commission on Women for deliberating on issues of women's empowerment. There is provision for special Women's Cell in police departments which is also a significant step in providing special protection to women. The new law⁴⁴ provides reservation of not less than 1/3 seats for women in panchayats. These may be allotted to different constituencies in a Panchayat. It is expected that about 8 lakh women including those belonging to SC/STs will benefit from such reservations.

Women organizations have demanded reservation of 1/3 seats for women in Indian Parliament. But the political parties have not been able to resolve several

⁴⁴ The Constitutional 73rd Amendment Act 1992 commonly known as the Panchayati Raj Amendment Act. Also note that the Constitutional 74th Amendment Act 1992 also has similar provision.

issues connected to this. We need to follow policies of affecting fundamental change in attitudes of the state and the society towards women. Major areas of focus are: improving wage conditions for women; equality of wages between men and women; protection of women from problems resulting from their biological situation; access to credit and training for self-employed.

Feminist women in India are mostly urban phenomena. Women in rural areas are a subject of grave exploitation. The voluntary organizations need to undertake massive programmes of reforms in this regard. The problem of dowry exists both in the urban and rural areas. The dowry prohibition law has made some impact on the abolition of this practice but we still have a long distance to cover.

E. Sexual Offenses Against Women and Some Recent Protest Movements

Nirbhaya Protest

On 16 December 2012 a female [physiotherapy intern](#)⁴⁵ was beaten and [gang raped](#) in [Delhi](#). She died from her injuries thirteen days later, despite receiving treatment in India and Singapore. The incident generated international coverage and was condemned by the [United Nations Entity for Gender Equality and the Empowerment of Women](#), who called on the [Government of India](#) and the [Government of Delhi](#) "to do everything in their power to take up radical reforms, ensure justice and reach out with robust public services to make women's lives more safe and secure".⁴⁶ Public protests took place in Delhi and many parts of the country, where thousands of protesters clashed with security forces. Similar protests took place in major cities throughout the country.

Six days after the incident, on 22 December 2012, the central government appointed a judicial committee headed by [J. S. Verma](#), a [former Judge of Supreme Court](#), to suggest amendments to criminal law to sternly deal with [sexual assault](#) cases and submit the report within 1 month.⁴⁷ The report

⁴⁵["IAP Condoles death of Delhi gang-rape victim"](#), *New Delhi: Zeenews.com. PTI*, 29 December 2012, *New Delhi*, last updated on January 20, 2013, IST 06:57.

⁴⁶[Stenhammer Anne F,"UN Women condemns gang rape of Delhi student"](#), *Press Release, UN Women*, 20 December 2012.

⁴⁷[Joshi, Sandeep \(24 December 2012\), "Shinde calls meeting of Chief Secretaries, police chiefs to review crime against women", *The Hindu.*, Chennai, India](#), retrieved on 27

indicated that failures on the part of the Government and Police were the root cause behind crimes against women. Major suggestions of the report included the need to review [AFSPA](#)⁴⁸ in conflict areas, maximum punishment for rape as life imprisonment and not death penalty, clear ambiguity over control of Delhi Police etc.⁴⁹

The [Cabinet Ministers](#) on 1 February 2013 approved for bringing an ordinance, for giving effect to the changes in law as suggested by the Verma Committee Report. According to former Minister of Law and Justice, [Ashwani Kumar](#), 90 percent of the suggestions given by the Verma Committee Report have been incorporated into the Ordinance.⁵⁰ The ordinance was subsequently replaced by a Bill with numerous changes, which was passed by the Lok Sabha on 19 March 2013.⁵¹ There is an urgent need for a policy-level discussion on lowering the age of consent which was increased from 16 to 18 years by the CLA Act, 2013.

In November 2019, the [gang rape](#) and murder of a 26-year-old veterinary doctor in [Shamshabad](#), near [Hyderabad](#), sparked outrage across [India](#).⁵² There are some

December 2012: Also see "[Justice J S Verma committee submits report on rape laws](#)". *Times of India*, 23 January 2013.

⁴⁸ Armed Forces (Special Powers) Act (AFSPA), 1958.

⁴⁹ [Joshi, Sandeep](#), "[Failure of governance root cause of crimes against women: Verma committee](#)", *The Hindu*. Chennai, India, 23 January 2013.

⁵⁰ "[UPA's Black Friday: Ashwani Kumar, Pawan Bansal resign - The Times of India](#)". For details see <https://timesofindia.indiatimes.com/india/UPAs-Black-Friday-Ashwani-Kumar-Pawan-Bansal-resign/articleshow/19992151.cms>.

⁵¹ The law has been severely criticized for being gender biased and giving women the legal authority to commit exactly the same crimes (against which they seek protection) against men with impunity. The Criminal Law (Amendment) Ordinance, 2013 has been strongly criticized by several human rights and women's rights organizations for not including certain suggestions recommended by the Verma Committee Report like, [marital rape](#), reduction of age of consent amending Armed Forces (Special Powers) Act so that no sanction is needed for prosecuting an armed force personnel accused of a crime against woman. The [Government of India](#), replied that it has not rejected the suggestions fully, but changes can be made after proper discussion.

⁵² Please see, [Balakrishna Ganeshan](#), *The NEWS Minute*, Friday, November 19, 2019, IST 12:46 available at <https://www.thenewsminute.com/article/when-will-our-country-become-safe-women-outrage-after-hyderabad-vets-murder-113148>.

stark similarities between Nirbhaya the 2012 Delhi gang rape victim and the Hyderabad gang rape victim. Both were from medical profession. Nirbhaya was a paramedic student while the Hyderabad victim was a veterinarian. Had they been alive, compassion would have been the common professional connects between the two. Both met tragic ends after being gang raped by lumpen elements working in public transport sector. In both cases, police let off the main accused just before the gruesome gang rape. One hopes the similarities end here for the sake of speedy justice to gang rape victim lest it becomes yet another case of delayed justice, if not denied. Still the fact remains that till today there has been delay⁵³ in executing death sentence to the Nirbhaya accused and as a result many people now supporting the action of police encounter that was taken by the Hyderabad police. Nirbhaya case reminds us why speedy justice is not merely an aspect of the right to life with dignity, but is essential for the efficacy of law and for smooth functioning of the society.

‘Me Too’ Movement and Ensuing Backlash

The ‘me too.’ movement was founded in 2006 to help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing. ‘MeToo’ movement was founded by Tarana Burke⁵⁴ but began as a much needed social phenomenon in October 2017 as a hashtag started by American actress Alyssa Milano who shared her story of sexual assault against Harvey Weinstein.⁵⁵ She did this in an attempt to demonstrate the widespread prevalence of sexual assault and harassment, especially in the workplace. It followed sexual-abuse allegations against Harvey Weinstein.

‘Me Too’ began gaining prominence in India with the increasing popularity of the international movement, and later gathered sharp momentum in October 2018 in the entertainment industry of Bollywood, centered in Mumbai, when

⁵³ It took 7 year 3 months 4 days to hang the accused: Please see, Times of India, 20/3/2020.

⁵⁴ Tarana Burke began ‘me too’ with young Black women and girls from low wealth communities. She developed culturally-informed curriculum to discuss sexual violence within the Black community and in society at large.

⁵⁵ En.wikipedia.org> wiki > Me_ Too movement.

actress Tanushree Dutta⁵⁶ accused Nana Patekar of sexual harassment.⁵⁷ This translated into a rush to comply with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013,⁵⁸ also known as the POSH⁵⁹ law, which mandates offices with more than 10 employees to have an internal complaint committee, among other things. There was a focus on doing sessions with small groups of women, getting their feedback.⁶⁰

Starting in September 2018, numerous women in India's media and entertainment industries shared their accounts on social media of workplace sexual harassment and assault, as part of the '#MeToo' movement. Thereafter, [Radhika Apte](#)⁶¹, Richa Chadda, [Swara Bhasker](#) and Konkona Sen Sharma, and many other Bollywood actresses are speaking up on Tanushree Dutta's experience. These public accounts, naming the accused, highlighted the failures of due process, lack of mental health services and support for survivors, and the urgent need to fully implement the Sexual Harassment of Women at Workplace Act, 2013, which prescribes a system for investigating and redressing complaints in the workplace.

An analysis of the BSE⁶² 100⁶³ companies by consultancy ComplyKaro⁶⁴ Services reveals that there has been a 14% increase in the number of complaints

⁵⁶ Hindustan Times, Bollywood, updated: September 25, 2018, IST 17:24, where Actress Tanushree Dutta says that she was abused by an actor and that the Me Too movement won't happen in India unless and until what happened with her on a movie set in 2008 is acknowledged.

⁵⁷ Ibid.

⁵⁸ Act No.14 of 2013.

⁵⁹ A law, to prevent and to provide protection against, Sexual Harassment of women at the workplace as well as Redressal of complaints of Sexual Harassment.

⁶⁰ Delhi-based lawyer Sonal Mattoo, who is on the ICC, of several organizations including BCCL which publishes ET Magazine.

⁶¹ See, <https://tribune.com.pk/story/2120335/4-radhika-apte-calls-metoo-movement-bollywood-dissappointing/> where she says "the movement 'came and went 'without making any impact", published on December 18, 2019.

⁶² Bombay Stock Exchange (BSE) was established in 1875 as the Native Share and Stock Brokers' Association. BSE-100 was launched in January 03, 1989 and was previously known as the BSE National Index.

⁶³ Economic Times, October 10, 2019.

in 2018-19, compared with the previous year. “Because of the #MeToo movement, organisations are doing more, fearing reputational risk. People now know that if women don’t have a choice, they might speak out on social media or go to the police. And because companies are doing more, women are more confident in approaching the ICC,” says Vishal Kedia, director of ComplyKaro.

Discouragingly, there has been a backlash against women who spoke out. Both actor Parvathy and singer Chinmayi Sripada have spoken about how work has reduced in the wake of their public statements against harassment. There have also been defamation suits filed against women, from former Union minister MJ Akbar, who is suing journalist Priya Ramani, to Tamil director Susi Ganesan, who has filed a case against screenwriter and filmmaker Leena Manimekalai. The latest is artist Subodh Gupta, who has filed a suit in the Delhi High Court and sought Rs 5 crore as damages from anonymous Instagram handle @herdsceneand, which had shared an accusation of harassment against him.⁶⁵

Sexual Orientation and Gender Identity

On September 6th 2018, India’s Supreme Court struck down section 377 of India’s penal code, decriminalizing consensual adult same-sex relations.⁶⁶ The Supreme Court, in four separate but concurring judgments, set aside its own verdict in the Suresh Kaushal case.⁶⁷ The five judges Constitution Bench unanimously decriminalized part of the 158 year old colonial era provisions of Section 377 of the Indian Penal Code, 1860 which criminalizes consensual unnatural sex. The Apex Court observed that:

⁶⁴ Complykaro Services Private Limited is a Private incorporated on 09 September 2014. It is classified as Non-governmental company and is registered at Registrar of Companies, it has been empaneled by Ministry of Women & Child Development, Government of India, as a resource company for providing training for The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013.

⁶⁵ Economic Times, October 10, 2019.

⁶⁶ *Navtej Singh Johar & Ors. v. Union of India*, W. P. (Criminal) No. 76 of 2016, ([Supreme Court of India](#)).

⁶⁷ *Suresh Kumar Koushal & Anr vs Naz Foundation & Ors*, Civil Appeal No. 10972 of 2013 arising out of SLP (C) NO. 15436 of 2009, Supreme Court of India.

“Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by individuals today and it is only when each and every individual is liberated from the shackles of such bondage and is able to work towards full development of his/her personality that we can call ourselves (India) a truly free society,”⁶⁸

“Section 377 is irrational, indefensible and manifestly arbitrary,” said Chief Justice Dipak Misra. “Majoritarian and popular views cannot dictate constitutional rights. We have to vanquish prejudice, embrace inclusion and ensure equal rights.”⁶⁹

The ruling followed decades of struggle by activists, lawyers, and members of LGBT communities. The court’s decision also has significance internationally, as the Indian law served as a template for similar laws throughout much of the former British Empire.

In December, the lower house of parliament passed the Transgender Persons (Protection of Rights) Bill, 2018. Rights groups and a parliamentary committee had criticized an earlier version of the bill for contradicting several provisions laid down in a 2016 Supreme Court ruling. Although the government incorporated several amendments in the revised bill, it failed to adequately protect the community, including transgender people’s right to self-identify. The Transgender Persons (Protection of Rights) Bill 2019 has been passed by the Parliament. The Act received the assent of the President on 5th December, 2019.

V. Crisis of Governance; Legislative Vacuum and Judicial Law Making for Social Development

According to Roscoe Pound, “The sociological jurists stand for what has been called equitable application of law; that is, they conceive of the legal rule as general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary man.”⁷⁰

⁶⁸ Ibid at 44.

⁶⁹ Ibid.

⁷⁰ Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence”, (1911) 24 Harvard Law Review 591 at page 597: Also see N.E.H. HAULL, “Reconstructing the

It is for this reason that judiciary is understood to be playing a very major role in bringing about the reform in the society to which the sociologists refer to as 'social change.' In the present discourse it would not be wrong to say that in many cases whenever there was a crisis in governance or there was a legislative vacuum our Apex court came to rescue and opened the path of judicial law making which in most of the cases contributed for social development and upholding the principles enshrined in the Constitution. One of the finest contributions in this regard can be seen in the acceptance and recognition to Public Interest Litigation.⁷¹

PIL can be seen as an important means of Social development. Contemporary Indian discourse on law and social change has given an important place to PIL. Judiciary has shown commitment to correct administrative injustice through this device. This method originated in the USA and has travelled fast in India. It is a concept aimed at increasing the accessibility of Justice and forms a part of constitutional jurisprudence in India⁷² and in many cases helped in ameliorating the social conditions as well.

PIL is concerned not with individual rights but with interests of class/groups. It goes to the credit of the Supreme Court that it has broadened Locus Standi which was diluted for the first time by **Justice P.N. Bhagwati** in the case of **S.P. Gupta .v. Union of India**.⁷³ He argued that Locus Standi arose in an era when private law dominated the legal system and public law had yet to be born. This is the case where Justice Bhagwati said that the court will readily respond even to a letter addressed by such individual acting pro bono public, thereby, making the procedure of approaching the court more flexible.

This single piece of judicial pronouncement has opened a plethora of litigation against the injustices and contributed much for social development covering many aspect of human existence in the Indian soil since then and contributed much for enforcing rights as per the directive principles of state policy which

Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange of Legal Realism", 1989, Duke L.J. 1302 at pages 1307-1308.

⁷¹ Here in after referred as PIL.

⁷² Ibid at 21.

⁷³ S.P.Gupta.v. Union of India, 1981, SUPP, SCC 87.

requires proactive involvement of state and public institutions to fight governmental lawlessness among many other things.⁷⁴

Prof. UpendraBaxi has referred this judicial activism trend by the nomenclature of Social Action Litigation (SAL) as this is an Indian brand of class action suits and noted that the Supreme Court of India is taking suffering seriously.⁷⁵ The PIL which started around 1970s had cases related to the rights of disadvantaged sections of society such as child labourers, bonded labourers, prisoners, mentally challenged, pavement dwellers, and women as the subject-matter of the case. But this trend underwent a change and the subjects of PIL got shifted to matters of collective concern such as environment and policy matters in the 1980s and early 1990s.⁷⁶ PILs have contributed to the social change in the sense that without such a mechanism many of the problems that had been faced by the poor and those inaccessible people would have never come before the court. This has also contributed to the development of the Supreme Court as an important institution for social change by its liberal and pro-active interpretation of the provisions of the Constitution. This judicial activism was mainly carried forward by the way of making Article 21 of the Constitution of India an umbrella provision and by stretching its ambit. From the sociological jurisprudential perspective, the Supreme Court of India has played an important role in the social transformation with providing access to justice being made available for all through PIL and taking up important issues leading to the policy moulding with the purpose of striking balance between interest claims of society and individuals.

⁷⁴ The crux of the PIL, is that: If a legal wrong is caused to a person/s by way of violation of legal/constitutional right... and such person cannot come to court due to: poverty, helplessness, disability; or socially or economically disadvantaged position he can maintain an application for appropriate direction, order or writ in High Court under Articles 226 or in case of fundamental rights in the Supreme Court.

⁷⁵Baxi, Upendra (1985) "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,"*Third World Legal Studies*", Vol. 4, Article 6: Available at:<http://scholar.valpo.edu/twls/vol4/iss1/6>.

⁷⁶ Deva Prasad, "Law and Social Transformation in India through the Lens of Sociological Jurisprudence," in, 'The Practical Lawyer' available at: http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=20264.

UpendraBaxi, an eminent jurist, has delineated the following typology of social/human rights activated judicial activism;⁷⁷

i) Civil Rights Activists, ii) People Rights Activists, iii) Consumer Rights Groups, iv) Bonded Labour Groups, v) Citizen for Environment Action, vi) Citizen Groups against Large Irrigation Project, vii) Child Rights Groups, viii) Custodial Rights Groups, ix) Poverty Rights Groups, x) Indigenous People's Rights Groups, xi) Women's Rights Groups, xii) Bar-Based Groups, xiii) Media Autonomy Groups, xiv) Assorted Lawyer-Based Groups⁷⁸, xvi) Assorted Individual Petitioners.⁷⁹

Over time it is not just the rights of the 'socially excluded' that have been put up for judicial review and intervention; a whole gamut of issues such as the environment, consumer affairs, property rights, the practices of municipal corporations, educational institutions, politicians and political parties, to name a few areas, have been presented before the courts to prescribe public policy outcomes. This widening of subject matter has caused Indian judicial activism to be celebrated as a device of engineering social change. But here it is pertinent to mention that some virtue could be seen in what we call interpretational judicial activism, while in other forms of judicial activism that encroach on legislative or executive decision-making on grounds of privilege could result in social costs that outstrip benefits.⁸⁰

VI. Social Engineering: An Assessment After 75 years Journey of Indian Democracy

Standing at the cross road after 75 years' journey of Indian democracy it has been seen that various laws have failed to fill the vacuum already created and a lot of change in social scenario has already taken place. During this journey

⁷⁷UpendraBaxi, "Judicial Activism: Legal Education and Research in Globalizing India," in *Mainstream*, New Delhi, 24 February, 1996, at page 16.

⁷⁸ This category includes the critically influential lawyers' groups which agitate for various causes.

⁷⁹ This category includes freelance activist individuals.

⁸⁰T. C. A. Anant and Jaivir Singh, "An Economic Analysis of Judicial Activism," *Economic and Political Weekly*, Vol. 37, No. 43 (Oct. 26 - Nov. 1, 2002), pp. 4433-4439. Also see <https://www.jstor.org/stable/4412779>.

India has witnessed the emergence of sui generis political engineering in the guise of social engineering and in the name of social engineering the survival of political engineering. This is because of the following reasons;

- a) In India, the poor and disadvantaged sections of people vote proportionately much more than the rich and stronger sections.
- b) Corruption at all levels of the system of government.
- c) The nature of politics has so far run on the premises where poverty alleviation has not remained just as an economic imperative but a political necessity.
- d) The withdrawal of the state from the essential function of shaping economic outcomes had eroded its role as an instrument of social inclusion.⁸¹
- e) The recent rise of crony capitalism, and reduced role of the state in reducing barriers to equality of outcomes has in fact produced misguided equality and fostered status quo.⁸²
- f) The rise of populism⁸³ which has brought more people into the economic mainstream but it was a political response to the symptoms of inequality rather than a solution.
- g) The techniques so far taken by several governments were not based on the principle of anti-free market policy it was rather based on political opportunism.

⁸¹Himanshu, "India's Politics and the poor," *Economy & Society*, available at [https://www.ecfr.eu/what does india think/analysis/indias politics and the poor](https://www.ecfr.eu/what%20does%20india%20think/analysis/indias%20politics%20and%20the%20poor): The findings are that since the onset of economic reforms in 1991 the state has been reduced to a merely political instrument, while the allocation of resources and even their redistribution are seen as the outcome of market-based policies.

⁸² Dennis R. Fox, "A Critical Psychology Approach to Law's Legitimacy," *HEINONLINE*, 25 *Legal Stud. F.* 519 (2001): Also see, Dennis R. Fox "Critical Psychology: An Introduction," Second Edition, Sage Publication, ISBN-13: 978-1847871732.

⁸³ The governments that have adopted pro-poor policies have been increasingly successful in recent years. This includes both the government at central and state level.

- h) The disjuncture between the process of political empowerment and the process of economic empowerment has led to a weakening of the state as mediator and regulator of economic institutions.⁸⁴

A danger inherent in the present system of government and political discourse led by the opposition can be seen which is virtually diluting the real issues and instead focusing on irrelevant issues. This becomes evident in view of the fact what the country has so far witnessed with regard to the Citizenship Amendment Act, 2019⁸⁵ and also NRC,⁸⁶ and NPR issues. What is ironical is that, a peculiar kind of silence and passive tolerance is clearly discernible both on the part of the Government and the whole opposition parties with regard to the increasing gap of inequality between poorest and the richer sections of the society. There is unique silence with regard to the publication of the name of big defaulters who looted and destabilized the Indian Banking System. The fallacious distribution of national wealth and its misuses makes it evidently clear actually where we are heading now.⁸⁷ A superficial projection of equality, and encouragement for

⁸⁴ The result can be ascertained from different economic corruption and looting of several thousand cores rupees by several economic offenders and fleeing from India and thereby putting huge pressure on Indian Economy.

⁸⁵ The Citizenship (Amendment) Act, 2019, passed by the [Parliament of India](#) on 11 December 2019. It amended the [Citizenship Act of 1955](#) by providing a path to Indian citizenship for illegal migrants of [Hindu](#), [Sikh](#), [Buddhist](#), [Jain](#), [Parsi](#), and [Christian](#) religious minorities, who had fled persecution from [Pakistan](#), [Bangladesh](#) and [Afghanistan](#) before December 2014.¹³ [Muslims](#) from those countries were not given such eligibility

⁸⁶ The [National Register of Citizens](#) is a registry of all legal citizens, whose construction and maintenance was mandated by the [2003 amendment](#) of the Citizenship Act. As of January 2020, it has only been implemented for the state of Assam, but the BJP has promised its implementation for the whole of India in its 2019 election manifesto. The NRC documents all the legal citizens so that the people who are left out can be recognized as illegal immigrants. The experience with Assam NRC shows that many people were declared "foreigners" because their documents were deemed insufficient.

⁸⁷ This become evident from the Oxfam Report published by Times of India, 23 January, 2019 which indicates that: "India's richest 1% gets richer by 39% in 2018. Just 3% rise for the bottom-half. 13.6 core Indians who make up to the poorest 10% of the country continued to remain in debt since 2004. "If this obscene inequality between the top 1%

limited, self-defeating legal solutions could be seen in the post-independence era.

VII. Epilogue

Law has often been used as an instrument of social engineering as far as India's pre-independence and post-independence scenario is concerned. There is a difference of ratio between two spheres namely "areas where law has contributed as an instrument of social engineering and social changes that germinated law." During pre-independence period it was seen that various socio-religious movements 'contributed much and as a result the colonial ruler was forced to enact several laws to eradicate several social evil and to cover few other things. The ratio was higher on the side of socio-religious movement and law making.

During post-independence era the scenario seems to be unique. In most cases it seemed that the ratio tilted in favor of the legislative bodies which had a constitution having enough provisions for enactment of laws that can bring about much needed social change and to fulfil the goal of the constitution. Viewed in this perspective it can be said that various laws (passed by successive governments) indeed have acted as an instrument of social engineering. Consequently, the ratio was higher in that side. On the other hand, there were instances of very few social movements which could attract the attention of the Government or the Apex Court and ultimately resulted into few law making or policy guidelines.

To fill the vacuum of law and resolve the crisis of governance the Apex Court of the country came forward. The result was application of various provision of the constitution and widening of the ambit of various articles therein along with introduction of PIL which went a long way for opening up a plethora of litigation against the injustices and contributed much for social development through judicial law making, covering many aspect of human existence in the Indian soil since then and contributed much to for enforcing rights as per the

and rest of India continues then it will lead to a complete collapse of the social and democratic structure of the country."

directive principles of state policy which requires proactive involvement of state and public institutions to fight governmental lawlessness among many other things. Here the ratio was greater on the side of judicial law making which eventually contributed to social engineering.

Finally, we would like to conclude by saying that the notion that law as an instrument of social engineering has gone through a huge metamorphosis and the journey so far made has not always been in a single straight line rather it has been in a zigzag way and that the ratio has not at all been proportionate.

A Critical Review on Indian Agricultural Policies with Special Reference to Women Farmers

Dr. Bhaswati Saha¹

Abstract

Due to out-migration of male labour role, responsibility and participation of women in agriculture at household level are expanding day by day. According to OXFAM report, women, who are economically active in India 80% women engaged in Agriculture and allied activity. But till women's labour remained unrecognized and invisible in the agricultural sector. In this context, proper planning, efficient policies, play a significant role to carry out agricultural activities effectively. After Independence the government introduced the different initiatives in the form of Five Years Plans, Schemes etc. which emphasized to empower Women farmers with food security and motivated to organise SHGs to enhance access to their technological, entrepreneurial skills and access micro-credit facilities. These plans concern with principle aim of reducing gender gap in agricultural and allied sector, ensuring their land rights, eradicating women's work drudgery. National Commission on Farmers, National Policy on Women farmers have been facing new challenges in the capitalist farming system with traditional patriarchal values. The Women Farmers Entitlement Bill, 2011 focused on land rights, water rights, credit and technological rights. Government of India has taken several steps to improve the overall condition of agriculture in India. Because of unsupportive social system, caste system, and in efficient administrative practices, the policies initiated by the Government are yet to achieve desired goals.

Key words: Feminisation of agriculture; women farmers; gender gap in agriculture; household labour; agricultural extension; right to access to land, credit, technology; National Policy on Women; Five year Plan.

I. Introduction

India possess only 2.4 percent land area in the world, in spite of that India is popularly recognised as global agricultural powerhouse. India is the largest

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producer (25% of global production), consumer (27% of world consumption) and importer (14%) of pulses in the world.² One of the main significant features of this agricultural and allied sector is the dominance of women.³ Women have always played crucial and varied roles in agriculture as farmers, co-farmers, family labourers, and wage labourers and also as managers of farms. Their role and participation are expanding day by day in agricultural sector because men are engaged in other sectors of the economy and their out-ward migration has become a prominent feature on account of lack of prospect in agriculture. IHD reports (2014) have revealed 70% of all women engaged in cultivation in the house-hold level due to male migration.⁴ National policies, planning have been remaining an imperative force for overall development of the country. National Policies, implementation is very important aspect to carry out their activities effectively. In India, the government has taken up several steps to improve the condition for women farmers' overtime through different policies and law. *This paper aims to explore* how women farmers are linked with different agricultural policies and programmes initiated by the Government of India that they stabilize themselves and stimulate action in the agricultural activities.

II. Agricultural activities vis a vis Women

According to The Women Farmers Entitlement Bill, 2011 '**Agriculture**' means and includes, all activities related to cultivation of crops, animal husbandry, poultry, livestock rearing, apiculture, gardening, fishing, aquaculture, sericulture, vermin-culture, horticulture, floriculture, agro-forestry, or any other farming activity carried out through self-employment, tenurial cultivation, share-cropping, or other types of cultivation including shifting cultivation, collection, use and sale of minor or non-timber forest produce by virtue of ownership rights or usufructory rights;⁵. Traditionally women have always played crucial and varied roles in agriculture as farmers, co-farmers, family

²<http://www.fao.org/india/fao-in-india/india-at-a-glance/en/>

³Available

at

<http://ncw.nic.in/pdfreports/impact%20of%20wto%20women%20in%20agriculture.pdf> accessed on 16th October, 2017 at 8.53 PM.

⁵ Section 2(a), THE WOMEN FARMERS' ENTITLEMENTS BILL, 2011.

labourers, and wage labourers and also as managers of farms. But till women's labour remained unrecognized and invisible in the agricultural sector. Their role and participation are expanding day by day in agricultural sector because men are engaged in other sectors of the economy and their out-ward migration has become a prominent feature on account of lack of prospect in agriculture. According to OXFAM report, women, who are economically active in India 80% women engaged in Agriculture and allied activity. They comprise 33% of the agriculture labor force and 48% of the self-employed farmers. About 60-80% food production are controlled by rural women.⁶ By the term **Agricultural Activity** it means any activity related to agriculture.⁷ And most important part of this bill is that definition of 'Farmers' explained in Section 2(c), The Women Farmers' Entitlements Bill, 2011. According to bill Farmers are those who

- i)* engaged in agriculture directly or through the supervision of others; or
- ii)* contributes to conservation or preservation of agriculture related varieties or seeds or breeds of farm animals; or
- iii)* contributes through traditional knowledge to any type of innovation, conservation or to propagation of new agricultural varieties or to agricultural cultivation methods or practices or to the practice of crop-livestock integrated farming system; or
- iv)* promotes agro-processing, and value-addition to primary products.

The recognition of the different allied activities and tenurial process within the sphere of 'Agriculture' and diversified contribution in the integrated farming system is an acknowledgment that both male and female are inseparable labour force in agriculture.

III. Women Agricultural Workers and Five Year Plans

⁶ Available at <https://www.oxfamindia.org/women-empowerment-india-farmers> access on 30.03. 2020. at 3.00p.m

4. id.

⁷ Section 2(b), The WOMEN FARMERS' ENTITLEMENTS BILL, 2011.

The Constitution of India (1950) incorporated the principle of equality of all regardless of caste, creed or gender (Article 14 and 16) and provided for mandatory instruments for affirmative action by the state in the form of reservations and special measures under Article 15 (3) in favour of women and children. This particular strategy for achieving equality is further through the inclusion of Directive Principles of State Policy in the body of **Part- 4** of the Constitution.

Under the Planning Commission of India, provides for the following:

- a. The Fourth Five Year Plan (1969–74) for the first time women farmers have been addressed to link with the ‘Farmers Training and Education Programme’ for meeting the differential technological needs of women.
- b. Putting the women’s issue in the mind in the Fifth Five Year Plan (1974-79), Training and visit (T&V) System of Extension was introduced. But it was in vain. In the meantime, 1974 the government of India set up the Committee on the Status of Women in India (CSWI) to assess the gender equality.
- c. In the Sixth Five Year Plan (1978-85) ‘employment of women’ was seen as vital indicator of developmental strategy. In the 1981 census report brought a new dimension in the definition of the employment category to identify marginal workers where women workers in the agricultural activities could be included. But identification and recognition of the activities have been remained very slow.
- d. In the Seventh Plan (1985-90) felt to improve science and technological issues towards women farmers especially who are engaged in the post harvesting activities, horticulture, plantation etc.
- e. In the Eight (1991-96) and Ninth plan (1997-2002) period was very crucial for women farmers. In this time period women farmers are motivated to organise SHGs to enhance their technological, entrepreneurship skills and access micro-credit facilities. This period has a path breaking entity not only agricultural sector but also whole economic situation. With the participation of the Uruguay Round of World trade Organisation India was interconnected with global economic system. It led to unstable situation in subsistence agriculture and drastic transformation of cash crops replaced by food crops.

f. 2001 and 2003 were landmark years for women farmers. In 2001 National Policy for Empowerment of Women was incorporated in the Ninth Plan and it put emphasis on empowering of female labour at the household level with proper food security. In 2003 The Manila Declaration of the International Conference on Women in Agriculture has asked national agricultural planners to recognize the gendered impacts of trade policies and has called for urgent action on a number of fronts including guaranteeing women's right to basic livelihood resources, support services and market opportunities; establishment of mechanisms for participation, access and accountability in trade negotiations participation, access and providing capacity building for women farmers.⁸

g. Next, the Tenth plan was initiated with principle aim of reducing gender gap.

h. 11th (2007-2012) Five Year Plan was concern with the increment of women's employment in agricultural and allied sector, ensuring their land rights, eradicating women's work drudgery by implementation new gender sensitive technology. This plan also scrutinizes gender based wage differentiation and other type of exploitation.

i. Next in the 12th (2012-2017) five year plan put emphasis on reduction of poverty.

III. National Commission on Farmers (NCF), 2005⁹ and Women Farmers

The National Commission on Farmers (NCF) was constituted on November 18, 2004 under the chairmanship of Professor M.S. Swaminathan. The Terms of Reference reflected the priorities listed in the Common Minimum Programme. The fifth and final report was submitted on October 4, 2006. The reports contain suggestions to achieve the goal of "faster and more inclusive growth" as envisaged in the Approach to 11th Five Year Plan. The NCF is mandated to make suggestions on issues such as food and nutrition security, increase flow of rural credit, special programmes for dry land farming; with overall countrywide

⁸ Edited by R.K.Punia, " Women in Agriculture" Vol-2: Education, Training and Development, Northern Book Centre,1992 New Delhi,

⁹KaushikiSanyal, PRS Legislative Research, available at <http://www.prsindia.org/parliamenttrack/report-summaries/swaminathan-report-national-commission-on-farmers-662/>, accessed on 10th August, 2017 at 6.44 PM

enhancing productivity profitability, and sustainability of the major farming. Apart from the general recommendations, this report was enriched with some gender based strategy. Such as-

- Proposal for conferment of right for women to land ownership
- Recommendation to be made for the credit, knowledge, skill, technological and marketing empowerment of women,
- Empowering male and female members of the Panchayettoincrease their important role in conserving and improving the ecological foundations for sustainable agriculture
- Village women and their associations should be encouraged to assume responsibility for all development schemes relating to drinking water, sanitation, primary education, health and nutrition

IV. National Policy for Farmers

The National Commission on Farmers submitted its final report in October 2006. National Policy for Farmers, 2007 neglected many points regarding upliftment of women farmers as these were recommended by National Commission for Women in the time of policy frame work. A brief discussion over the draft policy 2008 is as under.

A. Draft National Policy on Women in Agriculture, 2008¹⁰

Increased feminization of agriculture and commercialisation of agricultural productivity women have been facing new challenges in the capitalist farming system with traditional patriarchal values. National Policy on Women in Agriculture, 2008 recommended many new additional dimensions for women farmers:

The Policy had four main dimensions

1. *Natural Resource Assets*
2. *Production System*

¹⁰Available at ncw.nic.in/Comments/Agricultural_Policy.pdf, accessed on 21th April, 2016 at 10.33 AM

3. *Agricultural Marketing and Trade*
4. *Agricultural organisation Science and technology*

Natural Resource Assets

The Rural women are solely responsible for half of the world's food production, and in developing countries, it is as much as 80% of food crops.¹¹ In spite of that, women are devoid of agricultural assets like most crucial elements land, seed, water and forest rights.

Land Rights

First of all, policy recommended for ensuring the rights of land both homestead and agricultural property for women and single women headed households including widows, abandoned and deserted women by eradication gender discriminatory provisions from all personal laws. A special emphasis has been given to not only given to the distribution and recording of joint pattas but also providing access to information about joint title to land and family property. It is also said that in case of dissolution of marriage, maintenance shall be worked out to include women's right to joint patta. Transfer and sale of any common agricultural or homestead land, whether owned privately or collectively, shall be done with the prior and explicit consent of both spouses.

Displacement and Rehabilitation

Gender concerns shall be prioritized and taken into account when environmental and social impact assessments are done of any land alienating projects. Women shall have equal right to compensation and rehabilitation in case of the sale or transfer or alienation of privately or collectively held land. Women shall be recognized as "interested parties" and separate entities for any compensation and rehabilitation package. Care shall be taken to see that all widows, single, abandoned and separated women are also registered as separate entities. Basic social infrastructure shall be provided in all rehabilitation packages. It shall be mandatory for all rehabilitation packages to include the formation of a Mahila welfare fund to which contributions shall be made by both government and project holders.

¹¹Food and Agriculture Organization of the United Nations (1997). *Women and Food Security*. FAO FOCUS.

Seeds and Biodiversity

Indigenous knowledge and skill of rural women should be recognised, encouraged, protected through women's self-help groups and seed banks and also integrated into agricultural research in the public domain supported by a strong intellectual property rights

Water

Women farmers must have the conservation and equal distribution of all water resources through the formation of women's groups and SHGs by the help of Panchayet. Women agricultural workers from families of landless and small and marginal households shall have the first right over biomass augmented from watersheds.

Production System**Production of Food grains**

In connection with Women's right over production and food grain women's cooperatives shall be given priority in leasing or sale of uncultivated lands for agro-forestry or integrated and biological farming and develop land and soil conservation practices in order to increase the production of women farmers.

Labour and Livelihood

In Gross Domestic Product, unpaid work of women in family, farm and non-farm activities shall be identified and recognised and accounted for in Health care, childcare, and old age pension shall be provided to all women agricultural workers. All women agricultural workers shall be recognized and registered as workers for this purpose. Then appropriate status and rights shall be given to Seasonal and migrant women agricultural workers too. Minimum and equal wages are very important dimension in this struggle. It was recommended for formation of cooperatives, group enterprises and SHG for processing of agricultural produce.

Inputs for Agriculture and Allied Activities

Apart from land seed, fertilizer, nurseries, pesticide water and electricity are the basic conditions for improving agriculture. So all these facilities shall be restored, supplied and additional support shall be given to women headed

households through various agencies like KrishiVigyanKendras. SHGs and SGSY groups. Electricity should be given at free of cost to Single women headed households, small and marginal farmers.

Agricultural Marketing and Trade

Policy Support for Market Protection

Women farmers should be protected in trade and retailing marketing from unfair competition by Corporations.

Procurement of Agricultural Produce

Proper linkages should be incorporated among women led local mandis to the Food Corporation of India through women's SHGs.

Procurement of Produce of Allied Sector

A Price Commission shall be set up to determine and administer minimum support prices for different farm products. And women's cooperatives and SHGs shall be formed and promoted to carry out procurement and trade in these products.

Retail Marketing and Trade

Women retailers should be protected by establishing 'women kisanhaats', by financial and tax incentives, by strengthening its linkages with KVIC and small scale industries cooperation and others supportive Policy and legislative measures. Women retailers shall be provided regular market information through field level schools and IT kiosks.

Agricultural Organisation, Science and Technology

Debt Relief, Rural Credit and Investment: Debt Relief Commissions shall be formed at the state level in order to help indebted families facing agricultural distress especially in areas where there are repeated farmer suicides and women who are abandoned, deserted or rendered homeless because of farmer's suicides. A Gram Mahila Welfare Fund shall be formed in order to create common health, education and child care facilities at worker sites for women workers in agriculture and allied sectors.

Agricultural Extension: A cadre of women agricultural extension workers shall be created in order to ensure that women farmers have greater access to technology and knowledge that will reduce their labour time while increasing their productivity. Women SHGs shall be linked with the agricultural extension service in order to expand its scale and scope,

Research, Science and Technology: Science and technology organisations shall encourage and promote Women's knowledge of biodiversity in agriculture and allied sectors. Pro-women technologies and new experiments like bio-farms, integrated and organic farming shall be promoted for overall development of the women farmers.

B. The MahilaKisanShashaktikarnPariyojana, 2011

The MahilaKisanSashaktikarnPariyojana (MKSP) is a sub component of the National Rural Livelihood Mission (NRLM) and it was launched in 2011. Main objective of this scheme is empowering women in agriculture through strengthening community institutions of poor women farmers. It provides strategies on assisting women with a focus on empowering women in agriculture by to gain more control over the production processes and manage the support systems, enhance access to inputs and services from government and others. Women represent more than 40%The MahilaKisanShashaktikarnPariyojana was later announced with a start-up fund of 100 crore by then Finance Minister, Mr. Pranab Mukherjee in his budget speech in 2010-11. The MKSP seeks food and nutrition security at a household level through improvement in women's control over production processes and resources. It is also a programme that moves beyond providing information to women to creating institutions for women farmers for investments in livelihood activities and enhancing their assets. MKSP aim at:

- improved food and nutrition security of women and their families,
- increased incomes with sustainable agriculture practices to improve the quality of assets,
- access to productive resources such as land, credit, information, reduced drudgery of women farmers through use of gender friendly tools, and

- improved visibility of women farmers in the region by strengthening their institutions and supporting entrepreneurship.

The basic objectives translated through various guidelines of MKSP are to¹²:

- Create sustainable livelihood institutions of women around agriculture and allied activities;
- Create sector-specific geography specific sustainable package of practices;
- Create a wide pool of community resource persons for scaling up livelihood interventions in the entire country;
- Promoting and enhancing food and nutritional security at Household and Community level;
- Sustainable increase in income from primary sector livelihoods (Rs. 30,000 to 50,000 per annum);
- Drudgery reduction for women farmers;
- Poorest of poor focus – specific initiatives for the POP-landless, small and marginal farmers as project participants;
- To enable women to have better access to inputs and services of the government and other agencies.

The funds earmarked in the programme are therefore to CREATE THE HUMAN AND SOCIAL CAPITAL, while physical, natural and financial capital will be made available through convergence with other programmes such as Mahatma Gandhi National Rural Employment Guarantee Scheme, RashtriyaKrishiVikasYojana, National Food Security Mission, and Agriculture Technology Management Agency etc.

C. Gaps under NRLM and MKSP:

- NRLM and MKSP do not explicitly state the goal of women's empowerment for gender equality,
- They do not carry any gender analysis in their strategy unlike say the education for women's equality programme. It was only in some of the civil society organizations linked to women's movements.

¹² Available at www.aajeevika.gov.in/.../MKSP-Agriculture-Guidelines, accessed on 24th May, 2017 at 9.16 PM.

- The MKSP rests on the assumption that a lack of knowledge of agriculture technologies among owners of resource poor lands and households is primarily responsible for their inability to reduce costs of investments.

The Women Farmers Entitlement Bill, 2011: The acute distress of the “suicide widows” of different states, who would be left with debt ridden households, get dispossessed of their lands, disowned by their marital families and forced into waged labour had a very deep impact among the policy framers of India. On the basis of the recommendations of Dr. Swaminathan, the Chair of the Farmers Commission, the government of India tabled the ‘Women Farmers Entitlement Bill (2011) in the Rajya Sabha. Though the bill finally lapsed, the bill intended to provide for the gender-specific needs of women farmers, protect their legitimate needs and entitlements, and empower them. The Bill among other things provided definitions of women farmers along with definition of farmers and includes the followings:

- women will enjoy land rights (every woman shall have equal ownership and inheritance rights over agricultural land in her husband's family);
- water rights (a woman farmer shall have equal right as men to water, water resources, and irrigation facilities for farming);
- legal access to credit, technology and other agricultural inputs; and funds for support services.
- The Act provides Central Agricultural Development Fund for Women Farmers (CADFWF) for support services to empowered of women farmers.
- This Act recognises market facilities, training and capacity building program for women farmers
- The Act is also death with responsibilities of Central Govt., State government and also local authorities. It is also told about establishment of effective institutional mechanisms at the taluka or tehsil or block level.

The Draft National Policy on Women, 2016

The policy focuses on the financial inclusion of women. It felt the women should have the access to financial services such as credit sources, saving services, insurance, pension schemes aimed towards poor women (with contributions), special financial literacy programmes for the poor women and also availing of the transfer of benefits and subsidies that are offered by the Government. It also mentions as Follows:

- The draft policy aims to recognize women's unpaid work in terms of economic and societal value and the rights of women farmers in agriculture and its allied sectors and related value chain development. The policy aims to put its effort to support women in their livelihood, their visibility and identity, secure their rights over resources, ensure entitlements over agricultural services and provide social protection cover.
- It was proposed for '**KrishiSakhis**' for utilization of skills and capacities of successful women farmers.
- Women's traditional knowledge about conserving genetic diversity should be encouraged and incentivized by SHGs and cooperatives.
- Women farmer's collective farming activities will be incentivized by providing support for post-harvest storage, processing and marketing facilities, marketing of crops produced by women farmers.
- Existing legal provisions have been recommended to amend the existing legal provisions incorporating the provisions of:
 - Prioritization of women in all government land redistribution;
 - Land purchase and land lease schemes;
 - Joint patta;
 - Joint registration of land with spouses;
 - Incentivisation of transfer of land in favour of women through concession in registration fee and stamp duty to be introduced;
 - Tenancy laws should also been amended to ensure rights of the women;
 - Steps to be taken to involve women farmers in on farm participatory research for agricultural technology and the development of women friendly implements or tools;
 - Special packages to be introduced for the wives of farmers who committed suicide on account of failure of crops or heavy

indebtedness and are left behind to take care of their children and family.

All above recommendations had been discussed in details in draft of National Policy on Women in Agriculture, 2008.

Ministry of Agriculture & Farmers Welfare, Government of India has taken up some necessary measures for women farmers.¹³

- **Support to States Extension Programme for Extension Reforms 2010:** Under the centrally sponsored program it was decided minimum 30% resources were ensured to utilize for women farmers. Farmers' Advisory Committee at block and district level has been provided under the scheme guideline.
- **Sub Mission on Seed and Planting Material (SMSP) Program:** It was implemented under the National Mission on Agricultural Extension and Technology (NMAET) with the aim of development of entire gamut of seed production chain. Under this (SMSP) scheme training facilities have been provided where women farmers are also beneficiaries.
- **National Food Security Mission (NFSM):** It was launched in October 2007 was grant successful. According to the guideline of this scheme training on cropping pattern is necessary for women to create awareness on improved technology for increasing production and productivity of crops. This scheme is implemented 28 states and also ordered that 30% of allocation of fund would be spend for women farmers to enhance economic level of household.
- **Sub-Mission on Agricultural Mechanization (SMAM):** Under this scheme, the women farmers are trained for the new drudgery reducing technologies for women in agriculture invented and promoted by ICAR. The Indian Council of Agricultural Research (ICAR) has established a network of 645 KrishiVigyanKendras (KVKs) in the countrywide.

¹³ Press release of Ministry of Agriculture & Farmers Welfare, Government of India, on 02-August-2016 <https://pib.gov.in/newsite/PrintRelease.aspx?relid=148196> access on 05.04.2020. 1.p.m

Women beneficiaries are also provided 10% additional financial assistance for purchase of various agricultural machines and equipment.

- **National Horticulture Mission:** To improve nutrition development National Horticulture Mission was launched in 2005-06 from central Government. Here technological & extension supports are provided to women through Self Help Groups for enriching their self-reliant.

V. Conclusion

On the basis of above discussion, it may be stated that the Government of India has taken several steps to improve the overall condition of agriculture in India. It also has undertaken a comprehensive planning to empower women at the instance of feminisation of agriculture in Indian society as taking place in other parts of the world. Because of unsupportive social system, the policies initiated by the Government do not get much success. Since the rights over agricultural land is yet to be recognised so women are deprived of the benefits of different Government schemes like KCC, Soil Health Cards, FasalBimaYojna associated to achieve success in agriculture in West Bengal.

Water and Women's Right in India: An Eco-Feminist Approach

Neelam Lama¹

Abstract

Water scarcity is the most widespread and serious of all the ecological disasters on the planet, and it requires immediate attention for human survival as it is affecting almost every continent causing growing concern around the world.

The author would emphasise the importance of women in conserving water in this paper because they are profoundly linked to nature due to their similar life-giving biological processes. Against this background, this paper will discuss the primary role of women in the restoration and protection of the environment through joint efforts and plans, particularly in the era of water scarcity, and how eco-feminism, a branch of feminist theory, can help to solve the water scarcity if they are given proper awareness and training.

Keywords: WaterScarcity, conservation, natural resources, eco-feminism

I. Introduction

In most parts of the world, the golden age of safe, inexpensive, and readily available water has passed. Water shortages are threatening people's lives all over the world,² and the situation is only getting worse. India, the land of scared rivers and of generous rainfall is no longer a stranger to this crisis. If we see the background, the name 'India' is derived from the word 'Indus,' which refers to a large river, and India was once known as the land beyond the Indus.³ Unfortunately, it is currently experiencing a severe water shortage, with an estimated 2 lakh Indians dying each year due to lack of safe drinking water.⁴

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² VANADANA SHIVA, WATER WARS: PRIVATIZATION, POLLUTION AND PROFIT, 366(North Atlantic Books , 2016).

³*Id.*

⁴ Edith Brown Weiss, *the Coming Water Crisis: A Common Concern of Humankind*, 118.

There is explosion of population in the last century, overexploitation of water resources, industrial pollution and many more which makes the water crisis the most serious problem of this century. Ironically, two-thirds of the world's population is expected to face water scarcity by 2025, and ecosystems around the world will suffer even more.⁵ We are all aware of the disastrous consequences of it, and they affect different groups in different ways, with the most vulnerable groups like women and children bearing the brunt of it. Women face more challenges than men in all of these groups, especially those from less privileged socioeconomic backgrounds.⁶ According to the research, climate change affects women more than men,⁷ in the third world countries, women are responsible for finding a resource for their families. In their struggle to get water for their families, they encounter dozens of new unwelcome health problems,⁸ particularly for pregnant women, who may consume fewer nutrients than the energy they exert by walking miles to carry water, putting both mother and child at risk. Their health is also impeded by the lack of water, as it impairs their ability to sustain a regular menstrual cycle. Girl children because of the gender norms formulated by the society often miss schools as they have to carry the burden of water,⁹ bear the brunt of water shortages child marriages are common. Women and children also suffer problems, whether it's class predation, environmental poisoning, or health risks. As a result, the water crisis has become a deeply personal matter for women.¹⁰ In our nation, women produce

<http://www.unep.org/geo/GEO4/report/GEO-ReportFullen.pdf>.

⁵ WWF, <https://www.worldwildlife.org/threats/water-scarcity>

⁶Prabhash K Dutta, *Why India does not have enough water to drink*, INDIA TODAY, June 28, 2019 at <https://www.indiatoday.in/india/story/why-india-does-not-have-enough-water-to-drink-1557669-2019-06-28>

⁷ Mary Halton, *Climate change 'impacts women more than men*, BBC NEWS, March 8, 2018 at <https://www.bbc.com/news/science-environment-43294221>.

⁸ Emily Archer, *the wells are drying up: Water & Women in Ghana*, Vol. 35, No. 3/4 (March-April 2005), 23-2, <https://www.jstor.org/stable/20838316>.

⁹ Annie Banerji, *Water women' quench thirst of central India's parched villages*, REUTERS, August 27, 2019, <https://www.reuters.com/article/us-india-environment-water-idUSKCN1VH0ZQ>

¹⁰ Alexandra Barton, *Water in Crisis - Women In India*, The Water Project, <https://thewaterproject.org/water-crisis/water-in-crisis-india-women>

60-80 percent of the food and 90 percent of the dairy products. They have a big influence on finding a solution to the water crisis, and they've proven to be strong advocates for their families and communities. According to evidence from India, women are not only important in the fight against water scarcity, but they are also likely the only ones capable of doing so on a large scale.¹¹

II. Water Crisis is a Women's Issue

In a developing country, gender norms dictate that women and girls are the primary water carriers and getting a bucket of drinking water is a daily struggle for women due to depleted water resources¹² they walk long distances in rural areas and wait long hours in towns to collect water for drinking and cleaning needs for their families¹³ and are the primary victims of environmental degradation. As a result of the water crisis, women's roles as water suppliers are becoming increasingly burdensome¹⁴ and has a variety of direct effects on women and children, making water a feminist problem.¹⁵

Women are the ones who awaken society and defend the planet whenever there is a threat to life and survival. They have played a pivotal role in managing natural resources for a family and at a community level.¹⁶ As a result of women's involvement, there has been a paradigm shift from economics to ecology, as women are not only experts in the life-giving economy, but also experts in ecological science through their daily participation and management

¹¹ Arpit Jain & Reshma Anand, Why Do Women End Up Bearing The Burden Of India's Water Crisis? <https://www.youthkiawaaz.com/2020/02/women-bear-the-burden-of-indias-water-crisis/> 8 feb 2020

¹² Alexandra Barton, supra note 9.

¹³ National Commission Women's Report, *women and water based on a nationwide study on the water crisis*, <https://www.indiawaterportal.org/articles/women-and-water-report-national-commission-women>.

¹⁴ Alexandra Barton, supra note 9.

¹⁵ Emily Archer, The Wells are Drying Up: Water & Women in Ghana, https://www.jstor.org/stable/20838316?seq=1&cid=pdf-reference#references_tab_content

¹⁶ ARIEL SALLEH, *NATURE, MARX AND POST MODERN*, (Zed Book London, 2017).

of these resources. For the sake of future generations, their voices must continue to be fully integrated into policy and implementation efforts at all stages.

200 million hours of women's every day are spend in collecting water worldwide¹⁷

India, a country blessed with numerous water resources, is currently running out of groundwater and surface water, water-based ecosystems are quickly depleting, rivers are drying up due to unscientific use, and water resources are being disrupted.¹⁸ Every day women and girl child walk an average of six kilometre in Asia and Africa for collecting water.¹⁹ They waste valuable time gathering water and working longer hours as part of their household responsibilities; women are unable to engage in politics or, more importantly, obtain an education; without education, gender equality can never be achieved. Women, who must walk miles to bring water as a result of environmental degradation, are the primary victims of environmental degradation.²⁰ The consequences hasn't stopped, women have been sexually assaulted while relieving themselves in public areas due to cultural norms that make it unacceptable for women to be seen defecating, causing many women to leave home before dawn or after nightfall to preserve privacy.

III. Women are Primary Sufferer of Natural Resource Depletion

These gender-specific roles have had a significant impact on women, exposing them to greater risks in the absence of safe and sanitary facilities for millions of women across the world. Let's see how water is a women issue:

A. Risk to Health

¹⁷ Jennifer Schorsch, *Small Loans for Safe Water: Unleashing Women's Power*, IMPAKTER, March 19, 2019, <https://impakter.com/small-loans-for-safe-water-unleashing-womens-power/>

¹⁸ Samar Lahiry, *Why India needs to change the way it manages water resources*, DOWN TO EARTH, July 13, 2017, <https://www.downtoearth.org.in/blog/water/challenges-in-the-management-of-water-in-india-58275>, Down to earth, 13 July 2017

¹⁹ Jennifer Schorsch, *supra* note 16.

²⁰ *Id.*

Millions of people, mostly women, are affected by major illnesses each year as a result of a lack of water, which often puts their health at risk by reducing their ability to maintain their menstrual cycle.²¹ Due to polluted water, in 2018, 36000 people were diagnosed with water-borne disease every day²² and the biggest killer of children who are below five years.²³

B. Access to Public Sphere

Women's ability to engage in life outside of the home is hampered by the lack of clean water. Because providing water is a girl's job, girls aged 6 to 14 spend an average of **one hour** per day gathering water.²⁴ Because this is a women's and girls' task, many girls are forced to drop out of school to assist their mothers in collecting water and performing other tasks. It is a great loss of women in spending their day as they regularly repeat the same journey around three times a day for water than in the forests for firewood so her day, in a nutshell, revolves around fetching water and fetching firewood and in such circumstances not able to get a proper education.

Clean water is the fundamental right given to the citizen of India²⁵ but it seems government has turned a blind eye to the growing problems associated with it. According to 2019 survey,²⁶ 40% of girls aged (15-18 years) dropped out of school due to lack of sanitation facilities or assisting in the household work. '**Beti Bachao Beti Padhao**'²⁷ cannot be achieved without access to water. Such dropouts result in an increase in unpaid child care workers, child marriages, and a perpetuation of their financial reliance on men, as well as increased exposure

²¹ *Id.*

²² Chethan Kumar, *Polluted water killed 7 every day in 2018*, THE TIMES OF INDIA, June 29, 2019, <https://timesofindia.indiatimes.com/india/polluted-water-killed-7-every-day-in-2018/articleshow/69996658.cms>

²³ *Id.*

²⁴ National Commission Women's Report, *Supra* note 12.

²⁵ INDIA CONST, art 21.

²⁶ ManashPratimGohain, *40% of girls aged 15-18 not attending school: Report*, THE TIMES OF INDIA, January 25, 2020, <https://timesofindia.indiatimes.com/india/40-of-girls-aged-15-18-not-attending-school-report/articleshow/73598999.cms>.

²⁷ It is a government of India campaign aimed at raising awareness and improving the effectiveness of welfare services for girls in India.

to domestic violence. As a result, they are denied the right to education, which is now a basic right under Indian Constitution Article 21A and Right to Education Act, 2019.²⁸

C. Women and caste based discrimination

The archaic practice of only allowing upper-castes access to wells is still practised in many parts of India. Women from marginalised castes are not only mocked, harassed, and denied access to water, but there have been reports of how Dalit women being beaten up by upper-caste members for drawing water from a well. There are numerous cases of dalits being victimised.²⁹ There are many instances where dalits are victimised and harassed on account of that they suffer from physical as well as mental anguish.

D. Sanitation Facilities and Toilets

Another reason why water is associated with women is because of the lack of sanitation facilities. Most schools lack sanitary blocks with running water, making it difficult for girls reaching puberty to continue their education because there is no place to change their sanitary pads, forcing them to drop out. The two sides of the same coin are water and toilets. According to a CAG survey, 72 percent of toilets do not have running water, despite the government's construction of three crore toilets under the *Swachh Bharat Abhiyan programme*. From this, it is clear that the Swachh Bharat Abhiyan programme to be successful in India it would require a separate water policy.³⁰

²⁸ *India: why collecting water turns millions of women into second-class citizens*, THE CONVERSATION , October 17,2018, <https://theconversation.com/india-why-collecting-water-turns-millions-of-women-into-second-class-citizens-104698>.

²⁹ THE INDIAN EXPRESS REPORT, *Odisha: Dalit woman thrashed for drawing water from well in upper caste area*, September 04,2013, <http://archive.indianexpress.com/news/odisha-dalit-woman-thrashed-for-drawing-water-from-well-in-upper-caste-area/1164580/>

³⁰ Saptarshi Dutta, *3 Crore Toilets But Not Enough Water. Why the Swachh Bharat Abhiyan Needs A Dedicated Water Policy*, NDTV NEWS, May 30, 2017 <https://swachhindia.ndtv.com/3-crore-toilets-not-enough-water-swachh-bharat-abhiyan-needs-dedicated-water-policy-6827/>

IV. Contribution of Women's Movement for Better Management of Natural Resources

This issue can be solved if we recognise women's strength in the revival, restoration, and protection of the environment, as they have done in the past to protect a depleting environment. Women have made significant contributions to the preservation and protection of the resources in their immediate environment. Women led grass-roots movements in India, such as the Chipko Movement and the Green Belt Movement in Kenya, Anti-Militarist movement in Europe and the US, a movement against dumping of hazardous wastes in the US.³¹ One of the first environmentalist movement which was inspired by women was **Chipko Movement**, where twenty-seven Reni women in northern India took effective action to stop government permission for commercial logging in the 1970s. They threatened to hug the trees to prevent their felling. The Chipko women's protest saved 12,000 square kilometres of sensitive watershed.³² They also helped to safeguard water resources from corporate water management. Similarly, **the Green Belt Movement**, a conservation and forestry movement that began in Kenya on Earth Day in 1977, was led by Nobel Prize winner, Wangari Maathai is another well-known female-led initiative. Later, in the 1980s and 1990s³³ the anti-nuclear, pro-environment movement in the West began, which collectively influenced the central philosophy of ecofeminism that women and nature are closely connected as they have a compassionate and reciprocating relationship with the environment.³⁴

Women movement has highlighted the adverse effect of modernisation and industrialisation because they were both victims of environmental degradation and an active agents in the regeneration and protection of the environment. Women formed nonviolent action movements to protect their environment, their livelihood, and their ways of life have emerged from the Himalayan regions of Uttar Pradesh to the tropical forests of Kerala and from Gujarat

³¹DR. JANNI ARAGON AND DR. MARIEL MILLER, GLOBAL WOMEN'S ISSUES: WOMEN IN THE WORLD TODAY,(BCcampus,2012).

³²*Id.*

³³ Purnima Singh, *is ecofeminism relevant today*, October 29, 2019, <https://feminismindia.com/2019/10/29/is-ecofeminism-relevant-today/>

³⁴*Id.*

to Tripura in response to projects that threaten to dislocate people and to affect their basic human rights to land, water, and ecological stability of life-support systems.

V. Women Became Water Warriors in India

Women have raised their voices against environmental degradation at critical times and have played an important role in reviving and restoring water resources in India as evidenced by numerous examples. In order to protect environment, first environmental movement started in India was led by Amrita Devi in Bisnoi movement³⁵ along with other Bishnois struggled and sacrificed their lives to protect forest..

Another great example, where 20,000 of women came together and rejuvenated the **Nagandhi River** which is situated in the Vellore district of Tamil Nadu. The Naganadhi river was the primary source of freshwater had dried up decades ago. The place was drought prone area; the lands and wells were getting drier, so were their hopes and dreams. Women were in despair in seeing river dead river now and they build 3,500 recharge wells and several boulder checks and with the help of recharge well, rainwater was routed to the aquifers which helped in enhancing groundwater. Today, they have adequate water to drink and irrigate paddy fields.³⁶ In Bandha district of Bundelkhand, women have played an active role in bringing the life of many rivers, Bandha district is a parched region of 20 million people population with consecutive draught has taken away many water resources. **Jal Saheli of Bundelkhand** of Uttar Pradesh has become a ray of hope at the time of water crisis. A movement led by Sumitra shiva and many women have joined water 'sahelis' to fix water woes as major water

³⁵IshrathHumairah, *the Bishnois, India's original environmentalists, who inspired the Chipko movement*, <https://ecologise.in/2017/05/28/the-bishnois-indias-original-environmentalists-who-inspired-the-chipko-movement/>.

³⁶SaranyaChakrapani, *how 20,000 women in Vellore got together to save a dying river*, THE TIMES OF INDIA, June 19,2019, <https://timesofindia.indiatimes.com/india/how-20000-women-in-vellore-got-together-to-save-a-dying-river/articleshow/69850795.cms>.

reservoir, wells are dry in that area.³⁷ These women have played a great role for water conservation and have made aware of rainwater harvesting and connected to wells which are used for other household works like for washing clothes, the animal can drink water from it. Today the entire village have water. Hence, women have redefined the concept of patriarchy limits to what they can do and today they have changed the scenario of many villages. They are going home to home for awareness of how to save water and had made a kitchen garden so that water used in kitchen can reach field which helps in cultivating crops. They are known as Pani Panchayat. Another great example is of Madhulika Chaudhary, who is known as the "Lady of the Lakes," has transformed the deplorable Nekkampur Lake into a biodiversity hotspot. Her NGO is on a quest to save Hyderabad's water bodies. On the Nekkampur Lake, her team created a 2,500-square-foot floating island with around 3500 wetland plants that serves as a floating treatment wetland for the lake, which carried over 35000 samplings on it.³⁸ They have also contributed to Yerrakunta Lake, also known as Shaikpet Lake. In the last two years, their efforts at Nekkampur Lake have won them three State awards and three National awards.³⁹ Therefore, women have devoted a significant portion of their lives in environmental management.

A growing body of these evidences shows that water conservation can be more effective when women participate. Considering the significance of involving women in global water and sanitation management, several international agreements have begun to recognise women's voice and participation in regional, national, and international policies, beginning with the 1977 United Nations Water Conference in Mar del Plata, **the International Drinking Water and Sanitation Decade (1981-1990)** and **the International Conference on Water and the Environment in Dublin (January 1992)** both recognise the

³⁷ DD NEWS REPORT, *Jal Saheli' group to work jointly for water conservation in Bundelkhand*, https://www.youtube.com/watch?v=aWoTOMk_O_A.

³⁸ Syed Mhammad, *floating island to clean up Nekkampur Lake*, THE HINDU, February, 3 2018, <https://www.thehindu.com/news/cities/Hyderabad/floating-island-to-clean-up-neknampur-lake/article22644879.ece>

³⁹ Priyanka Pashupuleti, *On a mission to clean up lakes*, TELANGANA TODAY, January 27, 2020, <https://telanganatoday.com/on-a-mission-to-clean-up-lakes>.

central role of women in the provision, management, and protection of water.⁴⁰

Several environmental issues are addressed in **the Convention on the Elimination of All Forms of Discrimination Against Women (1979)**, an international “bill of rights” for women.⁴¹ Similarly, **the Beijing Platform for Action**, which was developed as a result of the Fourth World Conference on Women (1995), has a whole chapter dedicated to women and the environment.⁴² It foreshadowed the disparities in the effects of global warming on men and women, which are now apparent all over the world. There are major environmental treaties that recognise the importance of women and their unique role in management, such as **the United Nations Earth Summit (UNCED)** in 1992, which established two important conventions on biological diversity and desertification that have served as guides for implementation of environmental actions from a gender perspective.⁴³ A chapter on gender and women's participation in water management was included in Agenda 21. Women's participation and involvement in water-related development efforts are also encouraged by the resolution creating the International Decade for Action, 'Water for Life' (2005-2015).⁴⁴ **The 2015 Paris Agreement** included a special provision for women's empowerment, acknowledging that they are disproportionately impacted.⁴⁵ All of this has emphasised how women have a role to play in protecting natural resources, implying that women in both developing and developed countries have a greater role to play and participation

⁴⁰DR. JANNI ARAGON & DR. MARIEL MILLER, GLOBAL WOMEN'S ISSUES: WOMEN IN THE WORLD TODAY, (United States Department of State publishers, 2012).

⁴¹*Id.*

⁴² Beijing Declaration and Platform for Action The Fourth World Conference on Women, Having met in Beijing, September 4-15, 1995, https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf

⁴³Report of the United Nations Conference on Environment and Development, (June 3-14, 1992) Agenda 21, <https://www.un.org/esa/dsd/agenda21/Agenda%2021.pdf>.

⁴⁴ International decade for action, *Water for Life*, (2005- 2015), <https://www.un.org/waterforlifedecade/gender.shtml>.

⁴⁵ Mary Halton, *Supra* note 6.

in environmental decision-making processes.⁴⁶ It is becoming more widely accepted that women should play an important role in water management and that this role can be strengthened by implementing a gender mainstreaming strategy, especially in the national policies.

VI. Eco-Feminism: A Branch of Feminist Theory

It is claimed by the supporters of this theory that if we apply ecofeminism theory to solve the crisis by providing proper awareness and training to women, we will be able to solve it. According to this theory, women are more deeply linked to nature than men because they have a similar life-giving process, which inspires ecofeminism as a political movement to combat environmental degradation. We have witnessed how they have timely raised their voices against environmental degradation like Chipko movement by Vandana Shiva, Narmada BachaoAndolan by Medha Patkar etc.

Ecofeminism is based on a certain fundamental claim that environmental degradation and social injustice are caused by a hierarchical mindset. On the basis of a value hierarchy in which men are considered superior and civilised while women and nature are considered uncivilised and inferior, women and nature may be marginalised because they share a subordinate relationship with men. Ecofeminist argues that this way of thought is the source of sexism and environmental injustice. To address environmental degradation, we must challenge value hierarchical ways of thinking and frameworks. For example, capitalism is a central cause of environmental injustices exploited and destroyed by the industrial world system, and fighting against capitalism is necessary to address environmental destruction and poverty. Under the grab of development, nature has been exploited mercilessly and women's special knowledge of nature has been slaughtered with modern technology. Vandana Shiva has branded modern science as western and inherently masculine therefore destructive in nature.⁴⁷ Ecofeminism arose in the 1970s in response to a growing awareness of

⁴⁶ *Id.*

⁴⁷ Manisha Rao, *Ecofeminism at the crossroads in India: A review*, ISSN 1824 - 448, https://www.unive.it/pag/fileadmin/user_upload/dipartimenti/DSLCC/documenti/DEP/numeri/n20/13_20_-Rao_Ecofeminism.pdf.

women's relationship with nature. Ecofeminist movements exist all over the world that are devoted to the continuation of life on Earth. However, the idea of ecofeminism sheds light on women's position, stating that giving birth is the source of a biological connection to nature's life-giving processes. Due to their close relationship with nature, they bear direct responsibility for the healthy planet's and from these movements their voices have been timely raised and heard against such degradation.⁴⁸

VII. Conclusion and Suggestions

With unprecedented drought and a rise in urbanisation, industrialization, and massive population growth in the last century, have added more challenges to depleted water resources in India. Undoubtedly, 2025 is not far away but with the help of women, we can overcome this crisis. They have a significant role to play in environmental management because they account for half of the population; and in most developing countries, they are the primary resource managers for their families and are extremely dependent on available natural resources. Due to their close connection with their local environment and often suffer most directly from environmental problems.

However, if we see Aristotle's thought on women that women were inferior to men and do not hold capability like men,⁴⁹ is a wrong and mistaken theory as women's capabilities have been witnessed in India how peasant women who never went to school changed the country's policy and became experts in biodiversity conservation.

Although women play a critical role in managing natural resources, they are underrepresented in environmental decision-making processes. Women must be empowered, and their voices must be heard in policy and planning and their experiences and perspectives can be very useful for sustainable development policymaking and actions at all levels to avoid a storm of water shortages and food insecurity in future.

Suggestions:

⁴⁸ *Id.*

⁴⁹ Francis Sparshott, *Aristotle on*

Women, <https://orb.binghamton.edu/cgi/viewcontent.cgi?article=1106&context=sagp>.

1. **Involve women in decision-making:** We need to increase women voice in environmental decision-making and work with them on water supply regulation projects. Water and sanitation will not be the last question on women's minds if they are included in the decision-making process; it will be her priority.
2. **Educate, train them and more investment:** We need to educate and train women in the importance of water management, water conservation methods, technological advances and sustainable farming practise in order to protect the environment further; as it is true, if we educate one woman, we educate the entire family, as they ensure that the knowledge is passed down in the family, which will create awareness for future generations. Investment in water policies is required.⁵⁰ However, water supply, received a boost in the union budget in 2021, with Rs 50,000 crore allocated to the launch of the Jal Jeevan Mission⁵¹ which aims to provide tap water connections to 2.86 crore households.⁵²

Hence, to protect the environment from further degradation, we need to involve women as they possess the power for change.

⁵⁰ Greta Gaard, *Women, water, energy: an ecofeminist approach*, 161 Vol. 14, No. 2 (2001), ORGANIZATION AND ENVIRONMENT, 157, <https://www.jstor.org/stable/26161568>.

⁵¹ BUSINESS STANDARD REPORT, *Budget 2021: FM Sitharaman allocates Rs 50K crore for Jal Jeevan Mission*, February 2, 2021, https://www.business-standard.com/budget/article/budget-2021-fm-sitharaman-allocates-rs-50k-crore-for-jal-jeevan-mission-121020101568_1.html

⁵² *Id.*

Swachha Bharat Abhiyan and Affordable Housing for the Slum dwellers and EWS: Legal Challenges

Leena Kumari¹

Abstract

Shelter and Sanitation have remained major challenges before the Government of India. The growing trend of urbanisation has further presented problems for the poor people in terms of place of residence and cleanliness. This Article examines the recent initiatives of Government of India relating to 'Affordable Housing for All', 'Swachh Bharat Abhiyan' with respect to the latest rules framed for solid waste management, namely Solid Waste Management Rules, 2016. It examines the legal challenges relating to applicability of solid waste management rules with special reference to slum dwellers and to economically weaker sections of people. The central argument in this article is that the legal challenges in the application of new rules on solid waste management are real and need to be removed.

Key Words: Swachh Bharat Abhiyan, Affordable Housing, Solid Waste Management, Slum Dwellers, E.W.S.

I. Introduction

Shelter (or Housing in practical term)-the third limb of the proverbial 'Roti KapdaaurMakan'(bread, clothing, and shelter) -is a basic human requirement. Only a negligible percentage of more than one billion population of India, as of now, can afford to live in a decent residential accommodation of their own. Affordable Housing can be defined in terms of the number of households in different income ranges who can afford housing as provided by the market within that price range irrespective of the quality of housing.² The same definition is applicable to housing for the urban poor too. Since the affordability levels of our population are very low, the market provides them with housing which is characterized by insecure tenure, small size, unhygienic environment

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²In the U.S. for instance, the Department of Housing and Urban Development defines affordable housing by the expenditure approach, under which housing is deemed affordable if it costs less than 30% of the household income.

and non-existent infrastructure. Non-availability of affordable housing is as much a problem of the middle income groups as it is of the lower income groups.³ In their inability to find appropriate house, many medium or lower income groups are forced to opt for sub-standard housing. Therefore, many people opt for cheaper/subsidized housing provided by the state for the poor.

In this article, researcher explains Swachha Bharat Abhiyan and its salient features. After that, affordability and housing needs of poor people are examined. Subsequently, it elaborates upon the affordable housing scheme of the Government of India. Most importantly thereafter, it examines the legal aspects of shelter, housing needs of poor and sanitation requirement. Lastly, it examines the application of solid waste rules in the affordable housing. It examines whether the affordable housing scheme includes the collection, segregation, treatment facilities of solid waste management or not to achieve the objectives of Clean India Mission.

II. Swachha Bharat Abhiyan (SBA)/Clean India Mission

Sanitation has been a roadblock to India's development goals. Since 1980s, the Government of India has taken many efforts to provide toilets to each household and make the streets, public places of the cities clean. Its latest sanitation scheme is called 'Swachh Bharat Abhiyaan (SBA)' which was launched on 2nd October 2014 on the birth anniversary of Mahatma Gandhi. This mission covered 4041 cities/towns of India. One of its primary aims is to achieve universal sanitation coverage and use by 2 October 2019. An incentive of 12,000 INR was given to those rural households living below the poverty line (BPL) and also to persons with disabilities and widows if they construct a toilet. The Government of India declared on 2^{ns} October 2019 that 'all villages, Gram

³According to the World Bank, low income group means a person having income less than Rs 5800 a month; whereas the middle -income group means a person having income between Rs 5800 a month to Rs 70,000 a month. See, https://www.business-standard.com/article/economy-policy/india-stays-lower-middle-income-nation-while-sri-lanka-gets-richer-report-119070400113_1.html (accessed on 22.03.2020)

Panchayats, districts, States, and Union Territories are open-defecation free'.⁴ However, the claim of Government of India has been subjected to counter claims too.⁵

Next important aim of this mission was to improve solid waste management in urban and rural India. One of the stated objectives of SBA is to ensure door-to-door garbage collection and proper disposal of municipal solid waste in all the 83000 wards in urban areas by 2019.⁶ Spitting in the open, throwing garbage on the public spaces, open landfills had been a perennial problem in modern India. No segregation and recycling were done by the households and municipal bodies. The mission provided financial backup and political will to remove these obstacles. Concerned citizens filed public interest litigations in the higher Courts in India and the response has been also very positive when it comes to solid waste management. The Supreme Court held in a case that the Government of India is duty bound to make a nationwide law on solid waste management.⁷

III. Definition of Affordability and Housing Needs of Different Income Groups

Affordability is generally viewed as a ratio of price/rent of housing to income of household. The ratio differs for different income groups. Lower income groups can afford to pay much less proportion of their income for housing than that of

⁴Ministry of Jal Shakti, Department of Drinking Water & Sanitation Government of India, available at <https://swachhbharatmission.gov.in> (last accessed on 23rd May 2020)

⁵Annop Jain, Ashley Wagner, Claire Snell-Rood & Isha Ray, Understanding Open Defecation in the Age of Swachh Bharat Abhiyan: Agency, Accountability and Anger in Rural Bihar', 17(4) *International Journal of Environmental Research and Public Health* (2020) 1384

⁶Sadhan Kumar Ghosh, 'Swachha Bharat Mission (SWM)- A Paradigm Shift in Waste Management and Cleanliness in India', 35 *Procedia Environmental Sciences* (2016) 15-27

⁷*Al Mitra H. Patel v Union of India* (1998) 2 SCC 416

higher income groups. Deepak Parekh Committee⁸ report defines the affordability ratio for different income groups as follows:-

Table 1: Affordability Ratio of Different Income Groups

Income Groups	Size	EMI/Rent Income Ratio	Cost of Housing to Income Ratio
EWS – LIG	300-600 sq.ft	> 30% of household's gross monthly income	> 4 times households gross annual income
MIG	> 1200 sq.ft	> 40% of household's gross monthly income	> 5 times households gross annual income

There is another category of urban poor which is also (or ought to be) part of government's inclusive policy of providing Affordable Housing for all namely BPL (Below Poverty Line). This category needs to be considered separately and not as part of EWS. The affordability level of households in this category would be no more than 5 per cent of the income. The income categories and affordability levels thus can be defined as follows:-

Table 2: Affordability levels and Income Categories

Income Category (in Rs)	Affordability to Pay EMI/Rent (% of income)	Affordability to Pay cost of house (multiple of annual income)
BPL<=2690	5	2
EWS 539 – 3300	20	3
LIG 3301 – 7300	30	4
MIG 7301 – 14500	40	5

Affordability is to be defined not only in terms of purchase price of the house (in case of ownership housing) or rent but must also include other charges/fees (registration charge, search cost etc.) payable at the time of purchase/renting of

⁸This Committee was constituted in 2008 by the then Prime Minister Dr. Manmohan Singh. Deepak Parekh had a rich experience in serving with Ernst and Young, Grindlays Bank, and Housing Development Finance Corporation.

the house as also recurring cost over the lifetime of stay in the house. These would include taxes, maintenance cost.

A. Affordable Housing Scheme

The Government was making effort to provide low-cost housing had been made for many years, for example-National Urban Housing and Habitat Policy, 2007, JNURM (BHSP, IHSDP): Basic Services for Urban Poor (BHSP),RajivAwasYojana etc. A technical study conducted by the government of India in 2011 estimated housing shortage at 18.76 million units in urban areas. The Pradhan MantriAwasYojanawaslaunched in 2015, which gave a fresh impetus to affordable housing scheme.⁹ The PMAY-Urban (PMAY-U) subsumes all the previous urban housing schemes for the urban areas and aims at 'Housing for All' to be achieved by the year 2022. The unmet housing needs of the urban poor people could be addressed through the PMAY-U.¹⁰ The mission has four components:

1. *In-situ* slum¹¹ redevelopment (ISSR): This uses land as a resource. The scheme aims to provide houses to eligible slum dwellers by redeveloping the existing slums on public/ private land. A grant of INR 1 lac per house is provided by the central government to the planning and implementing authorities of the states/UTs under this scheme.
2. Credit-linked subsidy scheme (CLSS): This scheme facilitates easy institutional credit to EWS, LIG and MIG households for the purchase of homes with interest subsidy credited upfront to the borrower's account routed through

⁹See, Ministry of Housing and Urban Affairs, Government of India, available at <https://pmay-urban.gov.in/about> (last visited on 22.03,2020)

¹⁰'Housing Shortage in Urban Areas Down at 10 million units : Government', The Economic Times, Delhi, November 2017, available at https://www.google.co.in/amp/s/m.economictimes.com/wealth/personal-finance-news/housing-shortage-in-urban-areas-down-at-10-million-units-government/amp_article/show/61657624.cms (last visited on 22.03.2020)

¹¹'Slum' means a cluster of hutments with dilapidated and infirm structures having common or no toilet facilities, suffering from lack of basic amenities, inadequate arrangement for drainage and disposal of solid wastes and garbage. See, 'State of Slums in India: A Statistical Compendium', (2013) National Building Organization, Ministry of Housing and Urban Poverty Alleviation, Government of India

primary lending institutions (PLIs). This effectively reduces housing loan and equated monthly instalments (EMI).

3. Affordable housing in partnership (AHP): This aims to provide financial assistance to private developers to boost private participation in affordable housing projects; central assistance is provided at the rate of INR 1.5 lac per EWS house in private projects where at least 35% of the houses are constructed for the EWS category.

4. Beneficiary-led construction or enhancement (BLC): This scheme involves central assistance of INR 1.5 lakh per family for new construction or extension of existing houses for the EWS/ LIG.¹²

Legal Aspects of Shelter and Sanitation in Affordable Housing

Shelter is a basic need of human being. The problem of modern shelter in India has been direly felt by the planners and political mandarins. The evolution of human rights at the global level along with the writing of our own Constitution promulgated a new charter in India for the fundamental and other statutory rights of the people. Courts at the top level in India have also pronounced important judgments by which these international developments and the Constitution have been not only noticed but also interpreted broadly. The following international, national and judicial instruments and decisions show that shelter has been made a legal necessity.

Universal Declaration on Human Rights, 1948

One of the first human rights instruments at the international level was Universal Declaration on Human Rights (UDHR), adopted by the General Assembly of the United Nations in 1948.¹³ It provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing.¹⁴ It means that right to adequate housing was accepted by most of the nations in the United Nations more than 70 years ago. Still, the reality in India is that a negligible percentage of population have adequate standard of living.

¹²See, Ministry of Housing and Urban Affairs, Government of India, available at <https://pmay-urban.gov.in/about> (last visited on 22.03,2020)

¹³GA Resolution A/Res/217 (iii) , adopted on 10 December 1948

¹⁴Article 25, Universal Declaration on Human Rights

International Covenant on Economic, Social, and Cultural Rights, 1966:

The legal instrument to operationalize Universal Declaration on Human Rights in the field of economic, social and cultural rights was adopted by the General Assembly in 1966.¹⁵ It came in force on 3rd January 1976. It stipulates that the States Parties to the Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing.¹⁶ Almost 30 years passed after the adoption of Universal Declaration on Human Rights when the States Parties to the United Nations Charter recognized the right of its citizens to adequate housing. It is another tragedy that after 40 years of signing this Covenant by India, millions of citizens, in particular, in urban India, do not own their own household.

Sustainable Development Goals (SDG), 2030¹⁷

The Member States of the General Assembly of the United Nations have agreed to achieve sustainable development goals by the year 2030. There are 17 goals listed in it, which are an urgent call for action by all Member States. Out of these 17 goals, Goal 6 deals with ensuring availability and sustainable management of water and sanitation for all. It noted that at a global level, only 28% of total global population had been provided with sanitation services in 2000 when Millennium Development Goals were agreed to by the international community. The goal of the nations of the world is to collectively overcome this problem and provide sanitation service to all. According to the latest update, the percentage of global population having access to sanitation services has increased to 45% in 2017.¹⁸ Apart from that, Goal 11.1 provides that by 2030, access to safe and affordable housing would be ensured to all. It further sets the goal to ensure basic services and upgrade the slums. Funding for the sustainable goals has also been provided by the international community collectively.

Constitution of India, 1950

One of the most progressive fundamental instruments to govern our country is our Constitution, which was adopted by the Constituent Assembly in 1949 and

¹⁵GA Res 2200A (XXI), adopted on 16 December 1966

¹⁶Article 11(1), International Covenant on Economic, Social, and Cultural Rights

¹⁷GA Res 70/1, 25 September 2015

¹⁸Sustainable Development Goals Knowledge Platform of the United Nations, available at <https://sustainabledevelopment.un.org/sdg6#>

given to the people in 1950. It contains a whole chapter on the fundamental rights. It stipulates that all citizens have the right to reside and settle in any part of the territory of India.¹⁹ It further provides that State has the power, nevertheless, to make a law imposing reasonable restrictions on the exercise of such a right in the interests of the general public or for the protection of the interests of any Scheduled Tribe.²⁰ Even more important fundamental right is guaranteed by the Constitution in Article 21, which provides that a person's life and liberty cannot be taken away by the State except according to procedure established by law. From these provisions of the Constitution, it was difficult to derive whether a citizen of our country has got the fundamental right to shelter or not. On this point, the role of our Supreme Court is laudable as it has laid down several important judgments relating to the enjoyment of this right.

Olga Tellis v Bombay Municipal Corporation²¹

Around 5 million people of Mumbai reside in the slum areas even after two decades of the 21st century. When this case came before the Supreme Court of India in the 1980s, Olga Tellis and others lived on the pavements and in the slums of Mumbai. In 1981, the State of Maharashtra and Municipal Corporation of Bombay decided to forcibly evict all pavement and slum dwellers and to remove them to their respective places of origin or to places outside the city. Some of the pavement dwellers challenged the order of the municipal corporation by filing a public interest litigation in the Supreme Court. Ms. Indira Jaising, a famous lady advocate from Mumbai, fought for the pavement dwellers' cause. Justice YeshwantChandrachud, of the Supreme Court held that the right to life includes the right to livelihood. Forcible eviction of pavement dwellers would lead to loss of livelihood and deprivation of life. Without depriving the power of the municipal corporation to evict an encroacher on public land, the Supreme Court prioritized the right to livelihood of the poor *vis-a-vis* power of Municipal Corporation to evict the pavement and slum-dwellers.

State of Karnataka v Narsimhamurthy²²

¹⁹ Article 19(1)(e), Constitution of India

²⁰ Article 19(5), Constitution of India

²¹ AIR 1986 SC 180

²² AIR 1996 SC 90

The State of Karnataka passed a law in 1972 by which the Government could acquire private land for granting house sites to the poor.²³ Invoking the power under Section 3(1), the government acquired the land of petitioner without mentioning his name in the acquisition notification. Dealing with the question whether the omission to mention the name of the respondent in the notification vitiates its validity or not, the Supreme Court reiterated that right to shelter is a fundamental right under Article 19(1) of the Constitution. 'To make the right meaningful to the poor, the State has to provide facilities and opportunities to build house. Acquisition of the land to provide house sites to the poor houseless is a public purpose as it is a constitutional duty of the State to provide house sites to the poor.'²⁴In the context of urban India, providing land sites to the homeless may not be possible due to the scarcity of land. However, building multi-storeyed residential colonies for the poor and homeless would fulfil the constitutional requirement of right to shelter.

Chameli Singh v State of U.P.²⁵

In the district of Bijnore in Uttar Pradesh, the State Government acquired around 6 bighas of Chameli Singh and others' land in 1979 by exercising the power of eminent domain under Land Acquisition Act, 1894. The land was acquired to provide housing to the Scheduled Caste ('Dalits') of the State. The notification of acquisition was published in the State Gazette in July 1983. Chameli Singh and others challenged the acquisition without holding proper inquiry on many grounds, including their right to livelihood. JJ. K. Ramaswamy, Faizan Uddin, B.N. Kirpal of the Supreme Court held that the right to shelter includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation.²⁶ The Court further held that the right to shelter does not mean a right to roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being.²⁷As a result, the Court could not give any relief to

²³ The name of law passed by the Legislature of Karnataka was 'Karnataka Acquisition of Land for Grant of House Sites Act'.

²⁴ As per K. Ramaswamy J., paragraph 6 of the Order

²⁵ AIR 1996 SC 1050

²⁶ *Id.*, paragraph 8

²⁷ *Id.*

Chameli Singh as it held that individual's right of an owner must yield place to the larger public purpose.

Rajesh Yadav v State of U.P.²⁸(2019)

In Ballia district of Uttar Pradesh, complaint about encroachment of public land by poor and landless people was filed in the court by way of public interest litigation. In fact, residential leases of very small plots were granted by the competent authorities to these poor and landless, who belonged to Scheduled castes, and backward class. They built their huts since then in 1995. Petitioner complained that these pieces of land were public property and meant for public purposes. The Allahabad High Court came to the rescue of these people by giving a new interpretation of Articles 19(1)(e), 21, 38, 39 of the Constitution. Justice Surya Prakash Kesarwani reaffirmed the precedent laid down in *Olga Tellis*, *Chameli Sing*, *Narsimhamurthy*, *Nawab Khan Gulab Khan* cases and took notice of Article 25(1) of the UDHR, Article 11 of the International Covenant on Civil and Political Rights, and various resolutions passed by the General Assembly of the United Nations.²⁹ He observed, 'shelter for a human being is not a mere protection of his life and limb, but it is home where he has opportunities to grow physically, mentally, intellectually and spiritually'. He further observed, 'right to shelter includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation, and other civic amenities'. It may be noticed here that the word 'sanitation' was also included in Justice Kesarwani's interpretation of right to shelter. Lastly, he stated that 'the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their land to make the right to life meaningful, effective and fruitful'. His judgment was widely acclaimed by scholars and jurists. Professor UpendraBaxi wrote, 'Justice Kesarwani added a new chapter in the interpretative history of Article 21 of the Constitution'.³⁰

²⁸(2019)6 All LJ 644

²⁹GA Res.35/76 (1980), GA Res. 37/221 (1987)

³⁰UpendraBaxi, 'Housing for the Impoverished: A Basic Human Right', INDIA LEGAL (July 28, 2019), available at <https://www.indialegallive.com/viewpoint/housing-for-the-impoverished-a-basic-human-right-69818>

Almitra H. Patel v Union of India (1998)³¹

A Bangalore based lady activist, Al Mitra H. Patel, filed a public interest litigation on solid waste management in the Supreme Court in 1996. At that time, Justice J.S. Verma was on the bench. Her high quality education was shown in her pleadings and arguments. She prayed to the Court to issue suitable directions to the Government of India to make rules on proper municipal solid waste management in the cities and towns. Due to her efforts, Justice Verma issued a direction to the Government to constitute an expert committee to examine all aspects of municipal solid waste in Class I cities (having a population of over 1 lakh). The Committee's terms of reference included reviewing municipal laws, formulating standards and regulations for the management of municipal solid waste. It was entrusted with the task of giving suggestions on suitable practices and proven technologies for the sorting, collection, transport, disposal, recycling and reuse of municipal solid waste in an eco-friendly manner. Almitra Patel was also a member of the Committee. This Committee submitted its report in 1999. On the basis of the recommendations of this Committee, the Government of India notified the Municipal Solid Waste (Management and Handling) Rules, 2000.

SWM Rules, 2016

Due to the constant monitoring of the municipal solid waste by the Supreme Court and due to the loopholes in the MSW Rules of 2000, the Government of India notified new Solid Waste Management Rules in April 2016. This notification revised all previous rules on solid waste management. According to the new rules, the waste generator of a residential area is duty bound to adhere to it.³² Every waste generator is duty bound to segregate and store the waste generated by them in three separate bins- biodegradable, non-biodegradable, and domestic hazardous waste. These waste generators are further mandated to handover the segregated wastes to waste pickers³³ or authorized waste collectors.³⁴ These rules further prescribe that every waste generator is duty bound not to throw, burn, or bury the solid waste generated by him on streets,

³¹(1998)2 SCC 416

³²Section 2, Solid Waste Management Rules, 2016

³³Waste pickers are informally engaged in the collection of solid waste to earn their livelihood as per Section 2 (58), SWM Rules, 2016

³⁴Sec. 4(1)(a), *Id.*

open public space outside his premises, or in the drain or water bodies.³⁵ Where the residents of a society are organized into resident welfare associations(RWA), these RWAs are duty bound, in partnership with local body, to ensure segregation of waste at source by the generators.³⁶ These associations must facilitate collection of wastes in three separate bins and handover the recyclable material to authorized recyclers or waste pickers.³⁷

Resident welfare associations of economically weaker sections are also now under a duty to do composting of biodegradable waste themselves. Composting requires space and organic materials, which are very difficult for the slumdweller and economically weaker sections of the society. As the slumdweller are unable to compost the biodegradable waste, the waste can be dumped into landfills or would be handed over to waste collectors after paying fine, which is again a distinct possibility.

Waste generators are obliged to pay a nominal user fee³⁸, which would be imposed by the local bodies. As per the provisions of the North Delhi Municipal Corporation Byelaws, 2018, the minimum amount payable by the waste generator is INR 50.³⁹ Keeping in view the economic condition of the slumdweller, it may become difficult for them to pay this monthly fee to the local bodies.

IV. Solid Waste Management in Affordable Housing and Slums

Affordable housing provided by the public or private sector in the cities and towns is multi-storeyed. Assuming that poor people shift to affordable houses, it would be seen whether they would manage the waste generated by them properly according to the new rules or not. Whether affordable house scheme

³⁵Sec. 4(2), *Id.*

³⁶Sec. 4(6), *Id.*

³⁷*Id.*

³⁸'User fee' means a fee imposed by the local body any other entity mentioned in Rule 2, on the waste generator to cover full or part cost of providing solid waste collection, transportation, processing and disposal service.

³⁹Schedule I, North Delhi Municipal Corporation Solid Waste Management Byelaws, 2018

has included the integrated solid waste management concept?The untreated waste dumped into open in the slum areas affects our air, land and water. Therefore, the management plan of solid waste must be started at very first instance from where it is generated. Therefore, it is required that in every society it is collected in segregated form. So, the affordable housing scheme must include segregation facility. As a result of which the recovery and treatment of collected waste become easy and very less amount of waste dumped in to landfills.

As the SWM Rules of 2016 mandate a resident welfare society to provide space for composting facilities as well as segregation facility, these societies would be having a financial burden on their shoulders.⁴⁰ As per the construction plan of the public or private builders, the space for composting and segregation of waste is not properly kept in mind. Private builders are not much interested in providing housing to BPL and EWS people.⁴¹ Due to the reported loopholes, a few governments have directed the private builders to transfer EWS category flats to the government.⁴²

As far as slums are concerned, it is very difficult to apply SWM Rules, 2016 there. Slums have very small hutments and there are few basic amenities provided by the government there. Waste from the slums is mostly biodegradable. Failure to pay user-fee by the slum-dwellers may result in absence of collecting vans going to these areas. If the waste collecting vans would not go these areas, the solid waste generated in the slums would be either dumped in the open or drained out in the sewers. In both these cases, the Swachh Bharat Abhiyan would fail in its objective. According to the plan of the government, in-situ development of the slums is in the offing. However, it is better said than done. Assuming that in-situ development in the slum takes place, whether the slum-dwellers segregate the waste themselves and hand it over to authorised collecting vans provided by the municipal authorities. Financing slum redevelopment is a major challenge compared to providing affordable housing

⁴⁰Rule 4, Solid Waste Management Rules, 2016

⁴¹Swastik Harish, 'Urban Development, Housing and 'Slums', 43 (3/4) *India International Centre Quarterly* (2017) 184-198

⁴²'Haryana Government directs builders to transfer EWS homes to housing board', *Magicbricks*, September 11, 2018

to EWS or LIG. There needs to be a comprehensive financial strategy to enhance capability of slum dwellers to access housing finance. It may be a strategy implementation proven elsewhere in the globe or a completely new strategy. It's not only an economic but social issue. Economic participation from slum dwellers enables belongingness to their shelter and more attention to transform it into habitat from housing only. These are the real challenges before the government which can be tackled only when these poor people are provided space in a multi-storeyed building on the site of the slums.

V. Conclusion

Much water has flown since the time when many poor people lived in slums of cities and slum dwellers were forcibly evicted by the civic authorities. Now, the situation has improved a lot after the intervention of civil society and the Court. The Constitution of India has ensured the poor too a right to life. Right to life has been expanded to include right to shelter. Homeless people should be provided with shelters where the sanitation facilities are also available. Slums present challenges to the provision of sanitation according to SWM Rules, 2016 and according to the guidelines of Swachha Bharat Abhiyan. Private builders are not interested in EWS and BPL housing sector. The Government must come forward and bridge the gap between the homeless and the modern living in which basic sanitation facilities are also available.

NOTES AND COMMENTS**Relevance of Consumer Protection Act, 2019 in
E-Commerce***Chinmay Patra¹**Abstract*

Advancement in technology and modern consumer behavioural pattern has replaced the traditional mode of buying and selling practice of the consumer with the online mode of shopping which gives ease to the customer, to shop while sitting at his own space and placing order online and there after the product gets delivered at the customers address as opted. But this new technology-based shopping also brought many hassles to the customise online frauds, fake products, sub-standard products, debit card and credit card account hacking, no guarantee and warranty on products, jurisdictional issues, dubious product return policy, etc. In order to protect the interest of the Consumers, it was felt necessary to establish an adjudicatory mechanism to redress the grievance and issues of the consumer. Hence the Consumer Protection Bill came to existence on 1st of April 2020 after framing of the Consumer Protection Rules by the Central Government, for effective implementation of the act. This paper intends to highlight the issues which have not been addressed in the amended version of Consumer Protection Act 2019.

Keywords: E-Commerce, Protection of consumer rights, Unfair Trade Practice, Consumer Courts, Services Consumer Protection Act 2019.

I. Introduction

Ecommerce has overtaken the tradition mode of physical market place, where consumer uses to walk in to the shop/store to purchase products or avail services. All kinds of buying and selling are now possible online using internet, by just a click of a computer mouse, or tap of a mobile phone, and that to just sitting at their private space, no need to go out, stand in a queue, to buy things. This is just possible only because of the advancement of technology and change in consumer behaviour and needs. By the use of the internet service, consumers are now availing all kinds of online services including banking, insurance,

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purchase of product, and hire professional services, even participate in e- tender process and many more. Perhaps this new diversified field of ecommerce, gives enormous ease to the consumer, by saving their valuable time and energy, it also provides goods and services at very competitive and unbeatable price, which a consumer can't avail at the same price in the physical market. The online mode of buying goods or hiring services, gives consumer another advantage, by which they can at one time, search variety of related products, and compare their prices, and there after take an informed decision, to buy the product which is more profitable to them or choose not to buy. Here the consumer is the king and he can locate any vendor throughout the globe of his choice and at his convenience. Ecommerce now-a-days not only remain the necessity but also an integral part of daily life of the consumer. This paper aims to analyse the ecommerce industry in India and consumer behaviourism in making online transactions, what are the issues faced by the consumers during online shopping through digital means, what are the various laws in India that protects the consumer rights and their interest, who are the various stakeholders in ecommerce industry in India. This research paper also focuses on studying, what went wrong with the 34 year old Consumer Protection Act 1986 for which the Government of India repealed it and in its place brought the new Consumer Protection Act 2019. This research paper also wants to analyse the various provisions of law that is contained in the new Act and its relevance to ecommerce industry.

II. Research Methodology

The research methodology as adopted by the researcher is specifically qualitative, descriptive and analytical in nature. The various sources from which the researcher has collected information are mostly from documents and files, articles available online data maintained in various e-repositories, books, legislative enactments, Acts. All the above information and data has been properly and systematically analysed and on the basis of which research hypothesis has been formulated and answered by the researcher by following the rules of research methodology. And due consideration and credit has been given to all the references obtained in coming to a final conclusion on the research topic.

III. Defining E-commerce

“Ecommerce” is defined as a process of businesses and trading with goods and services using electronic links. “It means doing business over the internet selling goods and services which are delivered offline, as well as goods which are ‘digitalised’ and delivered online such as ‘computer software’”².

This mode of buying and selling through internet is known as “*electronic commerce*” (EC) or “*ecommerce*”.

IV. Classification of Ecommerce

Business to Business ecommerce (B to B)

This is the longest form of ecommerce business, it involves supply chain management, e-procurement etc.

Business to Consumer ecommerce (B to C)

It involves Businesses introducing and selling products to the consumer through online internet service.

Consumer to Consumer (C to C)

Here participants in an online market place can buy and sell goods to each other.

Businesses to government (B to G)

Here businesses sell goods and services to Government.

V. Impact of Ecommerce on Consumer Rights

Before discussing in details, the impact of ecommerce on consumer rights, let us first know about what are the rights available to a consumer. The United nation has laid down certain guidelines to protect consumer rights, these guidelines are known as “United Nation Guidelines For Consumer Protection” (UNGCP), for bringing effective legislation for protection of consumer rights, establishment of institutions to redress the consumer grievance and assisting the member states in formulating and enforcing domestic and local laws, rules, regulations for

² OECD Economic Outlook, Vol-67(2007).

effective implementation of such guidelines³. The US President John F. Kennedy on March 15th 1962, has recognised four basic consumer rights, i.e. right to safety, right to be heard, right to be informed and right to choose, these rights later on known as “Consumer Bill of Rights” which were further expanded by the “UNGCP” into eight rights by including four more new rights into it, i.e. right to basic needs, right to redress, right to consumer education, right to healthy environment⁴.

These eight rights have formed the “basis to protect consumer interest” throughout the entire world. The said rights can be described in the following terms:

- **Right to satisfaction of basic needs:** - to have access to basic, essential goods and services: adequate food, clothing, shelter, healthcare, education and sanitation.
- **Right to a healthy environment:** - to live and work in an environment which is non-threatening to the well-being of present and future generations.
- **Right to safety:** - to be protected against products, production processes and services that are hazardous to health or life.
- **Right to be heard:** - to have consumer interests represented in the making and execution of government policy, and in the development of products and services.
- **Right to redress:** - to receive a fair settlement of just claims, including compensation for misrepresentation, sale of spurious goods or unsatisfactory services.
- **Right to be informed:** - to be given the facts needed to make an informed choice, and to be protected against dishonest or misleading advertising and labelling.
- **Right to consumer education:** - to acquire knowledge and skills needed to make informed, confident choices about goods and services,

³ A History of Consumer Rights and Improvements, By Lexington Law, August ,23rd ,2011, <https://www.lexingtonlaw.com/blog/credit-repair/history-consumer-rights-improvements.html#>

⁴ Consumer Association of South Australia Inc.: <http://www.consumerssa.com/consumer-rights#>:

while being aware of basic consumer rights and responsibilities and how to act on them.

- **Right to choose:** - to be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality.

In India, consumer rights are very much present during the Vedic period, but the “consumerism movement” only started, after the enactment of the “Consumer Protection Act 1986”, which provided for the better protection of consumer rights, and led down provisions for establishment of Consumer Councils, and other authorities, for settlement of consumer disputes and matters connected there with.⁵ This led the consumers to become more vigilant about their rights and became protective to safeguard their rights from the mischievous traders, online merchants and service providers who use unfair trade practice, sale spurious goods and are deficient in their services.

In the year 2012, the Indian retail market composed of 92% in the unorganised sector, and 8% in the organised sector, out of which only 0.2% relates to online segment. Hence, ecommerce is a small silver of the Indian retail⁶. The ecommerce business in India has shown exponential growth in the last decade only because of the rapid adoption of technology, by the consumers and traders and also due to the digitalization policy of the Government of India.

⁵ Statement of Object and Reasons, (Consumer protection Act 1986).

⁶India E-Commerce, A report by AsselPartners India, 2014, www.slideshare.net/accelindiavc/accel-partners-india-india-ecommerce-insights-march-2014.

Figure-1 (E-commerce size (\$ billion) in India



Source – National report on ecommerce development in India (UNIDO)

“Ever since Men began to modify their lives by using technology, they have found themselves in a series of technological trap” (Roger Revelle).

So, due to the rise in online transactions and more dependency on ecommerce, the consumers faced many issues and drawbacks i.e. taxation issues, distribution of spurious and counterfeit goods, fraud, cyber security threat issues, low digital literacy among the consumers, data theft etc. The ecommerce giant companies like, Amazon, Flipkart, Snapdeal has also spending huge amounts of money to entice and lure the Indian consumers, so that they could expand their dominion in the Indian market.⁷ All this practices, has in fact raised the number of disappointed consumer, and also because of the faulty product and deficient services that they receive from the online merchants, and in order to redress

⁷ United National Industrial Development Organization, National Report on E-Commerce Development in India: https://www.unido.org/sites/default/files/2017-10/WP_15_2017_.pdf

their grievances, they approach mostly to the Consumer Courts as established under the Consumer Protection Act 1986.

This led to filing of more number of consumer cases and resulting in more backlogs of cases as because the consumer courts were already overburdened and packed with many pending cases with them. Also the Consumers Forum, in online dispute related cases, most of the time, fails to get himself satisfy, that whether the case is amenable to their territorial jurisdiction or not, as there is a confusion pertaining to “where the cause of action arouse”, as because in online purchase, the trader or merchant, sells their product on virtual mode and they don’t have a physical store or shop available in a particular fixed place and their registered offices and branch office are sometimes situated in far flung areas or mostly outside India and this gives rise to jurisdiction hunting situation, as because the act was not adequate and well drafted to address these kind of issues and this lead to ambiguity in deciding cases pertaining to online buying and selling disputes. Because as per the provisions of consumer protection Act 1986, “a complaint shall be instituted in a District Forum within the local limits of whose jurisdiction, the opposite party or parties resides, at the time of institution of the complaint, or where the opposite party or parties have a place of business or a branch office or personally works for gain, or where the cause of action wholly or partly arises”⁸ Further the Consumer Protection Act 1986, entertains only disputes where there is a “defect in goods” or “services” or regarding “unfair trade practice”, and does not have any provisions to redress issues pertaining to delay in delivery of goods purchased through online medium.

These loopholes were not even properly addressed in the Consumer protection Act 1986, Indian Contract Act, Indian Penal Code, Indian Evidence Act, Indian Stamp Act, and Information Technology Act 2000. The online negotiations, that took place, between the buyers and sellers, at the time of purchase of goods, or hiring services through electronic medium,, are not even considered as a valid form of contract or accepted form of documentary evidence within the definition of the Act itself, and which can be produced or accepted or relied upon by the Court, as a valid piece of documentary evidence, because all the above stated laws, are very old and were enacted when ecommerce business were not prevalent during that period. Hence all these lacunas in law, has grossly effected

⁸Section-11(1), (2),’ Consumer Protection Act 1986’.

the consumer rights and interest and they are being victimised, by the scrupulous online merchants and traders, who used the ecommerce medium, to accumulate huge wealth resorting to unfair means and at the peril and pain of the consumers, by jeopardising their right and interest. So, all these speculations and anomalies, have led to the enactment of a new law of consumer protection, which specifically addressed all the issues pertaining to ecommerce business.

Some of the Major Acts also got amended i.e. Contract Act, Indian Penal Code, Information Technology Act, Indian Evidence Act, Indian Stamp Act, so as to include provisions pertaining to validation of electronic transactions, electronic records, electronic documents and e-contracts, data security and authenticity of ecommerce transactions done online. But all such amendments still could not fill the lacuna and because of which that the Indian consumers suffer a lot while addressing their issues pertaining to ecommerce transactions, so finally the Government of India came up with the decision to repeal the old Consumer Protection Act 1986 and replace it with a new one which addresses all the issues which a consumer encounters doing ecommerce transactions.

The Consumer protection Bill 2019, was introduced in the parliament in January 2018, to replace the three decade (34 years) old "Consumer Protection Act 1986" because irrespective of amending the acts for three times, this old act failed to address issues pertaining to online transactions, telemarketing, multilevel and digital marketing. The Bill was introduced in the parliament on July 8th 2019 and got the assent of the President on August 9th 2019.

VI. Salient Features of Consumer Protection Act, 2019

The various features contained in the new consumer protection are as follows:

A. Application to E-Commerce Transaction

The Consumer protection Act 2019, has widened the definition of 'consumer'. As per section-2(7) of the Act, a 'consumer' is person who buys any goods or hires any services either through online, or offline transaction, or by any electronic means, teleshopping, direct selling or from multi level marketing. Hence the new Act along with others also brought ecommerce transaction disputes within its jurisdiction.

B. Complaints through E-filing

The new Act, provided another facility to the consumers, in which a consumer is entitled to file complaint before the District, State or National Commission through e-filing, though the traditional mode of physical filing of complaints also available to him . The Act also provided, if the complaint seeks to appear and conduct hearing through video conferencing mode, then the Consumer Court can also extend the technical support for the same⁹.

C. Enhanced Pecuniary Jurisdiction

The Act also raised the pecuniary Jurisdiction of all the District, State & National Consumer Commission. The District Consumer Forum(Now District Consumer Commission as per the New Act) is entitled to entertain complaint, where the value of the goods or services paid does not exceed Rs, 10,000,000/- (INR Ten Million). The State Commission can entertain complaint where the value of the goods or services does not exceed Rs, 100,000,000/- (INR One Hundred Million). Similarly National Commission can exercise jurisdiction where the value exceeds Rs, 100,000,000/- (INR One Hundred Million)¹⁰.

D. Protection of Personal Data

The New Act also made provisions, where if a trader, merchant or service provider shares any of the personal confidential information of the consumer without consumer consents, than it will amount to be covered under the definition of “Unfair trade practice”¹¹.

E. Monetary Cost for Misleading Advertisement

The New Act added penalty provisions for punishing any manufacturer, trader, retailer or seller or any endorser, advertiser and publisher who ever makes any false or misleading advertisement. The Central Consumer Protection Authority is entrusted with the powers to punish the offender, by imposing penalty orders or by passing directions of prohibition or discontinuance orders to the trader,

⁹ Chapter-4, Section-35(1), 38(6), “Consumer Protection Act 2019’.

¹⁰ Sections, 34,47,58 ‘Consumer Protection Act 2019’.

¹¹ Section-2(47),ix, ‘Consumer Protection Act 2019’.

manufacturer, and publisher etc, whoever was found to have engaged in such misleading advertisement¹².

F. Mediation

The New Act provides provisions for Alternative Dispute Settlement Mechanism (ADR), whereby the complainant may settle the dispute through the process of “mediation” by amicable means in a quicker way but provided that it is only possible where both the parties are willing to refer their dispute for settlement through mediation only¹³.

G. Complaint can be Filed where Complainant Resides

The most relevant amendment done in the new Act is this one, whereby a complainant is entitled to file complaint where he resides or works for gain¹⁴. The earlier act contained provisions for filing complaint only at the place where defendant reside or works for gain or where the cause of action partly or fully aroused. This new provisions will certainly give shy of relief to those complainants, who earlier suffered a lot, as they could not afford to file cases at the place where the defendant resided or works for gain, because such places are very far from the place of complainant residence, so it could not be possible for the complainant to approach the District Forum having jurisdiction, to file the complaint and conduct the hearing where defendant resides or works for gain.

H. Creation of Central State, District Consumer Protection Council

The Act lays down provisions for establishment of Central, State and District Consumer Protection Council, whose objective is to provide advice to the Government on promotion and protection of consumer rights under the Act, within the Country. State and District¹⁵.

¹² Section-21, ‘Consumer Protection Act 2019’.

¹³ Chapter-4 –Section-37, r/w,Chapter-5,Section-74-81(Mediation), ‘Consumer Protection Act 2019’.

¹⁴ Chapter-4, Section-34(2)(d), ‘Consumer Protection Act 2019’

¹⁵ Chapter-2, Section-3 - 9 ‘Consumer Protection Act 2019’.

VII. Consumer Protection E-Commerce Rules, 2020

The Central Government in exercise of the power conferred under section 101(1), sub-clause eg. Consumer protection Act 2019, has framed the rules named as 'Consumer protection E-Commerce Rules,2020. It applies to all kinds of goods and services availed through electronic and digital networks and also include digital products. It specifies all forms of unfair trade practice applicable to all kinds of ecommerce models. It also lays down the duties and liabilities of all kinds of ecommerce entities. And in case if any ecommerce entity violates the said rules, the Consumer Protection Authority as appointed under the Act, will initiate action against the same as per the law laid down under the Consumer Protection Act 2019.

VIII. Conclusion

In today's Consumer behaviour pattern, ecommerce has certainly become an integral part of their life. The Government of India, initiate to create a digital platform and connect the entire globe with it, including the rural sectors is also a laudable step along with the promotion of Information and Technology Media among the peoples as a means for the advancement of the nation. But every technology has some bugs that need to be fixed, so do in the case of mushrooming of ecommerce entities and the consumer being more reluctant on the online buying and selling of goods and services also created many techno-legal hassles and bugs for which the consumers rights are being hampered and as there was no direct regulatory authority present to regulate the same just before passing of the Consumer Protection Act 2019, So the rights of the consumers were being compromised as the Consumer Forum were not adequately equipped by law to deal with such cases. Hence the need aroused for bringing a separate law by repealing the old act of Consumer Protection. So by the introduction the new Consumer Protection Act 2019 along with the Consumer Protection Ecommerce Rules,2020, the consumers interest are being given due consideration and it won't be wrong to say that the new Act and the new Ecommerce Rule, both are very welcome initiate and relevant in protecting the rights and the consumers interest and shaping the modalities of ecommerce transaction.

Development of Sustainable Energy in India: Steps to be Taken

V Surya Narayana Raju¹

Abstract

Sustainable energy is the energy that meets the needs of the present generations without compromising the ability of future generations to meet their own needs, source that renew themselves, rather than sources that can be depleted such as Wind, Solar, Water, Bio-energy and geo- thermal energy etc. Usage of sustainable energy will not only decrease the energy crisis but also help to better the climatic and environmental conditions. The dedication to promote sustainable energy requires supportive policy and legislative framework. The Indian government is taking certain initiatives relating to energy sector particularly in order to develop renewable energy resources. This approach towards the development of verticals of sustainable energy is very encouraging. The steady and systematic development of non- conventional energy resources will give fruitful results for securing the better future. One of the main reasons for exploring the non- conventional energy resources or sustainable energy resources, because these resources are environmentally as well as economically sustainable by comparison with the conventional energy resources. The research paper will trace the development of sustainable energy in India, explores the provisions of renewable energy sources and concentrates on developing the idea of sustainable energy in comparison to other existed resources. In conclusion, it highlights what kind of paradigm shift would be required to be strengthened legal as well as policy making for securing better future in the field of sustainable energy.

Keywords: Sustainable Energy, Conventional and Non-Conventional Energy Resources, Legal Framework

I. Introduction

According to some estimates, the current global power consumption suggests that power consumption of about twelve terawatts² will reach thirty terawatts by

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² One terawatt equals 1000 gig watts or one million megawatts.

2040³globally. Other forecasts view that total global energy consumption will expand by fifty-four percent between 2001 and 2025⁴. The overall significant and drastic projected increase in the energy demand will occur in developing countries that depend primarily upon the combustion of hydrocarbons, such as coal, to produce the electricity necessary to meet their energy requirements.

As a result of the increasing reliance of developing countries on fossil fuels - particularly coal, which is the most carbon- intensive of fossil fuels - CO₂emissions from developing countries will be greater than those of developed countries by 2020 despite the lower projected energy consumption levels by developing countries. In fact, in 2001, developing nations consumed sixty four percent as much oil as industrialized nations, and by 2025 they are expected to consume ninety four percent as much as developed countries⁵.

There are two important corollaries to this premise which point towards the pressing need for more and more better quality energy specifically in the developing world. Firstly, 1.7 billion people, or one fourth of the world's population, which located in developing countries, who do not have access to electricity.⁶ The right of these countries to sustainable development is inconceivable without electricity. On seeing Second, 2.3 billion people rely on wood agricultural products and animal waste for their cooking and heating needs⁷. While wood and agricultural products may formally be classified as renewable biomass, the manner in which wood and agricultural products are

³See NEBOJSA NAKICENOVIC ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON EMISSION SCENARIOS 95-96, 221 (2000);

⁴ ENERGY INFO ADMIN. (EIA), INTERNATIONAL ENERGY OUTLOOK 2004, at 7 (2004), available at [www.eia.doe.gov/pub/pdf/international/0484\(2004\).pdf](http://www.eia.doe.gov/pub/pdf/international/0484(2004).pdf). The EIA's "reference case" projects total world energy consumption will increase from 404 quadrillion British thermal units (Btu) in 2001 to 623 quadrillion Btu in 2025. "Last accessed on 30/08/2017"

⁵ IEO 2004 (2004), available at <http://www.eia.doe.gov/oiaflieo/index.html> : "Last accessed on 31/08/2017"

⁶ INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK 2002 365 (2d ed.2002), available <http://www.iea.org/textbase/nppdf/free/2000/weo2002.pdf>: "Last accessed on 31/08/2017.

⁷ Ibid.

collected, harvested and used has led to an acute loss of biodiversity and environmental degradation⁸. Further, if we are to secure our energy needs, and more effectively, those of the developing world, we need to search for new renewable energy sources of sustainable primary energy.

Primary energy which refers to the kind of high energy required by humans that is found in the resources such as coal, gas, crude oil, sunlight, and uranium and is subjected to anthropogenic conversion or transformation. Sustainable primary energy means to energy that can be developed or produced without causing significant and destructive environmental impact. Moreover, the findings for new sources of sustainable energy must be paired with an unyielding and persistent thrust toward energy efficiency and for conservation. Oil and gas are finite and non-renewable natural resources. While their finite nature is not in doubt, controversy abounds as to the extent, and the anticipated life span, of petroleum reserves⁹. There is a volatile disagreement among environmental intellectuals about whether the world faces an surged oil peak, then followed by an drastically decline and exhaustion of resources.

The case for new energy accords that address the challenge of sustainable energy is premised upon six widely recognized phenomena¹⁰.

These six phenomena are:

- (i) The increasing energy demand, especially from the developing world;
- (ii) The harmful and liability environmental consequences of using fossil fuels or hydrocarbons as sources of energy;
- (iii) The limited nature of oil and gas reserves;
- (iv) The energy insecurity caused by affect on Crude oil;

⁸See LAKSHMAN D. GURUSWAMY, INTERNATIONAL ENVIRONMENTAL LAW IN ANUTSHELL 129-32 (2ded. 2003)

⁹ One thing is clear: While geologists may discover possible oil resources, they will remain in the ground until petroleum engineers can convert those resources into actual producible oil reserves.

¹⁰LakshmanGuruswamy, Sustainable Energy: A Preliminary Framework, 38 Ind. L. Rev. 671, 688 (2005)

(v) The uninterested and biased nature of the international legal response to the looming shortage of sustainable energy; and

(vi) The lack of satisfactory and unworthy technological, legal, economic, and social mechanisms that address this sustainable energy demands.

For achieving the goal of Sustainable energy we need to maintain energy security. There are three major pillars need to be followed in the energy security. The first seeks to limit energy vulnerability by reducing dependence on oil use from unstable parts of the world¹¹. The second attempts to offer access to adequate supplies at reasonable prices¹². The third endeavors to prevent international sabotage of oil pipelines and cables, tankers, offshore and onshore installations¹³.

II. Tracing History of Renewable energy in India

The world's leading economies have been pledging support for developing alternative and cleaner forms of energy, especially in this new century. According to the International Energy Agency ('IEA'), fossil fuels (oil, coal, and natural gas) will remain the dominant source of energy for the immediate future, but their share in the energy mix is bound to progressively decline in the future. IEA estimates that renewable energy demand may increase in 2035 by an amount ranging from fourteen percent to twenty seven percent. India needed solar power developers, or their successors in contract, to purchase and use solar cells and solar modules of domestic origin in order to develop growth rate in Indian energy sector. Perhaps the Indian government is amongst a few one who established and converted a department on renewable energy to a full fledged ministry after realizing the valuable utility of these sources in years to come as domestic as well as international level¹⁴.

¹¹ BARRY BARTON, ENERGY SECURITY: MANAGING RISK IN ADYNAMIC LEGAL AND REGULATORY ENVIRONMENT 17-28 (Barry Barton et al. eds., 2004).

¹² Ibid.

¹³ Ibid.

¹⁴ Available on <http://www.cii.in/web/cms/upload/renewableenergythenextwave/pdf> :
" Last accessed on 01/09/2017"

Renewable energy technologies such as solar, wind, geothermal and biomass power generation are gaining traction and popularity, but are not yet viable at a utility scale level to play a significant role in a country's energy demand. The inability to internalize the cost of greenhouses gas (GHG) emissions has caused significant under-pricing of non-renewable forms of energy. This market failure has also resulted in significant sub-optimal production of renewable energy. Economic theory posits that public intervention may be required when market fails to provide desirable public goods or prevent negative externalities. A number of firms in the renewable energy sector face complex risks involving future changes in demand, pricing, grid connection to wider markets, cost return on capital and other key performance and regulatory risks. The renewable energy industry is still developing and the economic viability of most such projects is uncertain. In addition, the discovery of shale gas has the potential to slow the development of renewable sources of energy. A recent study by KPMG, a consulting firm, indicates that the energy industry's focus on developing shale gas and other unconventional sources of energy could disrupt the economic ability to work successfully on renewable energy and could potentially take the focus away from this sector¹⁵.

In the year of 2006 the ministry renamed as ministry of New and Renewable energy (MNRE) and then considered as the nodal ministry for developing renewable energy in India. This is the great step towards the development of renewable energy in India. Before this in the year 1987, another important national institution namely Indian Renewable Energy Development Agency (IREDA) was also established with the responsibility to finance the renewable project throughout the entire country¹⁶. In the general sense we need to understand various types of renewable and non-renewable energy resources.

A. Non- Renewable Energy Resources

The Energy resources like Coal, Oil, Natural Gas, Some forms of Electricity, Non Sustainable Hydro Energy were the resources which cannot be renewed.

¹⁵KPMG, *Shale Gas: Global Perspectives*, 19, (2011) available at <http://www.gses.com/images/documents/shale-gas-global-perspective.pdf> : "Last accessed on 01/09/2017"

¹⁶ Available on IREDA website.

Once the end of these abovementioned resources we have to go for new dimensions in order achieve our requirements of Sustainable energy goals.

B. Renewable Energy resources

Being the paper is related to development of sustainable energy in India we need discuss somewhat elaborately relating to the energy sources which are renewable in nature. The following mentioned resources are helping towards the achieving the sustainable energy goals. Those renewable energy sources includes

- 1) Wind energy:
- 2) Small wind energy and hybrid systems
- 3) Small hydro power
- 4) Biomass and cogeneration
The various applications of biomass energy include:
 - 1) Thermal or heat.
 - 2) Mechanical water pumping for irrigation etc.
- 5) Biomass Gasifies
- 6) Solar Energy
- 7) Biogas

The above mentioned renewable energy sources which creating growth in the field of sustainable energy. Further the government which taking certain policy decisions and enacting some legislative framework trying to develop energy by using these resources. In the present era the usage of energy has increased drastically. In order to encounter the drastic demand the only option is to get sustainable energy through renewable energy resources in India.

III. Legislative framework on Sustainable Energy

The following Laws and policy are dealing with the Sustainable energy in India.

A. The Energy Conservation Act, 2001

“With the background of high energy saving potential and its benefits, bridging the gap between demand and supply, reducing environmental emissions through energy saving, and to effectively overcome the barrier, the Government of India

has enacted the Energy Conservation Act- 2001. The Act provides the much-needed legal framework and institutional arrangement for embarking on an energy efficiency drive”.¹⁷

Under the provisions of the said Act, Bureau of Energy Efficiency has been established with effect from 1st March 2002 by merging erstwhile Energy Management Centre of Ministry of Power. The Bureau would be responsible for implementation of policy programmes and coordination of implementation of energy conservation activities¹⁸.

B. Electricity Act, 2003

The Indian Parliament also passed the Electricity Act in 2003¹⁹ in order to consolidate laws relating to generation, transmission, distribution, trade and use of electricity. Among other things, it called for rationalization of electricity tariffs, creation of a competitive environment, and open access in transmission and distribution of electricity. The Act also mandated the creation of regulatory commissions at the central, regional and state levels.

The Electricity Act, 2003 have given much Potential for saving energy. Further the importance of energy efficiency and demand side management has clearly emerged from the various supply scenarios and is further underlined by rising energy prices. It is said in the act that Efficiency can be increased in energy extraction, conversion, transportation, as well as in consumption. Further, the same level of service can be provided by alternate means that require less energy²⁰.

C. “Integrated Energy Policy-2006” prepared by the Planning Commission, Government of India

In order to promote energy efficiency and conservation there is a need to create an appropriate set of incentives through pricing and other measures. Public

¹⁷Renewable Energy and Energy Efficiency Status in India: Report compiled by ICLEI South Asia May 2007.

¹⁸ Ibid.

¹⁹http://powermin.nic.in/acts_notification/electricity_act2003/preliminary.htm “ Last accessed on 02/09/2017”

²⁰Renewable Energy and Energy Efficiency Status in India: Report compiled by ICLEI South Asia May 2007.

policy can set the pace for such development by offering attractive rewards and imposing biting penalties²¹. An enabling institutional framework is essential to achieve the objectives of the mentioned Policy. The government somewhat trying to marginalize energy consumption and energy efficiency by using this policy.

D. New and Renewable Energy Policy, 2005

A comprehensive Renewable Energy Policy for all round development of the Renewable sector, encompassing all the key aspects, has been formulated by Ministry of New and Renewable Energy. “Through this Energy policy Statement, it is proposed to send appropriate signals to industry, scientific and technical community, business and investors to indigenously develop new and renewable energy technologies, products & services, at par with international standards, specifications, and performance parameters for deployment in a manner so as to arrive at an optimal fuel-mix that most effectively meets the overall concerns of the country”²².

E. National Renewable Energy Act 2015

The proposed enactment on separate Legislation for Renewable Energy resources which may lead for energy efficiency and sustainable development in India. Accordingly the government is paying attention towards the development of renewable energy resources in order to achieve sustainability in energy production.

The objectives of the National Renewable Energy Act includes

- a) To promote the production of energy through the use of renewable energy sources in accordance with climate, environment and macroeconomic considerations.
- b) Reduce dependence on fossil fuels, ensure security of supply and reduce emissions of CO₂ and other greenhouse gases.

²¹ Integrated Energy Policy: Report of the Expert Committee, Government of India, Planning Commission, New Delhi, August 2006

²² Supra.

c) Contribute to ensuring fulfilment of national and international objectives on increasing the proportion of energy produced through the use of renewable energy sources.

Further understanding The National Renewable Energy Bill is designed majorly for the development of conducive ecosystem, which promotes the utilization of Renewable Energy sources and permits investments. This includes, Renewable Energy Policy and Plan, Resource assessment, policies on testing, monitoring and verification, and indigenous manufacturing of components. However, By seeing the preamble of the Act, this is an Act to “promote the production of energy from renewable energy sources, in order to reduce dependence on fossil fuels, ensure energy security and reduce local and global pollutants, keeping in view economic, financial, social and environmental considerations, and for matters connected therewith or incidental thereto”²³.

According to the mentioned Act —Renewable Energy Sources means energy derived from non-depleting resources and includes the following sources.

1) Wind 2) Solar radiation; 3) Mini hydro; 4) Biomass; 5) Bio-fuels; 6) Landfill & Sewage gas; 7) Municipal solid waste; 8) Industrial waste; 9) Geothermal energy; 10) Ocean energy; 11) Any other energy source, as may be notified by the Ministry; and 12) Hybrids of above sources.

The major important provisions under this Act constituting the National renewable energy committee for developing resources under renewable energy.

The Functions of the NREC includes:

- i. Review the implementation of the National Renewable Energy and advising the development on renewable energy.
- ii. Facilitate the development and deployment of renewable energy sources in the country by developing of fiscal, financial, regulatory, policy, and institutional mechanisms;
- iii. The Central Government in discharging its functions under this Act and in accordance with the Energy Policy;
- iv. Identify and set research and development priorities for the sector;
- v. Coordinate on matters relating to grid integration of renewable energy.

²³ Preamble to the national renewable energy Act, 2015.

- vi. Monitor the development and progress of Renewable Energy Investment Zones
- vii. Identify measures for development of indigenous technology, manufacturing base, capacity development, skill development, export of technologies, and establish / coordinate related technology missions created under this Act;

The above mentioned policies and Legislative framework is somewhat lagging in the development of the real objective of the development of sustainable energy in India. In order to meet the consumption of energy demands we need to come up with the attracting legislations and policies in the renewable energy resources is concern.

IV. Conclusion

By considering the all the above laws and policies, India is more dependant on the non renewable energy resources such as like coal, crude oil and natural gas etc. for getting better future the India need to convert into using of non-renewable energy resources to renewable energy resources. By adopting this method the future generations would get survive relating to the energy? Moreover day by day the using of energy is increasing but on the other side non-renewable energy resources are decreasing. This will affect the future generations largely. For avoiding this situation we need to develop and encourage the renewable energy resources like solar, Wind, Bio-gas etc.

Suggestions:

- 1) Need to come up with the better policy towards the development of Sustainable energy resources.
- 2) Need to enact suitable legislations relating to improvement of renewable energy resources like Bio-gas, solar, wind energy etc.
- 3) Need to give incentives to the industries which related to the renewable energy.
- 4) Try to reduce non-renewable energy producers gradually up to not affecting the present energy demands.

5) Impose restrictions on non-renewable energy resources which causing environmental pollution.

BOOK REVIEW

A PEOPLE'S CONSTITUTION- The Everyday Life of Law in the Indian Republic (2018) by Rohit De, Princeton University Press 41 William Street, Princeton, New Jersey 08540, pp.5 +296, Price ₹.699

Subhajit Bhattacharjee¹

That in times where there is much consternation among legal scholars, lawyers, jurist, social commenter's, journalist, thinkers about working of the Indian Constitution, some even arguing to the extent that the major political document of our country have survived in serendipity, some even having the hubris to call the document a mere platitude, Dr Rohit De's book A PEOPLE'S CONSTITUTION- The Everyday Life of Law in the Indian Republic, in this background offers a fascinating read. Dr De, a legal scholar and an Assistant Professor of history at Yale University put into the argument and asserts by primarily focusing on four major Supreme Court cases entertained upon the writ jurisdiction of the Apex court as to how ordinary people interpreted and shaped the Constitution from below. He tries to manifest the fact that how ordinary citizens came to experience and internalize a new constitutional remedies in the courts for asserting and claiming their citizenship rights. That he further asserts the fact that constitutional culture of the 1950s was shaped predominantly by the interventions of certain marginal group's .He claims the process to be fascinating, though not unusual in other democracies, but complicated in India, for the fact that in India because electoral minorities are not just members of a socio-economic class or followers of a certain ideology but are inextricably linked to ascriptive identities.

That the book is primarily delineated into four chapters placed between the Introduction and an epilogue, with a common thread running amongst the chapters and that even of the introduction and epilogue. In the Introduction the author divides the part into seven sub- suitable chapters and looks the Indian Constitution through the prism of triumphalism, illusion, the contours of the writ jurisdiction employed by the Constitutional Courts in India, he also gives a brief overview of the scheme of the book , a brief history of the Supreme Court of

¹Assistant Professor, Department of Law ,University of North Bengal.

India and the most important of how people engaged themselves with the Indian Constitution particularly the voiceless, under representative, and the subalterns of the Indian body polity. That he establishes the fact that contrary to the popular belief, the Indian Constitution which is the longest surviving Constitution in the post- colonial world still continues to dominate the public life in India surreptitiously. Chapter 1 of the book furnishes around the liquor trade of the state of Bombay (now present day Mumbai), the trade particularly controlled and under the aegis of the Parsi community of the area and how the state by bringing into employ Article 47 of Indian Constitution tried to regulate the liquor trade. The chapter being further divided into eight sub chapters examines that how the draconian prohibition law of the state was challenged and in the word of the author “highlights how constitutional cases came to affect everyday legality”. The prohibition law was imposed under the garb of stating to the fact that temperance was the prevailing morality of the time and this idea was thoroughly contested and an early idea of public interest litigation as well as the relationship between liberty, property, and community was explored. Chapter 2 of the book examines the fact as how the plethora of administrative laws in the new republic was challenged, as well as the validity of the Essential Commodities Act was questioned before the writ courts. The discretionary administrative powers of the colonial state was kept alive now as in lieu of running the welfare schemes of the new state promising a welfare polity. That, the author gives an honest inside into the corruption of the then trading community of India, dividing the chapter into twelve sub heads (chapter) and makes the interesting claim of how illegality and culture of economic corruption augmented the process of judicial review of administrative action, the benchmark for operating rule of law in any nation state.

The book meanders into more enchanting territory in Chapter 3, this chapter being sub divided into ten distinct sub-chapters and here the history of cow vigilantism prevailing from the 19th century India can be traced upon and the author also lucidly mentions about the socio-economic realities circumscribing the politics around cow and that of beef ban and consumption. Here too we come to know an interesting fact that almost 3000(three thousand) butchers, all Muslim by faith with all gusto agitated against the beef ban in newly independent India probably according to the author the first, class action suit, where argument to assert their business claims revolved mostly around their

economic rights and realities without that of religious freedom again challenging the popular notion and narrative of the common folk and elite alike. The chapter also documents the fact as to how religious freedom, minority rights and political mobilization manoeuvres in creating a new constitutional language and morality and our country India breaking away from its feudal shackles. That the last chapter i.e. chapter 4 which is sub chaptered into ten parts is the most engrossing and riveting part of the book. That it reaffirms the fact that economic necessity propels almost every action in our life. That when great votaries of women rights and activist and nationalist of new nation with a honest intention harping on Article 23 of Indian Constitution supported the new laws made by the Parliament, banning trafficking of women, it was the action and claim of the sex-workers which took the politicians, bureaucrats, and middle-class women's activist abruptly by surprise and they were almost perplexed when the prostitutes asserted their Constitutional right to a trade or a profession and to freedom of movement around the country. That though their litigation achieved very little success but they opened a new scope for their organisational politics and brought some sought of systematic conventions into the daily life of the sex workers. The epilogue divided into four chapters stitches the thread that connects the prominent theme that binds each cases/topic discussed in the book as to how dynamic the Indian constitution became, and political aspiration and socio-economic changes that were brought about by thorough and engaging working of the Constitution, the threat which the new Indian state felt when people went to Constitutional courts to assert their rights and mostly the development of constitutional morality and consciousness of the citizenry of the new Republic and how people from political , social and economic minority depended on the world's most lengthiest Constitution to shape their future endeavours.

To conclude one must say it is almost a revisionist take as to the working of the Indian Constitution and the book all through challenges the popular narrative and dismiss any conjecture which raises an iota of doubt as to the Indian Constitution effectiveness and its engagement with its citizenry particularly, the low born and the economic and political minorities. The book other than being refreshing in its content is also unequivocal, explicit in the idea it wants to convey to its readers and the language used in the book is plain and simple, and the entire scheme of the book being precise and concise and making it a must

read not only for legal scholars, lawyers or jurist but also to any person interested in India's Constitutional history. The book is a stellar work and by the passing of time can be heralded as a classic.

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 six kilometers and from Siliguri is seven 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 sub-division 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 eighty, and the LL.M. course which was started in 1993 has twenty five 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 24 Ph.D. degrees have been awarded. Presently there are about twenty five scholars engaged in doctoral research under various faculty members under the UGC Regulation, 2009. The Department attracts scholars and students from all over India and especially from Sikkim, Assam, Tripura, Arunachal Pradesh, Uttar Pradesh and Orissa. 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.

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